

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

A.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Detroit, MI, Employer)

**Docket No. 12-57
Issued: July 10, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 5, 2011 appellant filed a timely appeal from May 3 and September 22, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP) and a May 19, 2010 nonmerit decision denying her request for reconsideration. 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.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability as of December 21, 2010 that was causally related to her accepted injury; and (2) whether OWCP properly denied merit review of its May 19, 2010 decision.

On appeal, appellant alleges that the employing establishment failed to provide her with work within her restrictions from November 30, 2010 until June 3, 2011.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a February 3, 2012 decision, the Board affirmed the December 20, 2010 decision denying appellant's claim for a recurrence of total disability for the period June 28 through December 20, 2010.² The facts and law contained in that decision are incorporated herein by reference. The relevant facts are delineated below.

OWCP accepted appellant's April 30, 2002 occupational disease claim for left shoulder tendinitis and left cubital tunnel syndrome.³ Appellant returned to modified duty on August 20, 2007. By decision dated March 9, 2010, OWCP accepted her recurrence claim for the period October 22, 2008 through March 7, 2010.

By decision dated May 19, 2010, OWCP denied appellant's recurrence claim for the period March 27 through June 27, 2010 on the grounds that the record did not contain medical evidence establishing that she was disabled during the claimed period.

Appellant submitted an October 29, 2010 report from Dr. Tariq M. Awan, a Board-certified family practitioner, who indicated that she could perform desk work, provided that she was not required to do any repetitive or overhead work.

By decision dated December 20, 2010, OWCP denied appellant's claim for compensation for the period June 28 through December 20, 2010 on the grounds that the medical evidence of record failed to establish that she was disabled for work during that period due to the accepted work injury. By decision dated February 3, 2012, the Board affirmed the December 20, 2010 decision denying his recurrence claim.

In a December 4, 2010 note, Dr. Awan diagnosed lower back pain, left shoulder tendinitis and left cubital tunnel syndrome. He indicated that appellant was disabled from work from March 30 through December 3, 2010. In a separate note dated December 4, 2010, Dr. Awan opined that she was able to return to work on December 4, 2010 with restrictions including no overhead, repetitive or overhead work and no lifting above the shoulder.

In a narrative report dated December 4, 2010, Dr. Awan diagnosed lower back pain, left shoulder rotator cuff tendinitis and left cubital tunnel syndrome. Examination of the left elbow revealed full range of motion and intact muscle strength in all planes. Sensation was intact to pinprick. There was a positive Tinel's sign in left elbow. There was full range of motion of the

² Docket No. 11-1350 (issued February 3, 2012). As noted, in its February 3, 2012 decision, the Board found that appellant failed to establish a recurrence of disability for the period June 28 to December 20, 2010. Decisions and orders of the Board are final upon expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). While an appellant may petition for reconsideration with the Board within 30 days of the date of issuance of a Board decision (20 C.F.R. § 501.7(a)), she did not file a petition for reconsideration with the Board of its February 3, 2012 decision. Although OWCP denied the recurrence claim at issue in this case as of December 6, 2010, the Board will address only the period beginning December 21, 2010, as the period December 6 to 20, 2010 was covered by the Board's February 3, 2012 decision.

³ Appellant's April 23, 2002 claim was accepted for contusions of the chest and left arm, elbow and shoulder in File No. xxxxxx836. File No. xxxxxx836 was combined with the instant case (File No. xxxxxx142), with File No. xxxxxx142 serving as the master file.

lumbar spine, including flexion/extension, left/right rotation and left/right side bending. Regarding the left shoulder, there was no tenderness to palpation over biceps tendon. There was full range of motion in forward/lateral elevation and internal/external rotation. Sensation was intact to pinprick.

On December 4, 2010 appellant accepted a full-time position as a modified mail handler. Duties included day-tagging containers. Physical requirements involved day-tagging parcels as they came off trailers and walking areas to ensure that parcels were tagged.

The record contains an unsigned December 12, 2010 emergency room report from Broadlawns Medical Center reflecting that appellant received a prescription for vicodin and neurontin on that date.

In a December 20, 2010 disability certificate, Dr. Awan diagnosed right shoulder dysfunction, left rotator cuff tendinitis and ulnar radiculopathy. He indicated that appellant was disabled from December 5 through 22, 2010. On December 23, 2010 Dr. Ateeq K. Rehman, a Board-certified physiatrist, stated that appellant could return to work on December 23, 2010 with restrictions.

In a letter dated January 13, 2011, the employing establishment notified appellant of its intent to terminate her for failure to report to work after working for one day on December 4, 2010. Patricia Ginther, a manager, indicated that, during an interview on December 23, 2010, appellant stated that she had reinjured herself at work on December 4, 2010 and had gone to the hospital after work on December 5, 2010. She noted that appellant had provided no evidence to support her claim that she was unable to work after December 4, 2010. The record reflects that appellant was terminated effective February 25, 2011 for failing to report to work as assigned from December 5 through 23, 2010 and failing to provide any medical documentation of her inability to work.⁴

On February 23, 2011 appellant filed a claim for compensation for the period December 4, 2010 through February 22, 2011.

In a letter dated March 14, 2011, OWCP informed appellant that the evidence and information submitted was insufficient to establish that she was totally disabled due to her accepted injury during the claimed period (December 4, 2010 through February 22, 2011). It noted inconsistencies in the evidence, including conflicting claims regarding dates she received treatment. Appellant was asked to provide additional evidence and information, including a medical report containing a diagnosis and a rationalized opinion as to the cause of her diagnosed condition.

In a December 20, 2010 disability certificate, Dr. Rehman indicated that appellant was on work disability from December 1, 2010 through January 20, 2011. Work restrictions included no overhead lifting, no repetitive or overhead work, no above-the-shoulder work and no bending or twisting.

⁴ Appellant grieved her potential firing from the employing establishment. She was permitted to return to limited duty in June 2011.

By decision dated May 3, 2011, OWCP denied appellant's recurrence claim effective December 6, 2010. On May 20, 2011 appellant requested a review of the written record.

Appellant submitted an appeal request form, dated May 17, 2011, requesting reconsideration of a May 19, 2010 decision denying her claim for compensation for the period March 27, 2009 through June 27, 2010. She also submitted a letter dated May 17, 2011 requesting that the May 19, 2010 decision be reconsidered due to her medical disability certificate.

In an appeal request form, dated May 20, 2011 and referencing the May 3, 2011 decision, appellant requested a review of the written record.

Appellant submitted disability slips from Dr. Awan and Dr. Rehman dated March 19 through August 11, 2011. On March 19, 2011 Dr. Awan provided examination findings and diagnoses pertaining to her left elbow, left shoulder and back. On June 11, 2011 he provided findings that revealed appellant's condition was unchanged and indicated that she was working full time with restrictions. On July 9, 2011 Dr. Rehman noted complaints of left arm pain, provided findings on examination and noted that she was working with restrictions. None of the aforementioned reports contained an opinion regarding appellant's ability to work from December 4, 2010 through February 22, 2011 or addressed her medical condition during that time period.

In a decision dated August 18, 2011, OWCP denied appellant's request for reconsideration. It found that the evidence presented was insufficient to warrant further merit review of the May 3, 2011 decision denying her recurrence claim beginning December 6, 2010.

Appellant submitted an August 3, 2011 report from Dr. Mohammad Yusaf, a Board-certified pediatrician, reflecting that she was seen in a hospital emergency room on that date for an acute exacerbation of chronic left shoulder and arm pain. A form report from the Henry Ford Wyandotte Hospital indicated that she was seen in the emergency department on August 19, 2011. Robert McIntee, nurse practitioner, stated that appellant was told not to work until released by her family physician. Triage notes dated August 19, 2011, signed by Dr. Gale Darnell, Board-certified in emergency medicine, reflected that appellant was seen in the emergency room on that date for left shoulder and arm pain.

By decision dated September 22, 2011, OWCP's hearing representative affirmed the May 3, 2011 decision denying appellant's recurrence claim beginning December 6, 2010.⁵ He found the medical evidence failed to establish that she was disabled during the claimed period or that her condition had worsened such that she was unable to perform the duties of the light-duty job provided by the employing establishment.⁶

⁵ The Board notes that OWCP's hearing representative incorrectly stated that he was affirmed a January 13, 2011 decision. The content of his decision, however, addresses the issues presented in the May 3, 2011 decision denying appellant's claim for a recurrence of disability beginning December 6, 2011.

⁶ OWCP's hearing representative noted that appellant had failed to provide medical evidence establishing that she sustained a new injury at work on December 5, 2010.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of OWCP's regulations define "recurrence of disability" 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.⁷ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her 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.⁸

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that she can perform the light-duty position, the employee has the burden to establish, by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁹

The Board will not require OWCP to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability beginning December 21, 2010. The record establishes that the employing establishment provided her with a light-duty position in accordance with her medical restrictions. Appellant has not provided a rationalized medical opinion establishing that she was disabled from that light-duty job as of December 21, 2010.

OWCP accepted appellant's claim for left shoulder tendinitis and left cubital tunnel syndrome. On December 4, 2010 Dr. Awan released her to work with restrictions including no repetitive or overhead work and no lifting above the shoulder. On that same date, appellant accepted a full-time position as a modified mail handler. Duties included day-tagging containers, physical requirements involved day-tagging parcels as they came off trailers and walking areas to ensure that parcels were tagged. The Board finds that the employing

⁷ 20 C.F.R. § 10.5(x) (2002). See *Carlos A. Marrero*, 50 ECAB 117 (1998).

⁸ *Id.*

⁹ *Conard Hightower*, 54 ECAB 796 (2003).

¹⁰ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

establishment provided appellant with a modified position that was within her medical restrictions.

On February 23, 2011 appellant filed a notice of recurrence of disability as of December 4, 2010. She did not allege, nor does the evidence support, that her duties had changed or that her condition had spontaneously worsened such that she was unable to perform the light-duty job. Rather, appellant alleged that she reinjured herself at work on December 4, 2010. She, however, provided no information as to how the claimed injury occurred or any supporting evidence that it, in fact, did occur. The Board notes that appellant's allegations undermine her recurrence claim, as they suggest that she may have experienced an intervening injury, rather than a spontaneous worsening of her accepted condition.¹¹

The medical evidence of record is insufficient to establish that appellant was disabled due to her accepted injury during the period in question. On the contrary, the medical evidence establishes that she was capable of working with restrictions. On December 4, 2010 Dr. Awan provided examination findings reflecting full range of motion and intact muscle strength in all planes of the left elbow, with intact sensation. In the left shoulder, there was full range of motion and no tenderness to palpation over biceps tendon. Dr. Awan diagnosed lower back pain, left shoulder rotator cuff tendinitis and left cubital tunnel syndrome. He opined that appellant was disabled from work from March 30 through December 3, 2010, but was able to return to work on December 4, 2010 with previously identified restrictions.

On December 20, 2010 Dr. Awan diagnosed right shoulder dysfunction, left rotator cuff tendinitis and ulnar radiculopathy and stated that appellant was disabled from December 5 through 22, 2010. This report does not contain a history of injury, examination findings or an opinion on the cause of appellant's claimed disability. Therefore, Dr. Awan's report is of limited probative value.¹² In March 19 and June 11, 2011 notes, he provided current examination findings and diagnoses pertaining to appellant's left elbow, left shoulder and back conditions on those dates. As these reports do not address the period in question, they are irrelevant to the issue at hand and insufficient to establish appellant's claim.

Dr. Rehman's notes and reports do not support appellant's claim. In a December 20, 2010 disability certificate, he indicated that she was on work disability from December 1, 2010 through January 20, 2011. At the same time, however, Dr. Rehman recommended work restrictions, which included no overhead lifting, no repetitive or overhead work, no above-the-shoulder work and no bending or twisting. It is impossible to determine from his inconsistent statements whether he believed appellant to be totally disabled from her light-duty job during the referenced period. Moreover, Dr. Rehman did not provide an opinion on the cause of appellant's claimed disability. Therefore, his report is of diminished probative value. Dr. Rehman's December 23, 2010 report, in which he stated that appellant could return to work on that date

¹¹ Appellant is not precluded from filing a claim for a traumatic injury for a claimed December 4, 2010 incident. The Board notes that this claim was developed as a claim for a recurrence of disability relating to her April 30, 2002 occupational disease claim.

¹² Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value. *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

with restrictions, undermines her claim of total disability. On July 9, 2011 he noted complaints of left arm pain, provided findings on examination and noted that appellant was working with restrictions. As these reports do not address the period in question, they are irrelevant. As noted, the Board will not require OWCP to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought.¹³

The remaining medical evidence of record, including emergency room records, x-ray and magnetic resonance imaging scan reports, disability slips and prescription notes, that do not contain an opinion on the cause of appellant's condition, are of limited probative value and insufficient to establish appellant's recurrence claim. The record contains an August 19, 2011 report from a nurse practitioner. As nurse practitioners are not considered to be physicians under FECA, this report does not constitute probative medical evidence.¹⁴

On appeal, appellant contends that the employing establishment failed to provide her with work within her restrictions from November 30, 2010 until June 3, 2011. She can establish a recurrence of disability by establishing that her light-duty assignment was withdrawn for reasons other than misconduct, nonperformance of job duties or a reduction-in-force.¹⁵ Appellant has not established such a withdrawal. The employing establishment controverted her claim and stated that it terminated her for her failure to appear for duty or to explain her absence. Appellant has presented no evidence to refute the employing establishment's position. Rather, the evidence shows that employing establishment provided her with a position within her restrictions. After accepting the position and working for one day, she abandoned her job, without communicating with her employer for a period of weeks. The Board finds that appellant failed to establish that her light-duty position was improperly withdrawn.

Appellant has failed to establish by the weight of the reliable, probative and substantial evidence, a change in the nature and extent of the injury-related condition resulting in her inability to perform the duties of her modified employment. She has provided insufficient rationalized opinion evidence establishing that she was disabled as of December 21, 2010 or any evidence that the employing establishment withdrew or was unable to provide her with, a light-duty job within her medical restrictions. As appellant has not submitted sufficient medical evidence to establish that she sustained a recurrence of disability due to her accepted employment injury, the Board finds that she has not met her 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(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹³ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁴ A medical report may not be considered to be probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined by FECA. Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." See *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁵ *Id.*

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁶ OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁸ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁹ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁰

ANALYSIS -- ISSUE 2

On May 17, 2011 appellant requested reconsideration of OWCP's May 19, 2010 decision denying her recurrence claim for the period March 27 through June 27, 2010. In its August 18, 2011 decision, however, OWCP denied her request for merit review of its May 3, 2011 decision, which denied her recurrence claim for a different period. The Board finds that it improperly interpreted appellant's May 17, 2011 letter and appeal request form as a request for reconsideration of the May 3, 2011 decision, when, in fact, she was requesting a merit review of OWCP's May 19, 2010.

The evidence of record clearly reflects intent on appellant's part to seek reconsideration of the May 19, 2010 decision. The May 17, 2010 appeal request form and letter requesting reconsideration specifically referenced the May 19, 2010 decision. The fact that on May 20, 2011 appellant requested a review of the written record, regarding the May 3, 2011 decision, indicates that she did not intend to ask OWCP for a merit review of that decision.

As OWCP failed to properly address appellant's request for reconsideration of its May 19, 2010 decision, the August 18, 2011 decision must be set aside and remanded for a determination as to whether appellant submitted sufficient evidence or argument to require OWCP to reopen a case for merit review under section 8128(a) of FECA.

¹⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(b).

²⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability that was causally related to her accepted injury as of December 21, 2010. The Board also finds that OWCP did not properly address appellant's May 17, 2011 request for reconsideration of its May 19, 2010 decision.

ORDER

IT IS HEREBY ORDERED THAT the September 22 and May 3, 2011 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

IT IS FURTHER ORDERED that the August 18, 2011 decision is set aside and the case is remanded for action consistent with this decision.

Issued: July 10, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board