

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. O'CONNELL, JR. and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Costa Mesa, CA

*Docket No. 00-2331; Submitted on the Record;
Issued November 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established his entitlement for compensation from March 24 to September 7, 1999 due to his accepted employment injury of October 2, 1997.

On October 2, 1997 appellant, then a 33-year-old tractor trailer operator, filed a notice of traumatic injury and claim for continuation of compensation (Form CA-1), alleging that on that date he sustained a right shoulder contusion when he was pulling an over-the-road container from the back of the trailer and it hit him in the right shoulder. On that date appellant received initial treatment for his injury at the East Edinger Medical Center, where he was diagnosed as suffering from a right shoulder contusion and received work restrictions of no lifting, pushing, or pulling with right shoulder. On October 3, 1997 the employing establishment made appellant a limited-duty job offer within his restrictions.

In a medical report dated October 29, 1997, Dr. Daniel E. Kaplan, a Board-certified orthopedic surgeon, stated that appellant suffered from a right shoulder contusion, that he recommended physical therapy and that appellant may perform modified work, no heavy lifting, no overhead work and that he anticipated his return to regular work within four to six weeks. In a medical report dated January 7, 1998, Dr. Kaplan diagnosed appellant as suffering from persistent tendinitis and stated that at the time appellant's subjective complaints outweighed the objective findings and he would recommend a magnetic resonance imaging (MRI) scan and that if that was normal, appellant could safely return to regular work. A MRI scan was conducted on January 14, 1998, which showed a moderate a-c joint hypertrophy. It also showed the findings were compatible with a rotator cuff tear at the musculotendinous junction of the supraspinatus tendon. In Dr. Kaplan's supplemental report dated January 28, 1998, Dr. Kaplan found that appellant had a rotator cuff tear in his right shoulder and he recommended rotator cuff repair of the right shoulder.

In a report dated February 12, 1998, Dr. Paul E. Wakim, an osteopath, found that appellant had a partial tear of the right rotator cuff, by history and an old fracture in his right shoulder. He noted that appellant was able to perform the full range of motion and had no

difficulty and no basic problems at this time and that he may return to regular-duty activities without any limitations and/or restrictions. Dr. Wakim did not recommend surgery and stated that appellant may pursue his regular-duty activity with precautions against constant overhead work and overhead lifting.

On March 9, 1998 the Office of Workers' Compensation Programs accepted appellant's claim for right rotator cuff tear, right rotator cuff repair.

In medical reports dated April 8, May 13 and June 24, 1998, Dr. Kaplan noted that appellant suffered from tendinitis, right shoulder, that he recommended surgery but that appellant wished to defer surgery and that appellant was capable of performing modified work with limited use of his right arm. In a medical report dated July 20, 1998, Dr. Kaplan noted that he discussed in detail with appellant the nature of appellant's job and advised appellant that based on his understanding of appellant's duties as a truck driver, Dr. Kaplan felt that he could safely perform them. He noted that if appellant experienced pain once he returns to regular duties, he should be reevaluated.

In a medical report dated March 10, 1999, Dr. Kaplan noted that appellant's prior symptoms had resolved. He noted that although there was a small rotator cuff tear noted on the MRI scan, Dr. Kaplan advised appellant that given that he was asymptomatic, he did not believe that any surgery was indicated. Dr. Kaplan further indicated that appellant could safely drive a truck, but did advise that appellant avoid overhead lifting. In an attending physician's report dated August 24, 1999, Dr. Kaplan stated that appellant had permanent restrictions of no overhead lifting, but indicated that he could drive a truck.

In a claim for compensation (Form CA-7) dated September 15, 1999, appellant requested compensation from March 24 through September 7, 1999. By letter dated September 15, 1999, the employing establishment controverted the claim, contending that appellant's treating physician did not authorize any period of temporary total disability for him, but rather, that appellant decided for himself to take off work.

By letter dated September 24, 1999, the Office requested further information from appellant. In support thereof, appellant submitted an attending physician's report dated August 24, 1999 wherein Dr. Kaplan noted that appellant had permanent restrictions of overhead lifting, but noted that he may drive a truck. He diagnosed appellant's condition as right shoulder tendinitis.

In a letter by appellant dated September 20, 1999 and received September 27, 1999, appellant stated that he was ordered to go home at the end of his shift on March 23, 1999 as there was no longer any work for him to do at the employing establishment. He also noted that if he goes back to driving he would be performing harmful, repetitive motion that will add to the worsening of his condition. Appellant further submitted an October 14, 1999 letter in response to the Office's request for further information, in which he stated that he was willing to continue working at the employing establishment in a position that would not cause any further damage to his injured shoulder area, that several months ago the employing establishment promised him a limited-duty position but they have not provided one.

By decision dated November 22, 1999, the Office denied appellant claim for disability compensation from March 24 to September 7, 1999, finding that the evidence of record failed to establish that appellant was totally disabled for the period claimed or that the employer was unable to provide light-duty work within restrictions.

By letter dated November 30, 1999, appellant requested reconsideration.

In support thereof, appellant submitted a February 22, 1999 letter from a manager at the employing establishment wherein he indicated that based on lack of proper medical documentation for extending appellant's disability, appellant was instructed to report back to his motor vehicle operator duties effective March 1, 1999 and that failure to do so would result in the employing establishment disallowing him the opportunity to work.

In further support of his claim, appellant submitted other medical reports, including an attending physician's report dated August 24, 1999 wherein Dr. Kaplan reiterated his earlier statement that appellant suffered from right shoulder tendinitis and had permanent restrictions of no overhead lifting, but that he may drive a truck. Appellant also submitted an April 8, 1999 report from Dr. Anatol Podolsky, a Board-certified orthopedic surgeon. Dr. Podolsky found that appellant suffered from post-traumatic impingement syndrome and possible partial rotator cuff tear. He recommended that appellant change from the driver position to a clerk craft position within limitations including no overhead reaching, no heavy lifting, pushing or pulling over 20 pounds. Dr. Podolsky noted that if appellant's condition flares up, he may be a candidate for further treatment. He also provided a work restriction form dated June 3, 1999, in which Dr. Podolsky restricted appellant from performing any overhead lifting of more than 10 pounds, climbing or twisting. On this form, he also noted that appellant could not operate a motor vehicle. Finally, appellant submitted a copy of the January 14, 1998 MRI scan of the right shoulder.

The employing establishment responded to appellant's reconsideration request, contending that appellant's physician returned him to light-duty work the day after the October 2, 1997 injury and that appellant decided not to work after they returned him to work as a motor vehicle operator on March 2, 1999. The employing establishment stated that appellant was sent home for lack of light-duty work.

In a decision dated March 6, 2000, the Office reviewed appellant's case on the merits and denied modification of its decision, as it found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision.

The Board finds that appellant has not met his burden of proof in establishing that he was entitled to compensation benefits from March 24 to September 7, 1999 due to his accepted employment injury of October 2, 1997.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 he 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 requirements.¹ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing on March 24, 1999 and his October 2, 1997 injury. The burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.²

In the case at hand, appellant has submitted no rationalized medical evidence which would indicate that he could not perform the duties of a motor vehicle operator commencing March 24, 1999. Dr. Kaplan, in his medical report dated March 10, 1999, noted that appellant's prior symptoms had resolved. He has consistently opined that appellant could drive a truck, but that he should avoid overhead lifting. Dr. Podosly limited appellant's overhead lifting to less than 10 pounds and no twisting or climbing. Although he recommended that appellant change to a clerk craft position and indicated in the work restriction form that appellant could not operate a motor vehicle, Dr. Podosly offered no explanation as to why appellant was restricted from this job. Appellant has submitted no proof that the employing establishment would not let him work because it had no light-duty work. The employing establishment contends that it offered appellant a job as a motor vehicle operator, but that he, on his own initiative, decided not to work, claiming that this position would hurt him. Accordingly, appellant has shown no medical evidence or other reason that he was totally disabled commencing March 24, 1999.

The March 6, 2000 and November 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *See Nicholea Brusio*, 33 ECAB 1138, 1140 (1982).