

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

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<b>B.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-1165</b>
	)	<b>Issued: January 18, 2024</b>
<b>U.S. POSTAL SERVICE, LEBANON POST</b>	)	
<b>OFFICE, Lebanon, PA, Employer</b>	)	
_____	)	

*Appearances:* *Case Submitted on the Record*  
*Russell T. Uliase, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 3, 2022 appellant, through counsel, filed a timely appeal from a February 17, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> The Board notes that OWCP had not issued a final decision regarding the issue of authorization of surgery. The Board therefore lacks jurisdiction to review this issue. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing September 24, 2020, causally related to the accepted employment injury.

### FACTUAL HISTORY

On April 22, 2014 appellant, then a 54-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed right elbow medial epicondylitis due to factors of his federal employment. OWCP accepted the claim for right medial epicondylitis and right partial rotator cuff tear. It subsequently expanded the acceptance of the claim to include right elbow lateral epicondylitis; right arm strain of muscle, fascia, and tendon of the long head of the biceps; and right foot/ankle localized edema post June 21, 2016 surgery.<sup>5</sup> OWCP authorized right rotator cuff and medial epicondylar pronator flexor mass repair surgery, which was performed on May 12, 2014, reattachment of right distal biceps tendon and right elbow debridement, and reattachment of common extensor surgery, which was performed on June 21, 2016. It paid appellant appropriate wage-loss compensation.

A February 2, 2017 functional capacity evaluation (FCE) found that appellant was capable of performing medium work with restrictions of occasional lifting up to 40 pounds from the floor to the waist, or up to 30 pounds from the waist to the shoulder: occasional carrying up to 40 pounds and frequently up to 30 pounds; pushing up to approximately 49.67 pounds; pulling up to approximately 50.2 pounds; and frequent lifting up to 30 pounds from the floor to the waist, or up to 20 pounds waist to shoulder.

In a report dated February 13, 2017, Dr. David L. Glaser, a Board-certified orthopedic surgeon, reviewed the February 2, 2017 FCE and observed that the weight limitation appeared to be a bit heavy for appellant. He reviewed and approved the modified job offer for very light duty with no repetitive activities. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Glaser advised that appellant was capable of performing light and medium work with

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the February 17, 2022 decision, OWCP received additional evidence. 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 additional evidence for the first time on appeal. *Id.*

<sup>5</sup> On October 30, 2011 appellant filed a Form CA-2 alleging that he sustained a right rotator cuff tear due to factors of his federal employment. OWCP assigned that claim OWCP File No. xxxxxx995 and accepted it for right rotator cuff sprain. It authorized right rotator cuff repair and removal of shoulder bone part surgery, which appellant underwent on December 6, 2011. Appellant's claims have been administratively combined by OWCP, with OWCP File No. xxxxx560 serving as the master file.

restrictions. The restrictions included up to 30 minutes each of reaching and reaching above the shoulder, and referred to the FCE for pushing/pulling and lifting restrictions.

On February 21, 2017 appellant accepted a modified city carrier job offer and returned to work that day. The physical requirements of the position included up to six hours of simple grasping with both hands.

On October 11, 2018 appellant accepted another modified city carrier job offer. The physical requirements of the position were as follows: up to eight hours each of reaching and reaching above the shoulder with the left arm; up to eight hours of occasional lifting up to 40 pounds to waist; frequent lifting up to 30 pounds to waist; occasional lifting up to 30 pounds waist to shoulder; frequent lifting up to 20 pounds waist to shoulder; occasional carrying up to 40 pounds; frequent carrying up to 30 pounds; occasional pushing of 49 pounds; occasional pulling of 50 pounds; and up to 30 minutes each of reaching with right arm and reaching above shoulder with right arm.

Thereafter, OWCP received an October 29, 2018 report from Dr. Glaser advising that appellant was capable of performing sedentary work with restrictions. The restrictions were as follows: no lifting more than 10 pounds; occasional overhead use; occasional lifting; no repetitive use of affected joint, and no driving.

On November 28, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), to Dr. Robert F. Draper Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of appellant's accepted employment-related conditions. In a report dated December 11, 2018, Dr. Draper diagnosed status post right shoulder rotator cuff repair, recurrent right shoulder rotator cuff tear and right elbow injury, right elbow avulsion medial epicondylar muscle, and right elbow surgery with reattachment of right distal biceps tendon, debridement, and reattachment of right elbow common extensor tendon. He reported that appellant continued to have right shoulder and elbow complaints. Dr. Draper reviewed the recent job offer and found appellant capable of performing medium-duty work with restrictions of occasional lifting of up to 40 pounds, frequent lifting of up to 25 pounds, and limited driving with a postal vehicle. In an attached Form OWCP-5c, he found that appellant was capable of performing medium work with restrictions of up to four hours each of reaching and reaching above the shoulder, occasional pushing/lifting/pulling up to 50 pounds, and frequent pushing/lifting/pulling up to 45 pounds.

On December 21, 2018 OWCP received a February 22, 2018 duty status report (Form CA-17) and an April 24, 2018 work restrictions note, wherein Dr. Glaser found that appellant was capable of performing sedentary work with permanent work restrictions of no lifting more than 10 pounds, and no repetitive upper extremity movement.

On January 23, 2019 the employing establishment offered appellant a limited-duty job as a modified city carrier based on the restrictions set by Dr. Draper. The physical requirements of the position were as follows: up to eight hours each of reaching and reaching above the shoulder with left arm; up to eight hours of occasional lifting up to 40 pounds to waist; frequent lifting up to 30 pounds to waist; occasional lifting up to 30 pounds waist to shoulder; frequent lifting up to 20 pounds waist to shoulder; occasional carrying up to 40 pounds frequent carrying up to 30

pounds; occasional pushing of up to 49 pounds; occasional pulling of up to 50 pounds; and up to 30 minutes each of reaching with right arm and reaching above shoulder with right arm.

In a letter dated January 30, 2019, counsel noted that Dr. Draper's report and the Form OWCP-5c were incongruous, and the offered position did not comply with Dr. Draper's restrictions.

In a work note dated February 6, 2019, Dr. Glaser related that appellant could not drive a vehicle, and had the following limitations: "sedentary-duty work, no lifting greater than 10 pounds, no overhead use, occasional lifting, and no repetitive use of the affected joint." In a narrative report dated February 6, 2019, he reviewed Dr. Draper's report and the offered job. Dr. Glaser opined that returning appellant to work with Dr. Draper's restrictions would be detrimental to appellant's shoulder and arm.

On February 22, 2019 OWCP requested clarification from Dr. Draper regarding appellant's work restrictions.

In a Form OWCP-5c dated March 15, 2019, Dr. Glaser found that appellant was capable of sedentary work and had permanent work restrictions of no reaching or reaching above the shoulder, up to three hours of repetitive wrist movements, no elbow repetitive movements, up to three hours of pushing/pulling less than 20 pounds, and up to three hours of lifting up to 15 pounds.

In a supplemental report dated May 15, 2019, Dr. Draper advised that appellant was capable of occasional lifting of up to 50 pounds, frequent lifting up to 25 pounds, and six hours out of an eight-hour day of driving a work vehicle.

On May 29, 2019 OWCP referred appellant, along with a SOAF, to Dr. John Perry, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion between Dr. Glaser, appellant's attending physician, and Dr. Draper, the second opinion physician, regarding appellant's work-related restrictions.

In a report dated July 11, 2019, Dr. Perry, serving as the impartial medical examiner (IME), detailed appellant's physical examination findings, and reviewed diagnostic tests. Physical examination findings included elongated distal right biceps tendon and right shoulder abduction limitation. Dr. Perry diagnosed multiple right shoulder rotator cuff repairs and repair of pronator teres, distal biceps tendon, and the lateral epicondyle common right elbow extensor tendon. He related that appellant's right shoulder rotator cuff tear was sound as resistance testing did not elicit pain. However, Dr. Perry also noted that appellant lacked shoulder abduction, which could be caused by scarring from his surgery, but he was unable to determine on examination whether appellant had adhesions on his right shoulder, because appellant complained of too much pain on passive motion. He also related that appellant had loss of strength of the elbow due to elongation of the right elbow biceps tendon. Dr. Perry found that appellant was capable of performing medium-duty work, noting that he should not overly stress prior operative sites. Dr. Perry noted that he was unable to find the 2019 modified job offer in the record. In an attached Form OWCP-5c, he indicated that appellant was capable of performing medium work, with restrictions of limited right shoulder reaching and reaching above the shoulder, and lifting of up to 30 pounds with both arms.

On September 13, 2019 appellant accepted an August 28, 2019 modified city carrier job offer. The physical requirements of the position were as follows: up to six hours of reaching; up to three hours of reaching above the shoulder with left arm only; up to one hour each of bending and stooping; up to six hours of driving; up to six hours of repetitive wrist/elbow movement; up to two hours each of pushing and pulling; and up to two hours of lifting up to 30 pounds with both arms.

On September 25, 2020 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing September 24, 2020. He claimed that he presented light-duty restrictions to work on September 24, 2020 but that the employing establishment informed him that these restrictions could not be accommodated. Appellant also alleged that his accepted conditions had worsened.

A magnetic resonance imaging (MRI) scan report dated September 11, 2020 noted that appellant had postoperative changes from his prior subacromial decompression.

Appellant subsequently submitted a September 21, 2020 Form OWCP-5c from Dr. Glaser reiterating restrictions previously noted.

In a development letter dated October 6, 2020, OWCP noted that appellant was claiming disability due to a material change/worsening of his accepted work-related conditions, and requested that he provide additional factual and medical evidence in support of his claim. It afforded him 30 days to respond.

Thereafter, OWCP received a September 17, 2020 report from Dr. Glaser diagnosing right elbow later epicondylitis and chronic right shoulder pain. On physical examination, Dr. Glaser reported 140 degrees flexion, 0 degrees extension, and positive Jobe and empty can tests. He again reiterated that appellant had a permanent 10-pound lifting restriction and a driving restriction.

In an October 22, 2020 statement, appellant noted that he had been performing a modified carrier position since September/October 2019. He stated that his chronic right shoulder and elbow pain had progressively worsened since returning to modified work.

The employing establishment controverted appellant's recurrence claim on November 4, 2020. It noted that since he began the "rehab job" on September 16, 2019 he was allowed to use his left arm to case and deliver mail, and was never required to perform overhead or repetitive duties with his right arm and no lifting over 30 pounds. Since he began working the job, appellant only worked an average of 39.75 hours per week and worked a full week in 32 out of 54 weeks.

In a report dated January 5, 2021, Dr. William P. West, an osteopath specializing in pain medicine, related that appellant had chronic intractable right shoulder and right upper extremity pain. He opined that appellant had exhausted all conservative treatments, and noted that spinal neuromodulation therapy was another option for further treatment.

By decision dated January 29, 2021, OWCP denied appellant's recurrence claim, finding that he failed to establish a material change/worsening in his accepted work-related conditions.

Subsequently, OWCP received a December 23, 2020, Form OWCP-5c from Dr. Glaser reiterating appellant's work restrictions previously noted.

In a letter dated February 4, 2021, appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on May 14, 2021.

By decision dated July 22, 2021, OWCP's hearing representative affirmed the January 29, 2021 decision.

In progress notes dated September 28, 2021, Dr. Carl E. Becker, an orthopedic surgeon, diagnosed right shoulder rotator cuff insufficiency. On physical examination, he reported decreased right shoulder range of motion and strength. Dr. Becker noted that his review of appellant's MRI scan from the prior year revealed full thickness rotator cuff tear with retractions. He recommended right reverse total shoulder arthroplasty.

On October 20, 2021 OWCP referred the case record to the district medical adviser (DMA) on medical necessity for the requested surgery. In a report dated October 28, 2021, Dr. Harold A. Fenster, a Board-certified general surgeon serving as a DMA, noted that the radiographic studies confirmed the progressive clinical deterioration of appellant's right shoulder, and that he currently has findings compatible with impingement. He requested that Dr. Becker provide rationale for the necessity of the prescribed surgery due to the accepted employment conditions.

On November 19, 2021 appellant, through counsel, requested reconsideration, and submitted the October 28, 2021 DMA's report in support thereof. Counsel asserted that the DMA's report supported appellant's recurrence claim. OWCP also received an additional report from Dr. Becker dated November 17, 2021. In this report Dr. Becker reiterated that appellant should undergo a total shoulder arthroplasty.

By decision dated February 17, 2022, OWCP denied modification.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> 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.<sup>7</sup>

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

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> See *S.P.*, Docket No. 21-0380 (issued November 22, 2022); *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).

illness is withdrawn, or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>8</sup>

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>9</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing September 24, 2020, causally related to the accepted employment injury.

OWCP properly found that a conflict of medical opinion existed between Dr. Glaser, appellant's treating physician, and OWCP's second opinion physician, Dr. Draper. It referred appellant to Dr. Perry for an impartial medical evaluation to determine appellant's work capacity.

On September 13, 2019 appellant accepted an August 28, 2019 modified city carrier job offer which was based on the restrictions of the IME, Dr. Perry. The physical requirements of the position were as follows: up to six hours of reaching; up to three hours of reaching above the shoulder with left arm only; to one hour each of bending and stooping; up to six hours of driving; up to six hours of repetitive wrist/elbow movement; up to two hours each of pushing and pulling; and up to two hours of lifting up to 30 pounds with both arms.

On September 25, 2020 appellant filed a Form CA-2a claiming disability from work, commencing September 24, 2020. He alleged that he presented light-duty restrictions to the employing establishment on September 24, 2020 but that the employing establishment informed him that these restrictions could not be accommodated. However, on October 22, 2020, appellant noted that he had been performing a modified carrier position since September/October 2019. On November 4, 2020 the employing establishment controverted appellant's recurrence claim, and related that appellant began the "rehab job" on September 16, 2019, and since then he was allowed to use his left arm to case and deliver mail, and was never required to perform overhead or repetitive duties with his right arm and no lifting over 30 pounds. Based upon this evidence, the Board finds that appellant has not established a recurrence of disability due to a withdrawal of his light-duty work, or that the physical requirements of such an assignment were altered so that they exceeded his established physical limitations.<sup>10</sup>

The Board also finds that appellant has not established that his accepted conditions worsened to cause total disability as of September 24, 2020.

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<sup>8</sup> 20 C.F.R. § 10.5(x); *see S.P., id.; D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> *Supra* note 8.

After September 24, 2020, OWCP received reports from Dr. Glaser dated September 17 and 21 and December 23, 2020, wherein he reiterated appellant's work restrictions. The Board has held that reports from a physician who was on one side of a medical conflict are insufficient to overcome the special weight accorded to the IME, or to create a new conflict.<sup>11</sup> These reports are therefore insufficient to establish appellant's recurrence claim.

In a report dated January 5, 2021, Dr. West related that appellant had chronic intractable right shoulder and right upper extremity pain. The Board has held that pain is a symptom and not a compensable medical diagnosis.<sup>12</sup> This report from Dr. West is therefore insufficient to establish that appellant sustained a recurrence of total disability due to his accepted conditions.

In a report dated September 28, 2021, Dr. Becker diagnosed right rotator cuff insufficiency. He explained that an MRI scan from the prior year showed full thickness rotator cuff tear. Dr. Becker recommended right reverse total shoulder surgery. In his report dated November 17, 2021, Dr. Becker reiterated that appellant should undergo total shoulder arthroplasty. However, he did not provide an opinion that appellant had total disability during the claimed period causally related to an accepted employment condition.<sup>13</sup> The Board has also held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.<sup>14</sup> As Dr. Becker did not address appellant's disability status or the cause of appellant's diagnosed condition, his reports are insufficient to establish appellant's recurrence claim.

In a report dated November 4, 2021, Dr. Fenster related that appellant's radiographic studies confirmed the progressive clinical deterioration of appellant's right shoulder, and that he currently has findings compatible with impingement. However, Dr. Fenster also did not address appellant's total disability status.<sup>15</sup>

OWCP also received diagnostic studies. The Board has held, however, that diagnostic tests, standing alone, lack probative value as they do not address the issue of causal relationship.<sup>16</sup>

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<sup>11</sup> See *C.L.*, Docket No. 18-1379 (issued February 5, 2019); *I.J.*, 59 ECAB 408 (2008).

<sup>12</sup> *K.B.*, Docket No. 21-0953 (issued October 12, 2022); *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *J.P.*, 59 ECAB 178 (2007).

<sup>13</sup> *M.H.*, Docket No. 22-1178 (issued April 25, 2023).

<sup>14</sup> See *T.S.*, Docket No. 20-1229 (issued August 6, 2021); *J.M.*, Docket No. 19-1169 (issued February 7, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>15</sup> *Id.*

<sup>16</sup> See *W.M.*, Docket No. 19-1853 (issued May 13, 2020); *L.F.*, Docket No. 19-1905 (issued April 10, 2020).

Because appellant has not submitted rationalized medical opinion evidence sufficient to establish employment-related disability from work during the claimed period, due to his accepted employment-related conditions, the Board finds that he has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing September 24, 2020, causally related to the accepted employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2024  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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