

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Cincinnati, OH, Employer**

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**Docket No. 10-1871
Issued: June 2, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2010 appellant, through her attorney, filed a timely appeal of a June 9, 2010 Office of Workers' Compensation Programs' merit decision denying compensation. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish an increase in his partial disability from June 25 through September 1, 2009.

FACTUAL HISTORY

On February 27, 1995 appellant, then a 41-year-old mail handler, filed an occupational disease claim alleging that he developed a right shoulder condition due to his employment

¹ 5 U.S.C. § 8101 *et seq.*

duties.² On January 31, 1995 Dr. Arnold R. Penix, a Board-certified orthopedic surgeon, performed surgery for impingement syndrome of the right shoulder and a partial-thickness rotator cuff tear. The Office accepted his claim for impingement syndrome and rotator cuff tendinitis. On August 6, 1997 it granted appellant a schedule award for 17 percent impairment of his right arm.

Appellant filed a recurrence of disability on February 27, 1998 alleging sudden worsening of his right shoulder condition on September 4, 1997. The Office denied this claim on June 12, 1998. Appellant filed a traumatic injury claim on September 30, 1998 and alleged that his right shoulder pain increased such that he could no longer raise it. By decision dated October 19, 1998, the Office accepted this claim for impingement syndrome of the right shoulder and combined the traumatic right shoulder injury claims.

Appellant filed a second recurrence of disability on January 14, 1999 and alleged that he was disabled beginning December 5, 1998. On April 28, 1999 the Office accepted the recurrence from December 9, 1998 through January 19, 1999.

Appellant returned to work on September 10, 2001 as a modified mail handler working six hours a day, lifting up to 10 pounds with no reaching above the shoulder or operating a motor vehicle. He worked in the rewrap section obtaining mail that had been damaged in handling from the hamper or cart, carrying the mail to the rewrap table, repairing the torn or damaged mail by taping or placing in a plastic bag. Appellant was allowed to work at his own pace. By decision dated November 16, 2001, the Office found that appellant's actual earnings represented his wage-earning capacity and reduced his wage-loss benefits. It granted him an increased schedule award for an additional 22 percent impairment of the right upper extremity on June 18, 2002.

Dr. Rajbir Minhas, a physician Board-certified in pain management, completed a report on April 21, 2008. He found a flat affect, a slow gait which needed support, positive Waddell sign and tenderness in the paralumbar region. Dr. Minhas diagnosed chronic pain syndrome, fibromyalgia, shoulder sprain and depression. In a form note dated May 21, 2008, he advised that appellant could work four to six hours, but could not climb stairs. Dr. Minhas provided restrictions of occasional lifting and carrying up to 20 pounds. He also indicated that appellant could bend, twist, push, pull, squat, kneel, stand and sit from one to six hours. Dr. Minhas repeated these findings in reports dated monthly from May through December 2008.

On January 15, 2009 Dr. Minhas stated that appellant was experiencing increased pain and stopped work. In notes dated February through April 2009, he recorded appellant's statements that everything was hurting including increased pain in the shoulder. On May 7, 2009 Dr. Minhas advised that appellant missed work due to increased pain. He completed work capacity notes on July 12 and August 6, 2009 and indicated that appellant should work only four hours a day. On July 2, 2009 Dr. Minhas stated that appellant had sought treatment for shoulder problems and had changed his work schedule to four hours a day.

² Appellant had previously filed a claim on April 25, 1991 alleging on that date he injured his left shoulder due to a defective latch on an all purpose container.

On June 16, 2009 Dr. Arnold R. Penix, an orthopedic surgeon, indicated that he treated appellant for a left shoulder condition. He advised that appellant could return to light duty on June 17, 2009 working only four hours a day. Dr. Penix completed a duty status report on June 17, 2009 that appellant should work four hours a day lifting up to 20 pounds and reduced his fine manipulation to one to two hours a day. On August 6, 2009 Dr. Minhas repeated appellant's statements that he had increased pain in the neck and shoulders and was experiencing harassment at work.

On March 31, 2009 the employing establishment drafted proposed duties for appellant reducing his work hours to four hours a day. The employer offered him a limited-duty position on August 13, 2009 working four hours a day. Appellant accepted this position on August 25, 2009.

Appellant filed a claim for compensation on September 14, 2009 alleging that he used intermittent leave without pay from June 25 through September 1, 2009. On the reverse of the form, the employer noted that he worked four hours a day with restrictions and received compensation for two hours a day on the periodic rolls. The accompanying time analysis form supported that appellant worked or used sick leave for four hours a day beginning June 25, 2009 utilizing approximately two hours of leave without pay on the days when he worked.

By letter dated September 18, 2009, the Office noted that appellant had reduced his work hours on or about June 25, 2009 and requested further information to support his claim of disability.

Appellant submitted a narrative statement alleging that he worked six hours a day until his pain level increased such that he was no longer able to maintain a six-hour workday. He requested compensation for the additional two hours a day that he was unable to work. In reports dated September 3 to October 29, 2009, Dr. Minhas repeated his diagnoses and noted that appellant reported that his work restrictions increased limiting his ability to work to four from six hours a day. On October 26, 2009 Dr. Penix stated that appellant had increased right shoulder pain and was on restricted duty working four hours a day. He concluded, "It has been understood since that ... eventually only be able to work four hours per day. It is my recommendation that [appellant] be restricted to a four[-]hour workday permanently."

By decision dated December 3, 2009, the Office denied appellant's claim finding that the medical evidence did not establish that his additional two hours of disability was due to a worsening of the accepted condition.

Counsel requested an oral hearing on December 7, 2009.³

On February 19, 2010 Dr. Penix noted appellant's history of injury to the right shoulder and returned him to work as a modified mail handler. During the past year, he also began

³ Appellant filed an additional claim for compensation for the period September 11, 2009 through January 29, 2010 on January 29, 2010. The Office requested additional information regarding this claim by letter dated February 8, 2010. There is no final decision from the Office regarding this claim in the record and the Board will not consider this issue on appeal. 20 C.F.R. § 501.2(c).

treating appellant for a left shoulder condition. Dr. Penix stated, “It is my opinion that his right and left shoulder complaints are related to his lifting and reaching activities as a mail handler.” He opined that appellant’s work restrictions should increase from six hours to only four hours a day with no overhead reaching or heavy lifting.

Dr. Minhas completed reports on January 28 and February 25, 2010 that diagnosed chronic pain syndrome, fibromyalgia, shoulder pain and depression. He noted that appellant was working four hours a day.

Appellant testified at the March 22, 2010 oral hearing that he returned to work six hours a day in 2001. He stated that his condition gradually worsened, his need for medication increased, and he developed a left shoulder condition. Appellant noted service-connected disabilities to his right knee and lower back of 60 percent. In April 2009, he could no longer work due to increased pain. On August 13, 2009 the employing establishment reassessed his position and limited his position to four hours a day. Appellant stated that his position required him to collect mail from the machines, place the mail in the tray, carrying the mail into his work area, repairing the torn mail and stamped the appropriate date. He stated that this was the only job available to injured mail handlers. Appellant’s attorney argued that the light-duty position upon which the wage-earning capacity determination was based was “make work.”

Appellant submitted additional medical evidence following the oral hearing including a February 3, 2009 magnetic resonance imaging (MRI) scan that demonstrated supraspinatus and subscapularis tendinosis with evidence of a full-thickness rotator cuff tear in the left shoulder. On May 19, 2009 Dr. Penix noted that he had treated appellant’s left shoulder since March 10, 2009. He found a positive impingement sign and subacromial bursitis and impingement. Dr. Penix attributed this condition to appellant’s employment duties of repetitive work at the employing establishment.

On March 17, 2010 Dr. Minhas listed appellant’s symptoms of aching stabbing pain in the neck and upper back, mid back, thigh, knee and legs. In a report dated April 15, 2010, he again diagnosed chronic pain syndrome, fibromyalgia, shoulder pain and depression. Dr. Minhas reported that appellant stated that he had a left rotator cuff tear.

In a decision dated June 9, 2010, an Office hearing representative affirmed the December 3, 2009 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act⁴ has the burden of establishing 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.⁵ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁷ The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁸

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁰ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹¹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹² Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment injury. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment injury identified by the claimant.¹³

⁶ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁸ *Sandra D. Pruitt*, 57 ECAB 126 (2005); *K.R.*, Docket No. 09-415 (issued September 30, 2009).

⁹ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹³ *Leslie C. Moore*, 52 ECAB 132 (2000).

ANALYSIS

Appellant's claim was accepted by the Office for a right shoulder injury for which he underwent surgery. He returned to modified duty for six hours a day. The Office issued a wage-earning capacity determination on November 16, 2001 finding that appellant could work as a modified mail handler for six hours a day with restrictions. Appellant continued to work in this position. He filed a claim for compensation commencing June 25, 2009 for an additional two hours of disability as he worked only four hours a day with restrictions and utilized two hours of leave without pay.

The Board notes that as appellant did not claim a period of total disability, the Office properly determined that his claim should not be developed as a modification of the wage-earning capacity decision. Rather, appellant has the burden of establishing that he sustained two hours of increased disability a day.¹⁴

Appellant submitted reports from Dr. Minhas, a physician Board-certified in pain management, who diagnosed several conditions not accepted by the Office, including fibromyalgia, chronic pain syndrome, fibromyalgia and depression. On January 15, 2009 Dr. Minhas noted appellant's complaints of increased pain. In July 12 and August 6, 2009 notes, he stated that appellant should work only four hours a day. On July 2, 2009 Dr. Minhas noted that appellant sought treatment for shoulder problems with another physician and had changed his work schedule to four hours a day. While these notes provide documentation of appellant's complaint that his pain level was increasing, Dr. Minhas did not provide any explanation of how any disability related to appellant's accepted right shoulder impingement syndrome or rotator cuff tendinitis. He did not distinguish the accepted condition from the other conditions that he diagnosed. Dr. Minhas did not provide a sufficiently detailed or well-reasoned explanation to establish that any disability on or after June 25, 2009 was due to the accepted conditions. These reports are insufficient to meet appellant's burden of proof.

Appellant also submitted notes from Dr. Penix. On June 16, 2009 Dr. Penix described appellant's left shoulder condition and reduced appellant's work hours from four to six. He did not attribute appellant's increased disability to the accepted right shoulder condition, but instead advised that the change in work restrictions was due to the left shoulder condition. As the increased disability does not relate to appellant's accepted right shoulder condition, this report is not sufficient to meet appellant's burden of proof.

On October 26, 2009 Dr. Penix stated that appellant had increased right shoulder pain and was on restricted duty working four hours a day. He stated that there was an ongoing understanding that appellant's work restrictions would increase so that he could only work four hours a day. While this note mentioned the accepted right shoulder condition, Dr. Penix did not provide any medical findings or a reasonable explanation of how appellant's right shoulder condition caused increased disability. He did not explain how or why he reached the conclusion that appellant could only work four rather than six hours a day. On February 19, 2010 Dr. Penix

¹⁴ See *Pruitt, supra* note 8 (finding that as appellant had not alleged a recurrence of total disability, modification of her wage-earning capacity determination was not at issue and that appellant retained the burden of proof in establishing disability for the 11 hours of disability claimed).

noted appellant's history of injury to the right shoulder and work history. He also mentioned the left shoulder condition and attributed this condition to appellant's work duties. Dr. Penix opined that appellant's work restrictions should increase to four hours a day of work. Again, he did not clearly attribute any increased disability to the accepted right shoulder conditions or offer any physical findings from examination. Dr. Penix failed to explain why he believed that additional work restrictions were necessary. He did not provide a detailed medical report with a history of injury, findings relating to appellant's right shoulder or a clear opinion addressing how this condition caused increased disability. Dr. Penix's reports are not sufficient to meet appellant's burden of proof.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish that his increased disability for work beginning on or after June 25, 2009 was due to his accepted right shoulder condition.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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