U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK A. SKELLHAM and U.S. POSTAL SERVICE,
POST OFFICE, Tulelake, CA

Docket No. 99-822; Submitted on the Record;
Issued September 15, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's benefits effective February 18, 1998.

On March 14, 1997 appellant, then a 36-year-old postmaster, filed an occupational disease claim alleging that he sustained employment-related tendinitis and bursitis in his elbow while in the performance of duty. He indicated that he first became aware of his condition on December 12, 1994 and that he first realized on March 4, 1997 that it was caused or aggravated by his employment.

In support of his claim appellant submitted a medical report dated March 5, 1997 from Dr. John M. Gargaro, appellant's treating physician Board-certified in orthopedic surgery, who stated that appellant had undergone surgery the previous summer but that his subsequent work over the Christmas period had "aggravated his condition and [he recommended] that [appellant] take at least three months off work and work on perhaps some retraining." He noted that appellant remained symptomatic with pain in his elbow and opined that he may not be able to continue his work as a postmaster.

In a medical report dated March 24, 1997, Dr. Timothy M. Deneau, an osteopath and the employing establishment's fitness-for-duty physician, stated that appellant's right arm condition was permanent and that he would be restricted to lifting no more than 15 pounds, no repetitive right hand grasping, no repetitive movements with his right wrist, elbow or shoulder and keyboard work restrictions to no more than 20 minutes between 10 minute work breaks. Dr. Deneau noted that appellant's job as postmaster includes sorting mail into distribution cases using repetitive motions of his right arm. He also stated that appellant's administrative duties comprise one and a half hours per day of an eight-hour workday. Dr. Deneau noted appellant's conditions as: status post medial epicondylar release and transportation of the ulnar nerve in the right elbow; persistent and chronic pain and dysesthesia in the right upper extremity and definite aggravation of his nonoccupational condition by his factors at work.

In a narrative dated May 26, 1997, appellant stated that his job as postmaster included four hours per day of sorting mail which aggravated his condition. He stated:

> "I was released to regular duty in November 1996. I began sorting mail and within three weeks my elbow was swollen again and my hand was going numb. My doctor told me to take two weeks off work, which I did. I returned to work for only two weeks, before my arm swelled again. I was instructed to take time off work again, which I did. When I returned, my arm was still swollen and painful."

In a memorandum of a telephone call dated May 28, 1997, the Office noted that appellant had left the employing establishment on March 10, 1997.

In a medical report dated June 11, 1997, Dr. Gargaro stated that appellant had undergone an ulnar nerve transposition and medial epicondylar debridement on July 16, 1996 based on appellant's "continued pain and dysfunction of the medial aspect of his elbow starting with a car accident back in New York." He then noted that "factors relating to his employment that may have aggravated his condition are indeed real." Dr. Gargaro stated: "[Appellant] sorts mail which is very repetitive flexion, extension, pronation and supination of the elbow. I think that to discount the affect of this type of work on aggravating this condition would be naive and incorrect." Dr. Gargaro stated:

> "[Appellant's] inability to return to his work postoperatively, I think, is direct evidence that the type of work he does aggravates the injury that was sustained and ultimately required surgical management. Unfortunately now, [appellant] has no relief from the symptoms in that the operation did not help him. He will most likely not improve and he has permanent impairment. I think the work he did at the [employing establishment] did aggravate the injury and may have impeded its ability to heal and may have in some ways caused us to fail in our conservative management of the problem."

He also noted that he did not disagree with Dr. Deneau's medical restrictions, adding that he "thought it would be worth giving him a try of three months off to see if he could return to work."

In a report dated July 8, 1997, the employing establishment stated that appellant's work duties included five to six hours of craft work daily from August 1994 to September 1995 and three to four hours of craft work daily from November 1996 to March 1997. The employing establishment noted that from September 1995 to November 1996 appellant performed audits.

In a medical report dated July 9, 1997, Dr. Daniel M. Hanesworth,[1] appellant's treating physician Board-certified in orthopedic surgery, stated that appellant's right elbow condition was caused by a car accident on June 6, 1994 and that since that time he has remained essentially symptomatic with pain and has had "significant problems that limits his ability to do his letter

[1] Dr. Haneworth noted that he had "taken over a number of Dr. Gargaro's patients."

sorting job." In a treatment note dated the same day, Dr. Hanesworth stated that appellant stopped sorting mail "since approximately December [1996]" but "continues to have significant tenderness as well as some ulnar nerve type symptoms, numbness and weakness going into the hand." Upon examination he stated:

> "[Appellant's] incisions are well healed. He is very tender to both deep palpation and light percussion over the medial epicondyle. None of these pains shoot down his arm. He describes numbness over his little finger in the ulnar aspect of his ring finger. Grip strength is done today and shows 130 pounds on the left and 80 pounds on the right. [Appellant] also has weakness to finger abduction."

Dr. Haneworth added that since appellant had not sorted mail in seven months and "still has significant symptoms," he could not "go back to his mail sorting job."

On August 12, 1997 the Office referred appellant, along with a statement of accepted facts and a copy of his medical records, to Dr. Darrell T. Weinman, Board-certified in orthopedic surgery, for a second opinion examination.

In a medical report dated September 11, 1997, Dr. Weinman noted familiarity with appellant's history of injury and stated that his condition was "connected to factors of employment by aggravation," but had "ceased in January of 1997 when he stopped sorting mail."[2] He noted that appellant had a "preexisting disability … from the contusion and sprain of his elbow, resulting from his motor vehicle accident followed by chronic epicondylitis of the right elbow." Dr. Weinman recommended further diagnostic testing and consultation with an expert to determine whether additional surgery was required. He also noted that there were no periods of total disability from work as a result of his medical condition and further noted that appellant could work with certain restrictions. Dr. Weinman noted that appellant returned to work in November 1996 after his July 16, 1996 right elbow surgery performed by Dr. Gargaro, but that by January 1997 he "was unable to continue to sort the mail because of swelling and pain in his right elbow, with radiating numbness to the little and ring fingers of the right hand." He then noted appellant's subjective complaints of pain in the medial side of the right elbow, swelling in the medial side of the elbow, numbness radiating down to the little finger and ring finger, and intermittent pain and swelling in the shoulder triggered by activity. Dr. Weinman further noted pain around the right scapular and posterior aspect of the right shoulder and loss of motion of the right elbow. He then performed a cervical spine examination including range of motion testing of the neck, elbow, shoulder, muscle strength neurological reflexes and palpitation test. Dr. Weinman also performed a shoulder examination including range of motion test, muscle strength and hand tests. He found tenderness of the bicipital region, hypalgesia to sharp pin prick over the right little finger and ulnar side of the ring finger, limited abduction of the right shoulder and palpatory tenderness over the trapezius and rhomboids, right side. Dr. Weinman diagnosed: (1) sprain of the flexor tendon, right elbow, resulting from the motor

[2] Dr. Weinman related appellant's statement that: "By January 1997 he was unable to continue to sort the mail because of swelling and pain in his right elbow, with radiating numbness to the little and ring fingers of the right hand." He then added: "He has been working at the post office, but not sorting mail and working under the limitations that Dr. Deneau gave him."

vehicle accident of June 1994, followed by chronic medial humeral epicondylitis; (2) cervical sprain resulting from the June 1994 incident, resolved; and (3) postoperative status medial epicondyle flexor conjoined tendon release at the medial epicondyle of the right elbow and subcutaneous transposition of the ulnar nerve, followed by ulnar neuropathy into the right hand and continued inflammation of the medial epicondyle of the right elbow. He also noted appellant's medial reports from Drs. Hanesworth and Gargaro.

The Office, on September 24, 1997 accepted the claim for medical treatment for temporary aggravation of right elbow epicondylitis. On that same date the Office requested Dr. Weinman to provide an explanation for his request for additional diagnostic testing if he believed that appellant's condition ceased in January 1997.

In a supplemental report dated September 30, 1997, Dr. Weinman stated that he had requested additional testing and consultation because certain issues including whether appellant's ulnar neuritis was treatable and whether it was caused by the "relative devasculation of the ulnar nerve as a result of the transposition" should be addressed by an expert . He further noted: "It could be argued that the elbow pain was a result of his motor vehicle accident." Dr. Weinman then stated that appellant's operation was not for the condition aggravated by federal employment and that his "current [medical condition] is a result of iatrogenic ulnar neuritis which resulted from the operation that was not done for the [work-related] aggravation."

On January 15, 1998 the Office issued a "notice of proposed termination of medical benefits." The Office indicated that the medical evidence showed that appellant's work injury had resolved. Appellant was given 30 days to submit additional argument or evidence.

By decision dated February 18, 1998, the Office finalized its proposed termination of benefits effective that date. In an accompanying memorandum, the Office stated that the weight of the evidence demonstrated that appellant no longer sustained residuals of his December 12, 1994 work-related injury.

In an undated letter received by the Office on March 12, 1998 appellant requested reconsideration. By merit decision dated March 26, 1998, the Office denied appellant's request for reconsideration. In a letter dated July 30, 1998, appellant again requested reconsideration. In support of his request he submitted a limited-duty job offer from the employing establishment. By merit decision dated September 4, 1998, the Office denied appellant's request.[3]

The Board finds that the Office improperly terminated appellant's compensation effective February 18, 1998 on the grounds that he had no disability due to his December 12, 1994 employment injury after that date.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation benefits.[4] After it has

[3] The Office noted that appellant "apparently retired on disability in April of 1998," but that "the exact date is not a matter of record."

[4] *Frederick Justiniano*, 45 ECAB 491 (1994).

determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to employment.[5] Furthermore, the right to medical benefits for the accepted condition is not limited to the period of entitlement to disability.[6] To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which no longer requires medical treatment.[7]

The Office has not met its burden here. The Board finds that there is a conflict in medical opinion between appellant's treating physicians, Drs. Gargaro and Hanesworth, Board-certified orthopedic surgeons and the Office referral physician, Dr. Weinman, also a Board-certified orthopedic surgeon, on the issue of whether the residuals of appellant's December 12, 1994 employment injury have resolved and such conflict necessitates resolution in accordance with 5 U.S.C. § 8123(a).[8]

In this case, Dr. Weinman, the second opinion consultant, stated that appellant ceased mail sorting activities in January 1997. However, the employing establishment noted that appellant was assigned three to four hours of craft work daily from November 1996 to March 1997. Appellant also noted that he sorted mail until March 1997. Thus Dr. Weinman's evaluation is not based on an accurate medical history and is of diminished probative value.[9] Further, Drs. Gargaro and Hanesworth noted in medical reports dated after January 1997, that appellant remained symptomatic with pain, which was aggravated by work and that his ability to perform his work including mail sorting had been adversely affected. Dr. Weinman on the other hand stated that appellant's disability ended when he stopped sorting mail in January 1997.[10] Given Dr. Weinman's inaccurate history of injury with respect to when appellant stopped sorting mail and the conflict between his opinion and appellant's treating physicians regarding the extent of appellant's symptoms after January 1997, the Board finds that the medical evidence is insufficient to establish that appellant no longer sustained residuals of his work-related injury.[11] Because the Office did not provide an adequate basis for its determination that appellant ceased to have residuals of his December 12, 1994 employment injury after January 1997, the Office did not meet its burden of proof to terminate appellant's compensation effective February 18, 1998.

[5] *Id.*

[6] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[7] *Id.*

[8] 5 U.S.C. § 8123(a) provides in relevant part as follows: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[9] *Marilyn L. Howard*, 33 ECAB 683 (1982).

[10] The Board notes that Dr. Hanesworth noted that appellant stopped sorting mail in December 1996.

[11] The Board also notes that Dr. Weinman failed to provide a rationalized medical opinion supporting his conclusion that appellant's current medical conditions was unrelated to his employment.

The decisions of the Office of Workers' Compensation Programs dated March 26 and February 18, 1998 are reversed.

Dated, Washington, DC
September 15, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member