

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

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**M.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Austin, TX, Employer**

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**Docket No. 13-1848  
Issued: January 9, 2014**

*Appearances:*  
*Lonnie L. Boylan, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 29, 2013 appellant, through his attorney, filed a timely appeal from a January 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant was disabled from June 19 through August 18, 2010, causally related to his accepted employment injuries.

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from January 30, 2013, the date of OWCP's decision, was July 29, 2013. Since using August 6, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 29, 2013, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

On appeal appellant's counsel contends that the modified position was not suitable.

### **FACTUAL HISTORY**

On May 16, 2007 appellant, then a 51-year-old city letter carrier, filed an occupational disease claim alleging that his right knee condition was related to his work duties of walking and climbing. OWCP accepted the condition of right knee medial meniscus tear. Appellant stopped work on March 30, 2008 and received compensation for wage loss through May 18, 2010. OWCP also paid for several right knee surgeries, which he underwent on March 31 and September 19, 2008, July 24, 2009 and February 24, 2010.

The instant claim was combined with two other claims. Under file number xxxxxx882, OWCP accepted that a February 25, 2009 injury resulted in a sprain of unspecified sites of the right knee, an internal derangement of the right knee and posterior cruciate ligament tear. Under file number xxxxxx345, OWCP accepted that appellant sustained a disorder of unspecified bursae tendons in the left shoulder region, left shoulder and upper arm suprapinatus sprain and displacement of cervical intervertebral disc without myelopathy on the left. Appellant stopped work as a result of his shoulder condition and was placed on the periodic rolls beginning August 18, 2010, when he underwent an approved left shoulder surgery.

On February 14, 2012 appellant filed two compensation claims for disability (Form CA-7) for the period June 19 to July 18, 2010 and from July 19 to August 18, 2010. He noted that he was sent home from work as there was no work available within his limitations.

The record reveals that appellant stopped work as a result of the July 24, 2009 surgery, but he continued to have symptoms and his physicians did not release him to work.

OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for a second opinion evaluation and for a functional capacity evaluation (FCE). In a December 14, 2009 report, Dr. Hood opined that, while appellant continued to have residuals of his work-related knee injury with surgeries, he was capable of working eight hours a day with restrictions. Due to his left shoulder condition, appellant could not perform any repetitive overhead work and his lifting restrictions placed him in the medium category. The December 22, 2009 functional capacity report advised that appellant demonstrated significant signs of symptom magnification, but was able to perform medium level work for an eight-hour day.

OWCP determined that there was a conflict in medical opinion regarding appellant's work capacity and limitations. It referred him for an impartial medical evaluation with Dr. Roby Mize, a Board-certified orthopedic surgeon. In a March 1, 2010 report, Dr. Mize noted the history of appellant's work injuries, his current symptoms and reviewed the medical record. He noted that appellant recently underwent arthroscopic surgery of the right knee on February 24, 2010 and presented findings on examination. Dr. Mize concluded that appellant could work eight hours a day in a limited or restricted work capacity, but requested a review of the functional capacity evaluation before making a final determination. He noted that appellant should recover from the acute phase of his recent right knee surgery. In an accompanying March 1, 2010 work capacity evaluation form, Dr. Mize advised that appellant was able to work eight hours a day with restrictions that would apply only for three months due to recent knee surgery.

In a March 10, 2010 addendum, Dr. Mize noted that appellant underwent an FCE on March 3, 2010, which classified him in the sedentary category to lift from desktop level only. He noted that appellant was functioning at a sedentary level with restrictions on sitting, limited standing and walking, but was not tested for maximum capacity due to the recent knee surgery. Dr. Mize stated that appellant would have difficulty lifting from the floor or above shoulder height.

On March 23, 2010 the employing establishment offered appellant an eight-hour-a-day modified city carrier position, which he refused.

On March 25, 2010 Dr. Helo Chen, an osteopath, released appellant to return to work with restrictions on March 27, 2010. The physician restricted lifting more than 5 pounds; standing, walking, climbing, kneeling, bending, stopping, twisting and pushing/pulling more than 10 pounds. On April 13, 2010 Dr. Chen stated that appellant was unable to work at the sedentary capacity as found by Dr. Mize or perform the duties in the March 23, 2010 job offer. He noted that Dr. Mize did not test for lifting during the functional capacity evaluation due to appellant's recent knee surgery.

In an April 15, 2010 duty status report regarding appellant's right knee condition, Dr. Chen opined that appellant was able to resume work on April 15, 2010 with lifting intermittently of 5 pounds or continuously 1 pound; twisting or driving for up to four hours; standing, walking, pulling, pushing up to 10 pounds for one hour; and no climbing, kneeling, bending or stooping. Dr. Chen subsequently advised that appellant was able to work under the outlined restrictions until August 18, 2010.<sup>3</sup>

On May 18, 2010 the employing establishment offered appellant a modified-duty carrier position. Appellant was to case mail (standing) for two hours a day; deliver mail (park loop two hours/curbside one hour) for three hours a day; and perform book maintenance for three hours a day. The physical requirements of the position entailed reaching above shoulder for two hours a day; standing/walking intermittently for two hours each; lifting no more than 10 pounds for up to four hours a day; and pushing/pulling intermittently for two hours each. Appellant accepted the position "under protest," on May 18, 2010. On the time analysis forms submitted with his claims for disability appellant reiterated that he was sent home by managers and not allowed to work.

In an April 17, 2012 letter, OWCP advised appellant to submit additional medical evidence to establish his disability during the period June 19 through August 18, 2010. He was provided 30 days to provide additional medical information. No further evidence was received.

The medical evidence in file number xxxxxx345 supports that appellant was unable to return to work in May 2010. Left shoulder surgery, was performed on August 18, 2010. In a

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<sup>3</sup> The medical evidence in file number xxxxxx345 for injury to appellant's shoulder supports that he was medically unable to return to work in May 2010 and was being scheduled for left shoulder surgery, which was performed on August 18, 2010. OWCP authorized the surgery and appellant was placed on the periodic rolls effective August 18, 2010. In a March 7, 2012 decision, OWCP's hearing representative found the medical evidence indicated that appellant was totally disabled due to his shoulder injury on May 18, 2010, but there was no rationalized medical evidence which clearly opines that appellant was disabled from the light-duty job he was supposed to return to under case number xxxxxx680 due to his shoulder injury.

May 20, 2010 report, Dr. James D. Key, a Board-certified orthopedic surgeon, noted appellant's complaints of the inability to lift his left arm above the level of his shoulder. He diagnosed impingement syndrome of the left shoulder with a partial thickness rotator cuff tear. Dr. Key noted that appellant wanted to return to work but could not do so until his shoulder healed. Appellant would require surgery given the fact that he did not respond to intraarticular steroid injections. He would require an arthroscopic evaluation of the left shoulder joint with debridement, an open Neer-Mumford procedure, repair of the partial rotator cuff tear, subacromial bursectomy and related procedures. Dr. Key submitted a preauthorization request for surgery. In subsequent duty status reports a physician with an illegible signature advised that appellant was totally disabled due to his left shoulder condition.

By decision dated May 17, 2012, OWCP denied appellant's claim for disability compensation from June 19 through August 18, 2010. It found that the medical evidence failed to establish that he was totally disabled.

On June 7, 2012 appellant requested a hearing before an OWCP hearing representative, which was held on November 14, 2012. He returned to work on May 18, 2010 for approximately 10 minutes and then was sent home by the employing establishment. His supervisor told him to go home but he did not have anything in writing. He filed a grievance in that matter and was advised to file a claim for payment with the Department of Labor. Appellant's treating physician advised him not to work because of his shoulder condition. He contended that the job offer was not within the restrictions of Dr. Mize, the impartial medical specialist, and he was not medically capable of performing the job offer. Appellant stated that he returned to work because he needed to get paid. He did not work from May 18 to June 19, 2010.

OWCP received medical evidence pertaining to appellant's right knee and left shoulder conditions and treatment in 2012. The evidence noted that appellant was capable of returning to work with limitations effective September 26, 2012. Also of record are materials to various grievances, the National Reassessment Program, health benefit enrollment transfers and time and attendance records. In a May 23, 2011 Step B decision the Rio Grande Dispute Resolution Team combined appellant's grievances regarding the job offer of March 23, 2010. It determined that management did not violate Article 19 of the National Agreement.<sup>4</sup>

By decision dated January 30, 2013, an OWCP hearing representative affirmed the May 17, 2012 denial of appellant's claim for wage-loss compensation. She found that the medical evidence did not support a worsening of appellant's work-related conditions or total disability from June 19 through August 18, 2010. The hearing representative also found there was no evidence that the employing establishment did not provide modified duty within his medical limitations.

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<sup>4</sup> The decision noted that on May 18, 2010 appellant reported to work to accept the limited-duty job offer from March 23, 2010 and had his left arm in a brace that restricted movement of his left shoulder.

## LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>5</sup> For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>6</sup> Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>7</sup> To meet his or her burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.<sup>8</sup>

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>9</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>10</sup> An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>11</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.<sup>12</sup> The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.<sup>13</sup>

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<sup>5</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

<sup>6</sup> See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

<sup>7</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>8</sup> *A.D.*, 58 ECAB 166 (2006); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>9</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

<sup>10</sup> *Roberta L. Kaamoana*, 54 ECAB 150 (2002).

<sup>11</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>12</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>13</sup> See *T.E.*, Docket No. 09-2040 (issued July 27, 2010); *Sedi L. Graham*, 57 ECAB 494 (2006).

## ANALYSIS

OWCP accepted that appellant's right knee medial meniscus tear was related to his federal employment and approved several surgeries, which were performed on March 31 and September 19, 2008, July 24, 2009 and February 24, 2010. Appellant was paid wage-loss benefits through May 18, 2010.<sup>14</sup> He was unable to return to his date-of-injury position and was provided a modified position on May 18, 2010.<sup>15</sup> Appellant accepted the job offer but contended that he was not allowed to work and was sent home. On February 14, 2012 he filed claims for wage-loss compensation for the period June 19 through August 18, 2010, which were denied. Appellant contends that his accepted left shoulder and right knee conditions prevented him from working.

In his May 20, 2010 report, Dr. Key opined that surgery was required on appellant's shoulder. However, he did not offer an opinion on appellant's ability to work. Dr. Key merely noted that appellant felt he was unable to work due to his shoulder condition. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a probative medical opinion on the issue of disability or a basis for payment of compensation.<sup>16</sup> There were no specific findings on examination to support that appellant was examined contemporaneously with the completion of the CA-7 forms to support a worsening of his shoulder condition to support total disability or any objective findings on examination to support a worsening of appellant's shoulder which would prevent him from working in the May 18, 2010 modified position. As such, appellant has not submitted sufficient well-reasoned medical evidence with objective findings on examination to support a worsening of either his left shoulder or right knee work-related conditions to support disability from work during the period claimed June 19 to August 18, 2010.

Regarding appellant's right knee condition, he contends that the modified work violated his work restrictions.<sup>17</sup> On April 15, 2010 Dr. Chen found appellant was able to work with lifting intermittently of 5 pounds and continuously 1 pound; twisting/driving for up to four hours; standing/walking/pulling/pushing up to 10 pounds for one hour, and no climbing/kneeling/bending or stooping.<sup>18</sup> The modified-duty carrier position offered on May 18, 2010 required: reaching above shoulder for two hours a day; standing/walking intermittently for two hours each; lifting no more than 10 pounds for four hours a day; and pushing/pulling intermittently two hours each. Dr. Chen provided restrictions were exceeded by the offered position. He restricted

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<sup>14</sup> Under case number xxxxxx345, OWCP accepted several left shoulder conditions and displacement of cervical intervertebral disc without myelopathy on the left. Appellant was placed on the periodic rolls beginning August 18, 2010, when he underwent an approved shoulder surgery.

<sup>15</sup> The employing establishment's March 23, 2010 modified position was withdrawn.

<sup>16</sup> *G.T.*, 59 ECAB 447 (2008).

<sup>17</sup> The Board notes that the restrictions offered by Dr. Mize., the impartial medical specialist, are irrelevant to this wage-loss compensation claim for the period June 19 through August 18, 2010 as they were only valid for three months or beginning June 2010 to allow appellant recovery from his February 24, 2010 knee surgery.

<sup>18</sup> No change was reported in Dr. Chen's restrictions during the disability period claimed.

appellant to one hour of standing/walking as pulling/pushing up to 10 pounds while the modified position required up to two hours of standing/walking/pushing/pulling. The modified limited-duty job offered is not within appellant's medical restrictions recommended by his treating physician. While he was released to return to modified work, the employing establishment did not offer appellant a modified position within his restrictions. As the employing establishment did not accommodate appellant's work restrictions for the period claimed, he was disabled from June 19 through August 18, 2010 causally related to his accepted right knee condition and OWCP erred in finding that he did not establish total disability for this period.

**CONCLUSION**

The Board finds that appellant is entitled to compensation for disability from June 19 through August 18, 2010 causally related to his employment-related conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 9, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board