

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a recurrence of disability beginning March 9, 2013; and (2) whether OWCP met its burden of proof to rescind its acceptance of appellant's claim for work-related disability for the period March 9 to May 30, 2013.

FACTUAL HISTORY

On November 21, 2012 appellant, then a 59-year-old Customs and Border Protection officer, filed a traumatic injury claim (Form CA-1) for a left shoulder injury he attributed to a November 7, 2012 training exercise where he was held by two individuals and then tased. On November 8, 2012 appellant resumed work in a light-duty capacity. In January 2013, OWCP accepted his claim for left shoulder acromioclavicular sprain, left shoulder rotator cuff strain, and left shoulder rotator cuff tear. On February 18, 2013 appellant returned to his regular work without restrictions. The employing establishment terminated appellant for cause effective March 8, 2013.

On May 31, 2013 Dr. Jeffrey S. Abrams, a Board-certified orthopedic surgeon, performed OWCP-authorized left shoulder arthroscopic surgery, which included rotator cuff repair, subacromial decompression, capsulotomy with release of adhesions, and distal clavicle resection. In his May 21, 2013 report, Dr. Abrams noted that appellant reported that he continued to work his regular job at that time, but had to be very careful not to do things that aggravated his shoulder condition. He indicated that he discussed the potential risks of left shoulder surgery with appellant and that appellant still expressed a desire to proceed with such surgery.³

In July 2013, appellant filed a recurrence of disability claim (Form CA-2a) beginning May 31, 2013. In a January 29, 2014 decision, OWCP accepted that appellant sustained a recurrence of disability effective May 31, 2013 based on the approved left shoulder arthroscopy.

On May 7, 2014 appellant filed a claim for compensation (Form CA-7) for the period March 9 through June 30, 2013. On May 20, 2014 OWCP paid appellant compensation for the claimed period beginning March 9, 2013.⁴

In a June 23, 2014 decision, OWCP rescinded its acceptance of the prior payment of wage-loss compensation for the period March 9 to May 30, 2013 because the evidence of record did not establish that appellant was disabled from work within the meaning of FECA. It referenced a May 21, 2013 report from Dr. Abrams, and noted that this report did not contain a medical opinion that appellant had work-related disability for the period March 9 to

³ The Board notes that, despite his recitation of work activities to Dr. Abrams, appellant did not work for the employing establishment after being terminated for cause effective March 8, 2013.

⁴ OWCP also paid compensation for the period July 1, 2013 through May 3, 2014, and it placed appellant on the periodic roll effective May 4, 2014. To date, he continues to receive wage-loss compensation for temporary total disability.

May 30, 2013. OWCP noted that there was no medical evidence of record showing a disability due to the employment injury during the period March 9 to May 30, 2013 and that appellant had been fired for cause on March 8, 2013.⁵

By letter dated June 24, 2014, OWCP notified appellant regarding the type of evidence necessary to establish work-related disability beginning March 9, 2013. Appellant was allowed 30 days to provide additional evidence.

In a July 25, 2014 decision, OWCP denied appellant's claim for a work-related recurrence of disability beginning March 9, 2013, noting that he had not submitted medical evidence establishing a material change/worsening of his accepted work-related conditions beginning that date.

Appellant, through counsel, requested a video conference with a representative of OWCP's Branch of Hearings and Review, but the request was later changed to a request for a review of the written record.

In his March 11, 2013 report, Dr. Abrams noted that he last examined appellant on February 18, 2013 at which time he had pain and limited range of motion. He indicated that on February 18, 2013 appellant continued to be able to work, but noted that during the interval of time between his February 18, 2013 visit and this notification, appellant expressed his belief that his symptoms had grown worse, and he was now expressing a need to be absent from work due to the continued and worsening symptoms within his left shoulder. Dr. Abrams indicated that he only saw appellant on February 18, 2013 and noted that his original work-related paperwork at the time suggested that he could return to his work. He advised, however, that appellant had notified his office that there had been a change in his level of pain and medical condition and he noted, "I am therefore requesting a leave of absence for [appellant]."

In a January 20, 2015 decision, the hearing representative affirmed OWCP's June 23 and July 25, 2014 decisions. She found that OWCP had met its burden of proof to rescind its acceptance of appellant's claim for work-related disability for the period March 9 to May 30, 2013. The hearing representative also found that appellant had not met his burden of proof to establish work-related disability beginning March 9, 2013. She noted that the documentation upon which the decision was based included information from the employing establishment showing that he was terminated for cause on March 8, 2013 and medical evidence which established that he was not disabled from work due to his accepted conditions until he underwent authorized surgery on May 31, 2013. The hearing representative noted that, in a March 11, 2013 report, Dr. Abrams indicated that, when he last examined appellant on February 18, 2013, he had determined he was capable of working, but he rendered appellant disabled from work on March 11, 2013 solely due to his subjective complaints and his request for time off. She indicated that Dr. Abrams reported that he had not examined appellant on March 11, 2013. The hearing representative found that appellant had failed to establish a work-related recurrence of disability beginning March 9, 2013 because the evidence did not support

⁵ Appellant remained eligible for wage-loss compensation on or after the May 31, 2013 shoulder injury based on the previously accepted recurrence of disability.

that the work stoppage during that period was due to a spontaneous change or worsening of his accepted conditions.

Appellant disagreed with OWCP's January 20, 2015 decision and requested reconsideration through his counsel on January 11, 2016. He submitted a January 6, 2016 report in which Dr. Abrams noted that he examined appellant on February 28, 2013 and appellant had significant discomfort and limitations.⁶ He reported that appellant then went on to have left shoulder surgery. Dr. Abrams indicated that it was his opinion that appellant was unable to work after the evaluation that led to his left shoulder surgery. He noted that appellant advised him that his leave of absence was secondary to shoulder pain. Dr. Abrams indicated that appellant already had confirmation of his left rotator cuff tear from a magnetic resonance imaging (MRI) scan. He noted that appellant had concerns regarding "his ability to be in or out of work based on his job."

In a September 1, 2016 decision, OWCP denied modification of the January 20, 2015 decision, finding that OWCP met its burden of proof to rescind its acceptance of appellant's claim for work-related disability for the period March 9 to May 30, 2013 and that appellant failed to meet his burden of proof to establish a work-related recurrence of disability beginning March 9, 2013. It noted that the January 6, 2016 report of Dr. Abrams did not contain a rationalized opinion that appellant sustained a work-related recurrence of disability beginning March 9, 2013 based on objective findings, but indicated that the report showed that it was appellant who expressed his desire to be off work during the period.

LEGAL PRECEDENT -- ISSUES 1 & 2

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 which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁷ Recurrence of disability 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 work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his established physical limitations.⁸ Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.⁹ A

⁶ The Board notes that there is no evidence in the record that Dr. Abrams examined appellant on February 28, 2013.

⁷ 20 C.F.R. § 10.5(x).

⁸ *Id.*

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, non-performance of job duties, downsizing, or the existence of a loss of wage-earning capacity determination.¹⁰

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light-duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.¹¹

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish that the recurrence is causally related to the original injury.¹² This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.¹³ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.¹⁴

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹⁵ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹⁶ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.¹⁷

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of proof to justify the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that

¹⁰ 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013).

¹¹ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

¹² 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 and 2.1500.6.

¹³ *See S.S.*, 59 ECAB 315, 318-19 (2008).

¹⁴ *Id.* at 319.

¹⁵ 5 U.S.C. § 8128.

¹⁶ *John W. Graves*, 52 ECAB 160, 161 (2000).

¹⁷ *See* 20 C.F.R. § 10.610.

it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.¹⁸

ANALYSIS -- ISSUES 1 & 2

OWCP accepted appellant's traumatic injury claim for left shoulder acromioclavicular sprain, left shoulder rotator cuff strain, and left shoulder rotator cuff tear, which arose on November 7, 2012. Appellant continued to work until March 8, 2013, at which time the employing establishment terminated him for cause. On May 31, 2013 he underwent OWCP-approved left shoulder arthroscopic surgery. OWCP accepted that appellant suffered a recurrence of disability effective May 31, 2013, and paid wage-loss compensation for temporary total disability. OWCP also paid appellant wage-loss compensation for the period March 9 through May 30, 2013, which it later rescinded. After rescinding the prior payment, OWCP then adjudicated the claimed period as a recurrence of disability, and found that appellant failed to establish that his work stoppage beginning March 9, 2013 was due to his accepted left shoulder condition. Accordingly, OWCP denied wage-loss compensation for the period March 9 through May 30, 2013. Appellant continues to receive wage-loss compensation based on his May 31, 2013 surgery-related recurrence of disability.

The Board finds that appellant failed to meet his burden of proof to establish a recurrence of disability beginning March 9, 2013.

Appellant asserted that Dr. Abrams' March 11, 2013 report supported his claim for work-related recurrence of disability beginning March 9, 2013. The Board notes, however, that this report does not support appellant's recurrence of disability claim. Although Dr. Abrams noted in his March 11, 2013 report that he examined appellant on February 18, 2013 at which time he had pain and limited range of motion, he also indicated that on February 18, 2013 appellant was able to work. In the rest of the March 11, 2013 report, Dr. Abrams discussed appellant's own belief that his left shoulder symptoms had grown worse after February 18, 2013 and that he needed to be absent from work. Dr. Abrams found that appellant should be placed on a leave of absence. The Board notes, however, that Dr. Abrams did not provide his own rationalized medical opinion, based on objective findings on physical examination and diagnostic testing, that appellant sustained a recurrence of disability due to the accepted work conditions. Rather, his opinion on disability was based on appellant's expressed wish to be off work. Therefore, Dr. Abrams' report is of limited probative value with respect to appellant's claim for a work-related recurrence of disability beginning March 9, 2013. The Board has held that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a rationalized medical opinion on the issue of disability.¹⁹

¹⁸ *Supra* note 16.

¹⁹ *See Naomi N. Chung*, Docket No. 05-61 (issued August 12, 2005). In a May 21, 2013 report, Dr. Abrams indicated that he discussed the potential risks of left shoulder surgery with appellant and that appellant still expressed a desire to proceed with such surgery. However, Dr. Abrams did not provide an opinion in this report that appellant had disability, whether work related or otherwise, for any given period.

Appellant also submitted a January 6, 2016 report in which Dr. Abrams noted that he examined appellant on February 28, 2013 and that he had significant discomfort and limitations at that time. He provided an opinion that appellant was unable to work after this examination.²⁰ The Board notes, however, that Dr. Abrams did not provide a rationalized medical opinion that appellant sustained a recurrence of disability on March 9, 2013 due to a work-related condition. Dr. Abrams discussed appellant's concerns about his left shoulder symptoms and his self-expressed need to take a leave of absence from work. However, he did not provide his own opinion, supported by objective findings, that appellant needed to be off work beginning March 9, 2013 due to a work-related condition. This report is limited probative value regarding appellant's claim for a work-related recurrence of disability beginning March 9, 2013 because it is based on appellant's self-expressed wish to be off work rather than being based on objective findings.²¹

Appellant did not submit any medical evidence containing a clear, rationalized opinion that he had a work-related recurrence of disability beginning March 9, 2013. Moreover, he did not establish a work-related recurrence of disability beginning March 9, 2013 due to a withdrawal of a light-duty position.²² The employing establishment terminated appellant for cause effective March 8, 2013, and a recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, non-performance of job duties, downsizing, or where a loss of wage-earning capacity determination is in place.²³

The Board further finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim for work-related disability for the period March 9 to May 30, 2013.

The Board finds that OWCP provided a clear explanation of its rationale for the rescission by explaining that the evidence did not establish that appellant was disabled within the meaning of FECA for the period March 9 to May 30, 2013.²⁴ It noted that Dr. Abrams released appellant to return to his regular work on a full-time basis without restrictions effective February 18, 2013 and that there was no medical evidence of record showing a work-related cause for disability during the period March 9 to May 30, 2013.

For the reasons discussed above, the reports of Dr. Abrams do not contain a rationalized medical opinion that appellant had work-related disability for the period March 9 to May 30, 2013. OWCP discussed this evidence in its decisions concerning the rescission of its

²⁰ The Board notes that there is no evidence of record supporting that Dr. Abrams examined appellant on February 28, 2013. Dr. Abrams might have inadvertently listed the date February 28, 2013 rather than the established examination date of February 18, 2013.

²¹ See *Naomi N. Chung*, *supra* note 19. On appeal counsel argues that the reports of Dr. Abrams establish appellant's claim for work-related disability of disability beginning March 9, 2013, but the Board has explained why they lack sufficient probative value on causal relationship to establish appellant's claim.

²² See *supra* note 9.

²³ See *supra* note 10.

²⁴ *Supra* note 16.

acceptance of appellant's claim for work-related disability for the period March 9 to May 30, 2013 and, therefore, it provided justification for its rescission action.²⁵

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish a recurrence of disability beginning March 9, 2013. The Board further finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim for work-related disability for the period March 9 to May 30, 2013.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁵ *See id.* On appeal counsel argues that appellant was not given a chance to respond to the rescission action, but he has not cited any relevant provision explaining what notice requirements were not fulfilled.