

**United States Department of Labor
Employees' Compensation Appeals Board**

R.A., Appellant)	
)	
and)	Docket No. 23-0483
)	Issued: December 26, 2023
U.S. POSTAL SERVICE, CHANTILLY POST)	
OFFICE, Chantilly, VA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 15, 2023 appellant filed a timely appeal from a January 4, 2023 merit decision and two January 20, 2023 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 20, 2023 decisions, appellant submitted additional evidence to the Board on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability from work commencing September 21, 2022, causally related to his accepted employment injury.

FACTUAL HISTORY

On August 9, 2014 appellant, then a 57-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained neck, back, and left shoulder injuries when he loaded trays of mail into his long-life vehicle while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for a right shoulder rotator cuff tear.³ It paid appellant compensation on the supplemental rolls, effective October 4, 2014. On December 12, 2014 appellant underwent OWCP-authorized right shoulder arthroscopy, once-anchor superior labrum anterior to posterior tear, subacromial bursectomy, four-anchor rotator cuff repair, and right shoulder biceps tenodesis. He remained off work.

On February 19, 2016 OWCP obtained a second opinion on the nature and extent of the accepted conditions by Dr. Chester Dilallo, a Board-certified orthopedic surgeon, who found appellant able to perform modified work as of April 16, 2015. In an accompanying work capacity evaluation (Form OWCP-5c) dated February 19, 2016, he found appellant able to perform full-time work with permanent restrictions against reaching, reaching above shoulder level, or operating a motor vehicle. Dr. Dilallo permanently restricted driving to and from work to two hours a day, limited pulling and pushing to 20 pounds, and limited lifting to 30 pounds.

OWCP paid appellant compensation on the periodic rolls, effective April 3, 2016.

Appellant returned to work on September 19, 2016, in a modified position as a webcam observer at the employing establishment. The position required sitting, intermittent fine manipulation, and intermittent simple grasping for up to eight hours per day.

On October 11, 2017 OWCP expanded the acceptance of appellant's claim to include left biceps tendon tear and lumbar strain.

On October 12, 2017 OWCP granted appellant a schedule award for 14 percent permanent impairment of the right upper extremity. The period of the award ran for 43.68 weeks from February 7 through December 19, 2017.

Appellant again stopped work on January 24, 2018.

³ Prior to the present claim, under OWCP File No. xxxxxx791, OWCP accepted that on January 26, 2011 appellant sustained sprains of the right elbow, forearm, and ulnar collateral ligament, synovitis and tenosynovitis of the right elbow, and a lumbar sprain when he slipped on ice and fell backwards while in the performance of duty. On July 26, 2011 appellant underwent OWCP-authorized resection and repair of right medial elbow tendinosis, partial medial condylectomy with removal of major osteophytic spur, ulnar nerve decompression, and a Nirschl procedure. On October 20, 2017 OWCP administratively combined OWCP File Nos. xxxxxx791 and xxxxxx432, with the latter designated as the master file.

In a January 25, 2018 form report, Dr. Homaira Behsudi-Walli, Board-certified in family practice, recounted appellant's symptoms of right acromioclavicular joint pain with limited motion. She diagnosed a right rotator cuff tear and held appellant off work.

In a June 17, 2019 report, Dr. Taeho Kim, a Board-certified internist, diagnosed a complex right rotator cuff and biceps tendon tear. He found that appellant had reached maximum medical improvement (MMI) on February 19, 2016.

On November 6, 2019 OWCP expanded the acceptance of appellant's claim to include right ulnar collateral ligament sprain, right radial collateral ligament sprain, and other synovitis and tenosynovitis of the right upper extremity.

On September 21, 2020 appellant accepted a full-time modified-duty position as a webcam observer at a new employing establishment office. The position required observing webcams and calling or sending e-mails about alerts and failures for up to eight hours a day. The physical demands included sitting, fine manipulation, and simple grasping for up to eight hours a day.

In reports dated November 6, 2020, Dr. Kim recounted appellant's increased right shoulder and lumbar pain symptoms. He administered an intra-articular injection to the right shoulder. Dr. Kim diagnosed a suspected exacerbation of underlying tendinitis/arthritis of the right shoulder, and chronic low back pain due to lumbar degenerative disc disease and lumbar strain.

Appellant continued performing the modified-duty position at the new employing establishment office. OWCP paid him wage-loss compensation on the supplemental rolls for intermittent work absences from January 2, 2021 through September 17, 2022.

On September 21, 2022 the employing establishment offered appellant a modified position as a rural carrier at the employing establishment's Fairfax, VA office. The job required observing webcams, calling or e-mailing alerts, and answering telephones for up to eight hours a day. The physical requirements included sitting, fine manipulation, and simple grasping for up to eight hours a day. Appellant stopped work on September 21, 2022.

OWCP received Form CA-17 reports dated August 30 and September 13, 2022 by Dr. Kim, limiting driving to one hour a day.

On October 1, 2022 appellant refused the offered position. On the job offer form, and in a September 27, 2022 statement, he contended that the employing establishment had abolished the webcam position, that managers informed him on September 21, 2022 that the duties of the offered position were substantially different from those of a webcam observer, that the commute to this new employing establishment office exceeded his one-hour driving limitation, and that the salary was lower than his current wage.⁴

⁴ In an October 4, 2022 letter, OWCP advised the employing establishment that the modified position offered appellant "cannot be considered appropriate" under 20 C.F.R. § 10.500(a) as it was temporary in nature although appellant had permanent work limitations, the description of the job assignment was unclear, and the work schedule was incomplete.

On October 11, 2022 appellant filed a Form CA-7 for disability from work for the period September 21 through 30, 2022.

In a development letter dated October 13, 2022, OWCP advised appellant of the deficiencies of his claim. It advised him of the type of additional evidence needed. OWCP afforded appellant 30 days to respond.

On October 28, 2022 appellant filed a Form CA-7 for disability from work for the period October 3 through 21, 2022.⁵

On October 30, 2022 appellant accepted the modified rural carrier position at the new employing establishment office. He returned to work on October 30, 2022 at the new employing establishment office.

In a September 22, 2022 report, Dr. Kim limited appellant to driving no more than one hour a day. He explained that additional driving time worsened weakness, pain, and mobility in appellant's right upper extremity.

On October 16, 2022 OWCP referred appellant and the case record, including a statement of accepted facts (SOAF) and a series of questions, to Dr. Randy Davis, a Board-certified orthopedic surgeon, for a second opinion regarding the extent of appellant's work capacity and the question of whether he had residuals of the accepted employment conditions.

In a November 16, 2022 statement, appellant contended that the offered modified-duty position exceeded his one-hour driving limitation.

In a development letter dated December 7, 2022, OWCP advised appellant of the deficiencies of his claim for wage-loss compensation for the period October 3, 2022 and continuing. It advised him of the type of additional evidence needed. OWCP afforded appellant 30 days to respond.

In a development letter dated December 15, 2022, OWCP advised appellant that the evidence of record indicated that he may have sustained a recurrence of disability due to withdrawal of a modified-duty position. It described the additional factual and medical evidence needed. OWCP afforded appellant 30 days to respond.

In a separate development letter also dated December 15, 2022, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor. It afforded the employing establishment 30 days to respond.

In a December 20, 2022 report, Dr. Davis noted his review of the medical record and SOAF. On examination he observed an old biceps tendon rupture at the left elbow with decreased biceps strength, well-healed surgical scars on the right shoulder, and significantly restricted range of motion of the right shoulder. Dr. Davis diagnosed a history of old left biceps rupture, right

⁵ On November 29, 2022 appellant filed a series of Form CA-7 for disability for the periods October 22 through 29, 2022 and November 4 through 18, 2022.

rotator cuff tear with superimposed degenerative arthritis, and lumbar strain with preexisting degenerative arthritis. He opined that the accepted conditions remained active and partially disabling, and that appellant had attained MMI. Dr. Davis found appellant able to perform the duties of a webcam observer. In an attached December 20, 2022 Form OWCP-5c, he limited lifting, pulling, and pushing to 10 pounds, operating a motor vehicle to and from work to one hour, and operating a motor vehicle at work to one hour.

In a December 21, 2022 report, Dr. Kim recounted that on October 31, 2022 appellant had been “required to work at a different facility, much longer drive from [appellant’s] home, and asked to move and lift heavy boxes, contrary to” his work restrictions. After a brief period of performing the new duties, appellant experienced “acute worsening of the right shoulder and arm pain,” with weakness and numbness of the arm and hand. Appellant did not work on November 1, 2022, returned to work on November 2, 2022, and experienced significant worsening of high right upper extremity symptoms. He presented for examination on November 3, 2022 with marked weakness in right hand grip and forearm supination and pronation, decreased sensation to touch in the right hand and forearm, and limited motion of the right shoulder. Dr. Kim opined that appellant “sustained an acute worsening of [an] already compromised [right] shoulder joint.” He held appellant off work. A subsequent magnetic resonance imaging scan of the right shoulder demonstrated a severe full thickness tear of the supraspinatus tendon, tear of the anterior two thirds of the infraspinatus tendon, full thickness tear of the biceps tendon, and superior labral tear. Dr. Kim noted that appellant was a candidate for complete shoulder arthroplasty. He opined that the tasks appellant performed at work on October 31 and November 2, 2022 clearly exceeded his work restrictions. Dr. Kim held appellant off work.

In response to OWCP’s December 7, 2022 development letter, appellant submitted a December 27, 2022 statement. He alleged that on September 21, 2022, a manager told him to leave the office as the webcam observer position had been abolished. An injury compensation manager then informed him of a position in a different employing establishment office as a webcam observer, but refused to provide a position description. Appellant contended that driving to this new office took longer than one hour, thus exceeding his driving limitation. He then left work. On October 29, 2022 appellant received an official job offer dated September 21, 2022 for a rural carrier position, but with the duties of a webcam observer. He reported for duty on October 31, 2022. A manager allegedly informed appellant that the webcam observer position had been abolished and assigned him to stand behind a window clerk to assist customers picking up parcels and held mail. Appellant was required to lift heavy boxes and pull parcel hampers in violation of his work limitations. He then experienced severe right shoulder pain and numbness in the right upper extremity.

OWCP received photographs of October 30, 2022 text messages between appellant and a supervisor accepting the September 21, 2022 job offer and November 7, 2022 text messages between appellant and a supervisor in which appellant alleged that his physician had held him off work.

By decision dated January 4, 2023, OWCP denied appellant’s claim for compensation for the period September 21 through 30, 2022. It found that the duties of the offered modified rural carrier position were within his medical restrictions.

OWCP received a November 3, 2022 report by Dr. Kim, recounting that appellant had taken a taxicab to the appointment as he could not drive himself due to his inability to grip the steering wheel with his right hand. He noted that as there was no longer light-duty work within his restrictions available at the prior employing establishment's office, he had been transferred to a new employing establishment office. On October 31, 2022 at the new employing establishment office, appellant lifted and moved heavy boxes and pushed boxes out of the way with his arms. He developed increased right shoulder and upper back pain, and numbness in the right forearm and hand. These symptoms continued to worsen. Dr. Kim diagnosed "[n]ew onset right arm and hand numbness and weakness since [October 31, 2022], most likely due to using injured right shoulder at work to move and lift objects," and suspected nerve impingement in the right brachial plexus or cervical spine. He held appellant off work.

In a January 5, 2023 statement in response to OWCP's December 15, 2022 development letter, appellant alleged that, on October 31 and November 2, 2022 while at work at the Chantilly, VA office, he lifted and carried heavy boxes, bound "hold mail," and pushed and pulled an all-purpose container and a mail hamper with heavy boxes, causing a worsening of his symptoms.

On January 13, 2023 OWCP received a response to its December 15, 2022 development letter to the employing establishment, including copies of personnel documents and an updated permanent modified job offer. The employing establishment confirmed that appellant's modified position had been withdrawn due to "need of business." It indicated that he would perform the "same duties as before, web cam," but at a different location.

By decision dated January 20, 2023, OWCP denied appellant's claim for compensation for the period October 3, 2022, and continuing. It found that the duties of the modified rural carrier position were within his medical restrictions.

By a separate decision also dated January 20, 2023, OWCP denied appellant's claim for a recurrence of disability commencing September 21, 2022,⁶ finding that he did not submit sufficient evidence to support a change or withdrawal of his light-duty position, or that he was forced to perform duties exceeding his work limitations.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁸ Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee

⁶ In the second January 20, 2023 decision, OWCP referred to appellant's October 11, 2022 Form CA-7 claiming compensation commencing September 21, 2022.

⁷ *Supra* note 1.

⁸ *M.M.*, Docket No. 21-0590 (issued December 2, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

was receiving at the time of injury.⁹ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹⁰ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.¹¹

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹² If the claim for recurrence of disability for work is based on modification of the claimant's duties or physical requirements of the job, the claimant should be asked to describe such changes. If the evidence establishes that the limited-duty position has changed such that it no longer accommodates the claimant's work restrictions, OWCP should accept the recurrence.¹³

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence establishes that, limited duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty requirements.¹⁴

ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant alleged a recurrence of disability commencing September 21, 2022, as his modified-duty position as a webcam observer at the employing establishment had been withdrawn, and the September 21, 2022 modified job offer exceeded his one-hour driving limitation as provided by Dr. Kim as of August 30, 2022. The Board has held that, if a claimant's limited-duty assignment changed such that he could no longer commute to work, this would constitute a

⁹ 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

¹⁰ *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

¹¹ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(3) (June 2013); *J.T.*, Docket No. 15-1133 (issued December 21, 2015).

¹⁴ *F.M.*, Docket No. 22-0346 (issued August 9, 2022); *see C.B.*, Docket No. 19-0464 (issued May 22, 2020); *R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

recurrence of disability.¹⁵ The employing establishment confirmed that it withdrew appellant's modified position due to business needs. It asserted that the modified position offered to him on September 21, 2022 was for the same duties as a webcam observer, but the employing establishment did not explain why the job title was "rural carrier" and not "webcam observer."

Appellant also claimed disability commencing November 3, 2022, as he was allegedly required to perform tasks exceeding his work limitations at his new duty station on October 31 and November 2, 2022. In support of his recurrence claim, appellant submitted a December 21, 2022 report from Dr. Kim who indicated that he examined appellant on November 3, 2022 for an "acute worsening of an already compromised right shoulder joint" after appellant had driven in excess of his restrictions, and lifted and pushed heavy objects while at work on October 31 and November 2, 2022. Dr. Kim found appellant disabled from work.

As appellant has established the withdrawal of his modified-duty position by September 21, 2022, the question remains whether appellant's work duties on and after that date exceeded his work restrictions, the case will be remanded for additional development. The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.¹⁶ While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹⁷

On remand, OWCP shall obtain a statement from a knowledgeable supervisor or supervisors regarding the commuting distance from appellant's home to the new employing establishment office, and the duties appellant performed on October 31 and November 2, 2022. After securing this response, it shall prepare an updated SOAF, including the duties appellant performed on October 31 and November 2, 2022, and refer him to a specialist in the appropriate field of medicine for a second opinion examination and an evaluation regarding whether appellant sustained a recurrence of disability on and after September 21, 2022. Following this and any other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁵ *K.E.*, Docket No. 13-0296 (issued June 6, 2013).

¹⁶ *V.D.*, Docket No. 21-1053 (issued March 20, 2023); *R.M.*, Docket No. 20-0486 (issued June 9, 2021); *Vanessa Young*, 56 ECAB 575 (2004).

¹⁷ *V.D.*, *id.*, *K.T.*, Docket No. 19-1436 (issued February 21, 2020); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

ORDER

IT IS HEREBY ORDERED THAT the January 4 and 20, 2023 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 26, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board