

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

W.G., Appellant)
)
)
and)
)
)
DEPARTMENT OF DEFENSE, U.S. ARMY)
CORPS OF ENGINEERS, Felicity, OH,)
Employer)

**Docket No. 13-990
Issued: September 25, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2013 appellant, through counsel, filed a timely appeal of a February 13, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability causally related to his February 15, 2012 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 15, 2012 appellant, then a 41-year-old electrician, injured his left arm while loosening bulkhead latch pins. OWCP accepted his traumatic injury claim for left shoulder strain.

On February 17, 2012 Dr. Richard J. Sanders, a Board-certified family practitioner, released appellant to full-time duty with the following restrictions: lifting, carrying, pushing and pulling items weighing less than 10 pounds, no climbing ladders and no overhead reaching or repetitive motion with the left arm.² He later halved appellant's workday to four hours in an April 6, 2012 report.

In May 1, 2012 reports, Dr. Paul J. Favorito, a Board-certified orthopedic surgeon, related that appellant previously underwent left clavicle open reduction internal fixation on June 5, 2008.³ Since the February 15, 2012 work injury, appellant experienced left shoulder pain. On examination, Dr. Favorito observed limited external rotation, anterior clavicular tenderness to palpation and mild-to-moderate swelling. X-rays confirmed well-positioned left clavicle plate with no signs of refracture or bone abnormalities. Dr. Favorito diagnosed left clavicle contusion and painful retained hardware. He placed appellant on total disability effective May 1, 2012 and recommended removal of the implant.⁴

Appellant filed multiple claims for wage-loss compensation beginning May 6, 2012. OWCP informed him in a June 25, 2012 letter that additional evidence was needed to establish a recurrence of disability.⁵ Appellant was given 30 days to submit a medical report from a physician explaining the connection between his present condition and the February 15, 2012 work injury.

On July 16, 2012 OWCP authorized the removal of retained left clavicle hardware. Appellant underwent surgery on August 1, 2012.⁶ In an August 7, 2012 postoperative report, Dr. Favorito noted significant improvement in his condition.⁷

By decision dated August 9, 2012, OWCP denied appellant's claim for a recurrence of disability. It found the evidence insufficient to establish that he experienced a change in the

² In an April 5, 2012 letter, the employing establishment maintained that it accommodated these restrictions.

³ The case record contains a June 5, 2008 operative report.

⁴ Dr. Favorito reiterated these findings in a June 12, 2012 report.

⁵ The case record does not indicate that appellant filed a Form CA-2a. Instead, OWCP treated his wage-loss compensation claims as a recurrence of disability claim.

⁶ Beginning August 1, 2012 OWCP paid wage-loss compensation attributable to the surgery. Appellant was discharged to regular duty on December 10, 2012.

⁷ Dr. Favorito continued to document appellant's recovery in subsequent September 28, November 5 and November 26, 2012 reports.

nature and extent of the medical condition resulting from the February 15, 2012 employment injury.

Counsel requested a telephonic hearing, which was held on December 7, 2012. Appellant testified that, sometime in June 2012, his supervisor demanded that he resume eight-hour workdays or “just stay off.” Thereafter, he stopped work on June 8, 2012. Counsel argued that the supervisor’s ultimatum constituted a withdrawal of appellant’s limited-duty assignment.

On February 13, 2013 an OWCP hearing representative affirmed the August 9, 2012 decision.

LEGAL PRECEDENT

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 resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean 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 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 he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish, by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and an inability to perform such limited-duty work. 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 limited-duty job requirements.⁹ To establish a change in the nature and extent of the injury-related condition, there must be a probative medical opinion, based on a complete and accurate factual and medical history as well as supported by sound medical reasoning, that the disabling condition is causally related to employment factors.¹⁰ In the absence of rationale, the medical evidence is of diminished probative value.¹¹ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.¹²

⁸ *J.F.*, 58 ECAB 124 (2006). A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties, or other downsizing. 20 C.F.R. § 10.5(x). See also *Richard A. Neidert*, 57 ECAB 474 (2006).

⁹ *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁰ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

¹¹ *Id.*; *Robert H. St. Onge*, 43 ECAB 1169 (1992).

¹² *Ricky S. Storms*, 52 ECAB 349 (2001).

ANALYSIS

OWCP accepted that appellant sustained left shoulder strain while in the performance of duty on February 15, 2012. He was discharged to modified assignment, originally on a full-time basis effective February 17, 2012 and then on a half-time basis effective April 6, 2012. Appellant filed multiple claims for wage-loss compensation beginning May 6, 2012, which were adjudicated as a recurrence of disability claim. He subsequently underwent the removal of retained left clavicle hardware on August 1, 2012, a procedure that was approved in advance by OWCP. Although appellant alleged that his supervisor withdrew his limited-duty assignment on June 8, 2012 by forcing him to choose between working eight-hour shifts and not working at all, he did not present any evidence to substantiate his allegation. The case record, in fact, does not demonstrate that the employing establishment either withdrew the job or altered the assignment so as to require him to exceed his physical restrictions. The question is whether appellant experienced, prior to the August 1, 2012 surgery, a change in the nature and extent of the February 15, 2012 employment injury that resulted in recurrence of disability on May 6, 2012.

Medical evidence of bridging symptoms must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.¹³ In May 1, 2012 reports, Dr. Favorito reviewed appellant's medical history, obtained x-rays and conducted a physical examination. He diagnosed left clavicle contusion and painful retained clavicle plate connected with a June 5, 2008 open reduction and internal fixation. Dr. Favorito placed appellant on total disability effective May 1, 2012 and recommended removal of the plate. However, he failed to explain with sound medical reasoning how the February 15, 2012 work injury disabled appellant for work on and after May 6, 2012, the date of the alleged recurrence. In the absence of rationalized medical opinion evidence, appellant did not meet his burden of proof.

Counsel contends on appeal that the February 13, 2013 decision is contrary to fact and law. The Board has already addressed the deficiencies of the claim.

The Board notes that appellant submitted new evidence after issuance of the February 13, 2013 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.¹⁴ Appellant may submit new evidence or argument as part of 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.

CONCLUSION

The Board finds that appellant did not establish that he sustained a recurrence of disability causally related to his February 15, 2012 employment injury.

¹³ *Id.*

¹⁴ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2013 merit decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 25, 2013
Washington, DC

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

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

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