U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL D. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, OH

Docket No. 00-367; Submitted on the Record;
Issued September 17, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective September 13, 1997.

The Office accepted appellant's claims for left knee and chest wall sprains, a torn lateral meniscus and related surgery on October 20, 1992, a partial lateral meniscectomy and open lateral release on August 1, 1995 and a left shoulder rotator cuff tear.

Appellant was involved in two nonwork-related automobile accidents, one on December 11, 1985 when he sustained neck and left shoulder injuries and another on March 31, 1991 when he sustained right knee and whiplash injuries. Appellant returned to work on July 10, 1995 as a modified letter carrier for four hours a day. Appellant stopped working on July 29, 1995, underwent repeat arthroscopic surgery on August 1, 1995 and returned to his modified letter carrier position for four hours a day on November 1, 1995. Appellant stopped working on January 1996 and has not worked since.

In a statement dated December 23, 1994, appellant's treating physician, Dr. Glenn H. Carlson, a Board-certified orthopedic surgeon, stated that appellant had severe unrelenting left shoulder pain due to a work-induced injury and shoulder impingement with rotator cuff involvement. He stated that appellant needed an arthroscopic shoulder decompression, which would be done by a sports medicine expert, Dr. Anthony D. Frogameni, a Board-certified orthopedic surgeon.

By decision dated June 5, 1995, the Office denied appellant's request for surgery on the grounds that the claimed left shoulder condition was not causally related to the accepted injury. Appellant requested an oral hearing, which was held on February 16, 1996. By decision dated July 19, 1996, the Office hearing representative set aside the June 5, 1995 decision and remanded the case for the second opinion physician, Dr. Gerald W. Sutherland, a Board-certified orthopedic surgeon, to address whether appellant's torn left rotator cuff was causally related to the March 28, 1995 employment injury.

In a report dated September 5, 1996, Dr. Sutherland considered appellant's history of injury, performed a physical examination and diagnosed a work-related rotator tear of the left shoulder. He stated that appellant's left shoulder injury was secondary to appellant's fall on ice on March 28, 1995. Dr. Sutherland stated that appellant had residual pain and discomfort and was a candidate for surgical repair of the left rotator cuff. He stated that appellant's hypoesthesia or numbness in his left upper extremity was not related to the rotator cuff tear and might be related to his fall on the ice but was aggravated by the automobile accident in December 1985.

By letter dated October 23, 1996, the Office accepted appellant's claim for a left rotator cuff tear but found insufficient evidence to demonstrate appellant's need for surgery related to the March 28, 1995 employment injury.

In investigative reports dated November 17 and November 19, 1996, the employing establishment noted that appellant had been roller skating for 25 years, that he biked once or twice a week since July 1996 on a 6-mile bike trail outside his home, that he lifted weights 5 times a week at the Flex Connection and has lifted weights since 1987. Appellant stated that his workout included doing the bench press up to 140 pounds, the incline bench up to 100 pounds, tricep curls from 15 to 20 pounds, leg press up to 100 pounds, squats from 135 to 160 pounds and the seated row up to 100 pounds. Although the investigative report stated that appellant denied performing the military press or any shoulder exercises in the past six months, a video obtained May 20 and August 17, 1996 showed appellant lifting weights in excess of the those amounts. Based on investigations by the employing establishment on September 17 and November 19, 1996, claimant admitted that he biked 6 miles once or twice a week, roller skated for the past 25 years at least once a week and did weight lifting 5 days a week including a bench press from 140 to 185 pounds, incline bench up to 100 pounds, squats from 135 to 160 pounds and seated row of up to 100 pounds.

By letter dated December 3, 1996, the Office asked Dr. Sutherland to provide a supplemental report, given the additional information it had received regarding appellant's biking, roller skating and weightlifting activities, explaining how appellant's left shoulder complaints and need for surgery were causally related to the March 28, 1995 employment injury. The Office also asked him whether appellant was medically capable of performing his duties as a letter carrier and provide reasons for his opinion. Similarly, by letter dated December 3, 1996, the Office asked Dr. Carlson to explain whether appellant was capable of working as a letter carrier.

Dr. Carlson submitted progress notes dated from July 26 to December 27, 1996, in which he documented that appellant continued to have persistent pain in his left knee and left shoulder. Although he prescribed that appellant work four hours a day on July 26, 1996, Dr. Carlson stated that on December 13, 1996 that because appellant was unable to find comfortable employment and felt persistent pain, "early retirement" was an option. In his August 16, 1996 report, he noted that appellant had documented left shoulder problems since 1985 related to a work injury and not a previous accident.

In a report dated December 24, 1996, Dr. Sutherland stated that the activities which appellant had participated in were not a contributory factor to the tear or his rehabilitation. He stated that he did not feel that appellant's rotator cuff tear was a temporary or permanent

aggravation to the underlying condition from the standpoint of either roller skating or bicycle riding. Dr. Sutherland stated:

> "The weight lifting, however, is again a different problem and the fact that he would be doing any type of overhead weight lifting would certainly be considered as a permanent aggravation to the underlying condition and could seriously contribute to the damage of the supraspinatus tear."

In a report dated January 17, 1997, Dr. Carlson considered appellant's history of injury and stated that the left thoracic outlet, "if it exists and if caused by the work-related accident, has been attended to in the past by Dr. Paul Clark" and "any further comment would be hearsay." He stated that "[s]ubjectively, appellant has complained of pain; although, realistically I am aware that he is able to do much more with the shoulder than what he subjectively admits." Dr. Carlson stated that appellant's left knee had a work-induced meniscal tear with a cyst, was surgically treated in the past by arthroscopy and arthrotomy with good results and had reached maximum medical improvement. He performed a physical examination of the left knee and found slight tenderness of the incision and excellent stability of the medial/lateral collateral and cruciate ligaments. Dr. Carlson stated that an x-ray of the knee showed no arthritic change. He stated that appellant "was left with minimal permanent/partial impairment," that in the past appellant stated that he was unable to do any prolonged standing or walking and appellant stated that he was unable to walk more than 50 feet a day. Dr. Carlson stated:

> "There is reason to believe that appellant is able of doing much more. His true capacity is best to be evaluated with an evaluation of his routine functional capabilities and/or private investigation of his daily routines."

He stated that he had no comment on appellant's left shoulder, neck and stress. Dr. Carlson stated that appellant's ability to perform his regular letter carrier position would depend upon his functional capacity and that "could be addressed by knowing his ability to do his normal routines at home and with his hobbies, weightlifting, etc." He stated that if appellant was able to do such activities without limitation, "then there is no reason to believe that he would need such limitations at work."

In a report dated March 5, 1997, Dr. Carlson stated that he noted some incorrect statements in his January 17, 1997 report. He stated that appellant "DID receive a work-induced injury to the left shoulder and left knee when he slipped on ice and wet grass while working for the [employing establishment] on March 28, 1985." Dr. Carlson stated that when he first saw appellant, he thought he had possible mid cervical impingement and referred appellant to another physician. Dr. Carlson reiterated that other physicians were treating appellant for his thoracic outlet syndrome and awaiting approval of left shoulder arthroscopy. He stated that the lateral meniscal tear with overlying cyst in the left knee had been surgically corrected and was resolved based on a 1994 magnetic resonance imaging (MRI) scan. On physical examination, Dr. Carlson stated that appellant's left knee had "definite crepitance or grind of the knee during 30 [to] 60 [degrees] knee motion" and had "some degree of scar formation from previous surgery with subjective pulling pain of the scar as noted."

In a March 12, 1997 progress note, Dr. Carlson stated that appellant continued to have occasional "ache, pain and discomfort to the left knee." He stated that appellant felt that he needed limitation regarding his walking capabilities even though he had been to do numerous activities such as roller blading and weight leg lifting without significant problems.

The Office referred appellant to another referral physician, Dr. Paul S. Kenyon, a Board-certified orthopedic surgeon, for a medical evaluation. In a report dated April 14, 1997, he considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests of record including MRI scans, x-rays and a myelogram on various parts of appellant's body. Dr. Kenyon stated that there was a tear of the posterior horn of the lateral meniscus which "was probably related to his previous surgery and his profound physical activities." He stated that the reasons for the lateral release were unclear. Dr. Kenyon noted that appellant denied that he was really able to lift over 200 pounds bench pressing and over 100 pounds with the military press despite the video showing him lifting those weights. He performed a physical examination and stated that appellant's subjective complaints were inconsistent with the objective examination. Dr. Kenyon stated that the inconsistent objective examination was manifested by voluntary weakness and the objective examination was consistent with physical fitness placing him well above the top one percent of males in his age group. He stated:

> "With regards to his alleged injury, I doubt that his injury was ever significant given that in the late 1980s he did heavy weight lifting. My thoughts are that he probably injured his knee while lifting weights, especially with squatting up to 500 pounds which takes a terrible toll on the knee and most likely that is where this discomfort has come from."

Regarding appellant's shoulder diagnosis of thoracic outlet syndrome, he doubted "very much" that appellant had that condition because an electromyogram (EMG) "at best, is nondiagnostic and really means nothing." Dr. Kenyon stated that appellant did not have the body habitus to suggest thoracic outlet syndrome and his current physical activities did not suggest that condition.

Dr. Kenyon opined that the diagnosis of fibromyalgia "was ridiculous," given appellant's level of physical activity and presentation of body habitus. Regarding the disability related to appellant's back and knee, Dr. Kenyon stated:

> "[Appellant] may have some anterior knee pain secondary to overuse given the amount of physical activity that he performs, but I cannot imagine how this would interfere with being a letter carrier. My thoughts are that the meniscal pathology that was present back in the early 1990s by Dr. Carlson probably relates to his weight lifting and does not relate to the injury at all. I would have expected to find some significant chondromalacia changes if there was a torn meniscus, which there clearly was not. I cannot believe that his original injury in 1985 would cause a meniscal cyst. My thoughts are that this meniscal cyst was caused by this man's profound physical activities related to weight lifting. I think the subsequent arthroscopy, again, has been aggravated by these profound physical

activities and may even relate to the surgery itself depending on how the meniscus was trimmed."

He stated that he found no reason why appellant could not return to a regular job consistent with his age and body habitus and could return to work as a letter carrier. Dr. Kenyon stated that the "only real objective finding is one of a left distal biceps tendon rupture which is obviously compensated for and requires really no restrictions," as proven by appellant's ability to lift weights.

On July 10, 1997 the Office issued a notice of proposed termination of benefits, stating that Dr. Kenyon's report which was thorough and well reasoned constituted the weight of the medical evidence and established that appellant had no remaining residuals causally related to the March 28, 1985 employment injury.

By decision dated August 22, 1997, the Office terminated appellant's compensation benefits, effective September 13, 1997, stating that the evidence of record established that appellant recovered from the effects of the March 28, 1985 employment injury.

Appellant initially requested an oral hearing before an Office hearing representative, which was scheduled and then rescheduled pending completion of a fraud investigation. After the hearing was rescheduled a second time, appellant requested a written review of the record.

Appellant resubmitted the report from Dr. Carlson dated January 17, 1997 and the progress note dated March 12, 1997.

In a progress note dated December 3, 1997, Dr. Carlson diagnosed knee sprain and strain and stated that appellant's current inability to work was due to knee pain with any prolonged standing or walking. He found no swelling, good stability and range of motion and mild crepitance and grind of patellofemoral joint. Dr. Carlson stated that appellant should work as much as tolerated.

In a report dated January 21, 1998, Dr. Carlson stated that appellant had a diffuse "ache/pain" discomfort of his upper back, shoulder musculature due to a fibromyalgia of inflammation of the lining of the muscles which was confirmed by the rheumatologist, Dr. Allan Kirsner. He stated that appellant's type of work requiring mailbags would lead to aggravation of this condition although the condition is of unknown cause. Dr. Carlson stated that appellant had left shoulder impingement with rotator cuff irritation of the supraspinatus tendon which related to appellant's fall at work in March 1985. He stated that the MRI scan dated May 21, 1993 confirmed that diagnosis and definitive treatment was awaiting Dr. Frogameni's care. Dr. Carlson stated that appellant's current discomfort in the left shoulder limited his ability for overhead use and use of a mailbag at present. He stated that appellant's neck pain related back to the fall in March 1985 and that an MRI scan dated October 11, 1993 revealed a disc herniation at C5-6 with narrowing of the neural foramen against the nerve. Dr. Carlson stated that the condition limited appellant's ability to carry a mailbag and do much at and above shoulder level work. He stated that "separately, the left knee developed discomfort after the fall of 1985." Dr. Carlson stated appellant had a meniscal tear with a secondary meniscal cyst and that after surgery, appellant had a continued grind of the kneecap. He stated that the kneecap

grind prevented him from doing any repetitive bending, stooping, kneeling or prolonged standing and that this would be aggravated with prolonged work of that means. Dr. Carlson reiterated that the true capability of appellant doing various activities "would be dependent upon the results of a functional capacity evaluation." He stated that, since appellant "never attempted to, nor felt that he was able to return back to work to try this type of activity, it is unknown truly what his capabilities would be."

By decision dated August 23, 1999, the Office hearing representative affirmed the Office's August 22, 1997 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.[2]

In this case, the Office obtained information from the employing establishment that established that appellant engaged in strenuous physical activities: biking 6 miles once or twice a week, roller skating for the past 25 years at least once a week and lifting weights 5 days a week. The Office asked appellant's treating physician, Dr. Carlson, and the second opinion physician, Dr. Sutherland, to review the information about appellant's athletic activities and provide opinions as to whether appellant could perform the work of the letter carrier. In his progress notes dated July 26 to December 27, 1996, Dr. Carlson documented that appellant had persistent pain in his left knee and left shoulder and stated that appellant had shoulder problems since 1985 due to his work-related injury. In his January 17, 1997 report, Dr. Carlson stated that appellant complained of subjective pain in his shoulder and he was aware that appellant was able to do much more with his shoulder than he subjectively admitted. He subsequently addressed only appellant's left knee, stating he had no comment on appellant's left shoulder, neck and stress and that another physician was treating appellant for thoracic outlet syndrome if it existed. Regarding appellant's knee, Dr. Carlson stated that appellant had a work-induced meniscal tear. He stated that in the past appellant was unable to do any prolonged standing or walking and appellant stated that he was unable to walk more than 50 feet a day. Dr. Carlson stated that appellant's ability to perform his regular letter carrier position would depend upon his functional capacity which could be determined by his ability to do his normal routines at home and his hobbies such as weight lifting. Dr. Carlson stated that if appellant could perform those activities without limitation, then appellant did not require limitations at work. In his March 5, 1997 report and his March 12, 1997 progress note, Dr. Carlson did not further address appellant's ability to work. In the March 12, 1997 progress note, he stated that appellant felt that he needed walking restrictions despite his ability to roller blade and lift leg weights.

[1] *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

[2] *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Dr. Carlson's opinion is of diminished probative value because it is inconclusive. Since Dr. Carlson stated in his January 17, 1997 report that appellant's ability to work depended on the results of a functional capacity evaluation, Dr. Carlson's opinion does not establish that appellant can work. The Board has held that inconclusive or equivocal medical opinions are not probative.[3] Further, Dr. Carlson's statement that appellant would not require limitations if he could do the weight lifting without restriction is supportive of a finding that appellant could work since the evidence shows appellant reportedly lifted heavy weights without difficulty. Dr. Carlson also opined that appellant could do more with his shoulder than he subjectively admitted.

In his December 24, 1996 report, Dr. Sutherland's report was neither clear nor conclusive. He stated that the activities in which appellant participated were not a contributory factor to his rotator cuff tear but stated that the overhead weight lifting would certainly be considered a permanent aggravation to the underlying condition and could seriously contribute to the damage of the supraspinatus tear." Dr. Sutherland did not address how appellant's performing the rigorous athletic activities affected his ability to work. His statement that the overhead weight lifting "could contribute" to the tear is vague and speculative and does not address whether appellant has a work-related disability which prevents him from working. The Office has held that vague and speculative medical reports are not probative.

In his April 14, 1997 opinion, the referral physician, Dr. Kenyon, considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests of record. He stated that there was a tear of the posterior horn of the lateral meniscus which "was probably related to [appellant's] previous surgery" and his profound physical activities. Dr. Kenyon found that appellant's subjective complaints were inconsistent with his objective examination, which placed him well above the top one percent of males for physical fitness in his age group. He did not believe that appellant ever had a significant injury because he performed heavy weight lifting in the late 1980s. Dr. Kenyon opined that appellant did not have thoracic outlet syndrome because an EMG is nondiagnostic and appellant's "body habitus" and physical activities did not suggest that condition. He also opined that appellant did not have fibromyalgia because of his body habitus and physical activity. Dr. Kenyon concluded that the meniscal pathology identified by Dr. Carlson in the 1990s "probably" related to appellant's weight lifting and did not relate to the work-related injury at all. Dr, Kenyon stated that he would expect to find some significant chondromalacia changes if there was a torn meniscus and there were not any. He also believed that the meniscal cyst was caused by appellant's physical activities related to weight lifting. Dr. Kenyon stated that appellant's subsequent arthroscopy, apparently referring to the August 1, 1995 surgery, was aggravated by appellant's physical activities and might have related to the surgery itself "depending how the meniscus was trimmed." He stated that the only objective finding was one of a left distal biceps tendon rupture which required no restrictions as proven by appellant's ability to lift weights. Dr. Kenyon opined that appellant could return to work as a letter carrier.

The referral opinion of Dr. Kenyon that appellant was able to return to work without any restriction is complete and well rationalized, and constitutes the weight of the evidence of this

[3] *See Roger Dingess*, 47 ECAB 123, 137 (1995); *Ern Reynolds*, 45 ECAB 690, 696 (1994).

case. Dr. Kenyon found that no medical evidence showed that appellant had thoracic outlet syndrome, fibromyalgia or a work-related knee or back condition. He noted that appellant's degree of physical fitness placed him well above the top one percent of males in his age group. Dr. Kenyon found on physical examination that appellant's subjective complaints were inconsistent with the objective examination in that appellant manifested voluntary weakness despite his being very fit. He also noted that appellant denied being able to lift the heavy weights the video showed him lifting. Dr. Kenyon stated that his only objective finding was a left distal biceps tendon rupture which was obviously compensated for by appellant's weight lifting and required no restrictions. Dr. Carlson's subsequent report dated January 21, 1998 is not sufficient to counter Dr. Kenyon's report. In his January 21, 1998 report, Dr. Carlson reiterated that appellant's true capability was dependent upon the results of a functional capacity evaluation. He also stated that appellant never attempted or felt able to return to work so it was unknown what his capabilities were. Dr. Carlson's opinion remains vague and speculative and does not establish that appellant is unable to work. Dr. Kenyon's opinion which is complete and well rationalized justifies the Office's termination of benefits.

The August 23, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 17, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member