

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

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**Docket No. 07-225
Issued: May 31, 2007**

Appearances:

*John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 7, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 9, 2005 merit decision denying his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after June 30, 2004 due to his employment-related right shoulder condition.

FACTUAL HISTORY

On July 20, 1989 appellant, then a 38-year-old distribution clerk, filed a traumatic injury claim alleging that he sustained a right hand injury on July 17, 1989 due to sorting mail. The Office accepted that appellant sustained de Quervain's tenosynovitis and carpal tunnel syndrome of the right wrist and authorized a right carpal tunnel and first dorsal compartment release which

was performed on March 23, 1990.¹ Appellant was released to work without restriction on September 13, 1990. The Office also accepted that appellant sustained a right rotator cuff tear and rotator cuff syndrome in 1993 and authorized right acromioplasty and rotator cuff repair surgery which was performed on November 17, 1993. He was returned to light-duty work on January 12, 1994.

On December 27, 1995 appellant filed an occupational disease claim alleging that he sustained injury to his right shoulder and arm. He did not stop work but continued performing light-duty work which restricted him from lifting more than 20 pounds, climbing ladders and reaching above his shoulder with his right arm. The Office accepted that appellant sustained impingement syndrome of the right rotator cuff. On June 12, 1996 appellant underwent a revision acromioplasty of the right shoulder which was authorized by the Office.²

Appellant continued to work in light-duty positions at the employing establishment. He voluntarily retired on disability retirement effective August 19, 2002. In mid 2004, appellant claimed that he sustained a recurrence of disability on June 30, 2004 due to his employment-related right shoulder condition.³

On July 27, 2004 Dr. W. Harold Knight, an attending Board-certified orthopedic surgeon, diagnosed “right shoulder” and recommended that appellant undergo physical therapy for two weeks and “continue to work at his same permanent restrictions.” The record contains physical therapy reports from July and August 2004 in which appellant’s therapists discussed his right shoulder condition.

By decision dated November 3, 2004, the Office denied appellant’s claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after June 30, 2004 due to his employment-related right shoulder condition.

Appellant requested a hearing before an Office hearing representative. At the May 17, 2005 hearing, appellant’s attorney contended that appellant did not have the burden of proof to establish that he sustained an employment-related recurrence of disability on June 30, 2004, but rather that the Office had the burden of proof to terminate appellant’s compensation beginning June 30, 1994. He asserted that because the employing establishment could not offer appellant light-duty work within his restrictions around the time appellant retired in August 2002, the Office had not met its burden of proof to terminate appellant’s compensation. Counsel cited the

¹ Appellant had a right volar ganglion surgically excised from his right wrist in 1990.

² The Office granted appellant schedule awards for a total 21 percent permanent impairment of his right arm.

³ The Office accepted that appellant sustained an employment-related right knee injury on January 8, 2002 and authorized the performance of right knee surgery in April 2002. Appellant began to receive disability compensation based on his knee injury rather than his right shoulder injury. He continued to receive compensation in connection with his right knee injury after he retired and, in a dated June 29, 2004 decision, the Office terminated this compensation effective June 29, 2004 on the grounds that he had no residuals of his right knee condition after that date. The record contains very few documents concerning appellant’s right knee injury and appellant has not claimed that his June 30, 2004 recurrence of disability was due to his right-knee condition.

case of *Cindy L. Moss*, Docket No. 04-1386 (issued December 13, 2004), in support of his argument.

In a decision dated and finalized September 9, 2005, the Office hearing representative affirmed the June 29, 2004 decision. The Office hearing representative determined that it was appellant's burden of proof to establish that he sustained a recurrence of disability on or after June 30, 2004 due to his employment-related right shoulder condition. He found that appellant did not submit sufficient evidence to meet that burden of proof.

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁴ This burden includes the necessity of 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 rationale.⁵ Where no such rationale is present, medical evidence is of diminished probative value.⁶

ANALYSIS

The Office accepted that appellant sustained a right rotator cuff tear and rotator cuff syndrome in 1993 and authorized right acromioplasty and rotator cuff repair surgery which was performed on November 17, 1993. He was released to light-duty work on January 12, 1994. After filing an occupational disease claim in December 1995, the Office accepted that appellant sustained impingement syndrome of the right rotator cuff. On June 12, 1996 appellant underwent a revision acromioplasty of the right shoulder which was authorized by the Office. He continued performing light-duty work for the employing establishment and voluntarily retired on disability retirement effective August 19, 2002. In mid 2004 appellant claimed that he sustained a recurrence of disability on June 30, 2004 due to his employment-related right shoulder condition.

Counsel argued that appellant did not have the burden of proof to establish that he sustained an employment-related recurrence of disability on June 30, 2004, but rather that the Office had the burden of proof to terminate appellant's compensation beginning June 30, 1994. Citing *Cindy L. Moss*, Docket No. 04-1386 (issued December 13, 2004), he asserted that because the employing establishment could not offer appellant light-duty work within his restrictions

⁴ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986). Under 20 C.F.R. § 10.5(x), a recurrence of disability is defined, in part, as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."

⁵ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁶ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

around the time he retired in August 2002, the Office had not met its burden of proof to terminate his compensation.

It is well established that once the Office has accepted a claim, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ The Board notes that appellant's reliance on *Cindy L. Moss* is misplaced as the facts of that case are readily distinguished from the facts of the present case. The employee was receiving compensation in connection with her employment injury at the time the employing establishment in that case indicated that it could no longer provide light-duty work for her.⁸ In the present case, appellant had retired effective August 19, 2002 and was not receiving compensation in connection with his employment-related right shoulder condition either at the time of his retirement or at the time of his claimed recurrence of disability on June 30, 2004. Appellant has the burden of proof to present medical evidence showing that he sustained an employment-related recurrence of disability on or after June 30, 2004.

The Board finds that appellant did not submit sufficient medical evidence to meet his burden of proof to establish that he sustained a recurrence of disability on or after June 30, 2004 due to his employment-related right shoulder condition. On July 27, 2004 Dr. Knight, an attending Board-certified orthopedic surgeon, diagnosed "right shoulder" and recommended that appellant undergo physical therapy for two weeks and "continue to work at his same permanent restrictions." Dr. Knight's brief reports are of limited probative value on the relevant issue of the present case in that they do not contain any opinion that appellant's right shoulder condition on or after June 30, 2004 was related to his employment-related right shoulder condition.⁹ Moreover, Dr. Knight did not provide a diagnosis of appellant's right shoulder condition, did not specify the work restrictions he felt appellant needed and did not clarify the cause of the condition which necessitated such restrictions. The record also contains physical therapy reports from July and August 2004 in which appellant's therapist discussed his right shoulder condition. However, physical therapists are not physicians under the Act and are not qualified to provide the necessary medical evidence to meet appellant's burden of proof.¹⁰

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹¹ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment conditions and, therefore, the Office properly denied his claim for compensation.

⁷ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁸ The Board reversed the Office's termination of the claimant's compensation because the employing establishment could not offer light-duty work within the claimant's restrictions at the time of the termination.

⁹ See *Charles H. Tomaszewski*, *supra* note 4 (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁰ *Jane A. White*, 34 ECAB 515, 518-19 (1983).

¹¹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after June 30, 2004 due to his employment-related right shoulder condition.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 9, 2005 decision is affirmed.

Issued: May 31, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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