U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID S. HESS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Baltimore, MD

Docket No. 01-1232; Oral Argument Held July 16, 2002; Issued September 5, 2002

Appearances: *Leonard J. Sperling, Esq.*, for appellant; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS WILLIE T.C. THOMAS,

The issue is whether appellant sustained a recurrence of disability in April 1999, causally related to his March 28, 1997 employment injury.

The Board has reviewed the case record in this appeal and finds that the case is not in posture for decision.

On March 31, 1997 appellant, then a 51-year-old attorney, filed a traumatic injury claim alleging that on March 28, 1997 he tripped and fell over a steel plate with four protruding bolts in front of the employing establishment's building. Appellant stated that he chipped a bone in his right wrist and sustained bruises to both palms of his hands, upper arms and chin. He stopped work on March 31, 1997 and returned to work on April 4, 1997.

By letter dated May 6, 1997, the Office of Workers' Compensation Programs accepted appellant's claim for a fractured right wrist.

In a telephone conversation with an Office representative on March 7, 2000 appellant stated that he sought medical treatment for his right shoulder beginning in April 1999 and that he subsequently underwent surgery. The Office representative advised appellant to file a recurrence claim with his employing establishment in order for the Office to review and consider his claim for a right shoulder condition that was causally related to his March 28, 1997 employment injury.

On April 5, 2000 appellant filed a claim alleging that he sustained a recurrence of disability, which he attributed to his March 28, 1997 employment injury. Appellant submitted medical evidence regarding a right and left shoulder condition and a gastrointestinal condition, which all required surgery.

By letter dated April 27, 2000, the Office advised appellant that the evidence submitted was insufficient to establish his recurrence claim. The Office requested that appellant submit additional medical and factual evidence bridging his original employment injury to his subsequent injuries.

In response, appellant submitted a May 17, 2000 letter accompanied by medical evidence.

By decision dated June 13, 2000, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to his March 28, 1997 employment injury. In letters dated June 21 and 27, 2000, appellant requested an oral hearing before an Office representative.

Appellant testified at the hearing and submitted medical evidence in support of his claim.

In a January 30, 2001 decision, the hearing representative affirmed the Office's June 13, 2000 decision.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires 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 the employment injury and who supports that conclusion with sound medical reasoning.[1]

Appellant has submitted medical evidence indicating that he received medical treatment for a right shoulder condition following his fall on March 28, 1997. In a June 20, 1997 report, Dr. Martin Z. Kanner, a Board-certified physiatrist, noted that appellant complained of persistent right shoulder, bilateral elbow and right wrist pain following a work-related injury on April 28, 1997[2] where appellant tripped over bolts in front of his office building. He noted a review of medical records and his findings on physical examination. Dr. Kanner stated that appellant was approximately eight weeks status post work-related hyperextension injuries to the bilateral wrists with bilateral lateral humeral epicondylitis and common extensor tendinitis and right supraspinatus tendonitis of the shoulder. He stated that appellant no longer required any treatment for his wrist fracture, but prescribed Daypro and physical therapy for appellant's elbows and right shoulder.

In his treatment notes covering the period July 3 through 16, 1997, Dr. Kanner indicated appellant's persistent right shoulder pain and treatment with physical therapy, Daypro and other medications. In his October 7, 1997 treatment note, Dr. Kanner indicated that appellant essentially had complete range of motion of the right shoulder in all directions and his other

[1] *Louise G. Malloy*, 45 ECAB 613 (1994); *Lourdes Davila*, 45 ECAB 139 (1993); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[2] In a June 23, 1997 letter, Dr. Kanner stated that he mistakenly noted the date of appellant's employment injury as April 28, 1997 rather than March 28, 1997.

findings on physical examination. He stated that appellant had reached maximum benefits and that appellant was discharged from his care in an improved condition.

A July 3, 1997 x-ray report of Dr. Marlene J. Severson, a Board-certified radiologist, noted the March 28, 1997 employment injury and provided a diagnosis of mild degenerative change at the greater tuberosity of the right shoulder.

In a March 26, 1999 report, Dr. Marcel A. Reischer, a Board-certified internist and physiatrist, indicated that appellant was being evaluated for right shoulder pain and pain in his arm and knee. Dr. Reischer noted his findings on physical examination and diagnosed a frozen right shoulder. Dr. Reischer stated that he was going to obtain an x-ray of appellant's right shoulder and cervical spine. He also stated that he was going to stop appellant's treatment of Daypro and obtain laboratory studies. In a March 31, 1999 report, Dr. Reischer stated that appellant had some spurring at the right C5-6 foramen, as well as, some abnormality at the C4-5 level as demonstrated by x-ray.

In a June 18, 1999 report, Dr. Reischer noted that appellant continued to have symptoms in his right shoulder. He indicated that he was going to obtain a magnetic resonance imaging (MRI) scan of appellant's right shoulder. A June 24, 1999 MRI report revealed a massive tear of the rotator cuff involving the supraspinatus and infraspinatus tendons with marked retraction of the tendons and moderate atrophy of the muscles. In his June 25, 1999 report, Dr. Reischer noted the MRI findings and referred appellant to an orthopedic surgeon for evaluation.

In a July 9, 1999 report, Dr. Reischer noted his findings on physical and objective examination of appellant's right shoulder. He indicated a review of the MRI report and its results. Dr. Reischer stated that appellant also had a tear of the anterior and superior glenoid labrum, moderate effusion of the glenohumeral joint and subchondral degenerative changes in the greater tuberosity.

In his July 13, 1999 preoperative report, Dr. Howard Ronald Friedman, a Board-certified internist, noted that appellant was undergoing surgery for pain in his right shoulder and a suspected rotator cuff tear.

A July 29, 1999 report of Dr. Michael A. Jacobs, a Board-certified orthopedic surgeon, indicated that he performed arthroscopic surgery on appellant's right shoulder on July 27, 1999. Appellant's postoperative diagnosis was chronic impingement of a rotator cuff tear of the right shoulder. In an August 5, 1999 follow-up note, Dr. Jacobs stated that appellant's shoulder had a massive cuff tear.

In his August 9 and 13, 1999 reports, Dr. Reischer noted appellant's unsuccessful right shoulder surgery and continued symptoms.

In a September 15, 1999 report, Dr. Evan L. Flatow, a Board-certified orthopedic surgeon, stated that appellant had an unrepaired massive rotator cuff tear with significant atrophy of the muscles and pain. He noted that appellant was unhappy with the loss of strength and function. Dr. Flatow explained to appellant that even if he was able to repair the tear, he might not recover strength if the muscles were very atrophied. He further explained that in this situation, a tendon transfer of the teres major or latissimus dorsi would be considered to attempt

to bring in a healthy muscle group. Dr. Flatow discussed the risks involved in the surgery and the rehabilitation process. He recommended that appellant consider the operation and noted that he agreed to do so.

A September 21, 1999 report of Dr. Andrew Cosgarea, a Board-certified orthopedic surgeon, revealed a history of appellant's right wrist, shoulder and knee conditions, his findings on physical examination and a review of medical records. He stated that appellant had a massive right shoulder rotator cuff repair status post arthroscopic debridement. Dr. Cosgarea noted that appellant may undergo a course of physical therapy for his right shoulder.

Appellant has also submitted medical evidence indicating that he received medical treatment for gastrointestinal and left shoulder conditions subsequent to his right shoulder injury. A November 20, 1999 hospital discharge report of Dr. Gary Hamamoto, a Board-certified surgeon, indicated that appellant underwent surgery on October 20, 1999 due to a small bowel obstruction and that a pathological evaluation was pending to determine whether appellant had Crohn's disease. Surgical pathology reports of Dr. D. Dutta, a Board-certified pathologist, dated October 27, 1999 revealed small fragments of fibroadipose tissue with focal fibrinous exudates. Dr. Dutta stated that the small intestine had multiple chronic ulcerations with stricture formation and diaphragmatic lesions most consistent with a nonsteroidal anti-inflammatory drug-related injury. Dr. Dutta noted that appellant had been taking nonsteroidal anti-inflammatory drugs (NSAIDS) daily for the past few years and that the histopathologic changes present with the history of such use was consistent with NSAID related enteritis.

Dr. Hamamoto's treatment notes dated November 3, 1999 through March 1, 2000, indicated that appellant was seen for follow-up treatment concerning his stomach condition. Dr. Hamamoto noted appellant's use of Daypro and nonsteroidal anti-inflammatory drugs related to knee pain. He also noted that appellant experienced right shoulder pain.

In a November 9, 1999 treatment note, Dr. Edward Wolf, a Board-certified internist, provided his findings on physical examination and stated that appellant was status post recent small bowel resection for possible nonsteroidal induced inflammation. He stated that it was undetermined whether the primary etiology was inflammatory bowel disease or a nonsteroidal induced small bowel illness. In his February 17, 2000 treatment notes, Dr. Wolf stated that appellant did not require any further treatment.

Dr. Reischer's December 30, 1999 report indicated that appellant was complaining of pain in his left shoulder and continued symptoms in his right shoulder. He noted his findings on physical examination regarding the left shoulder. Dr. Reischer opined that "[appellant] is developing new symptoms on the left which I think are secondary to relative overuse, as the result of the abnormalities on the right." He stated that he was going to be more aggressive regarding appellant's left shoulder since his right shoulder was watched for a while and appellant tolerated his symptoms until they were no longer tolerable.

A January 4, 2000 MRI report of Dr. Loralie D. Ma, a radiologist, revealed that appellant had a rotator cuff tear of the left shoulder and moderate to marked acromioclavicular joint arthritis. On February 2, 2000 appellant underwent arthroscopy surgery on his left shoulder and the tear was repaired.

A February 4, 2000 operative report of Dr. Edward McFarland, a Board-certified orthopedic surgeon, noted appellant's left shoulder surgery. Dr. McFarland's discharge report of the same date revealed diagnoses of symptomatic left rotator cuff tear and massive right rotator cuff tear. A pathology report of the same date from Dr. Rennae Suzette Green, a pathologist, revealed a diagnosis of fibrovascular tissue and synovium with mild chronic inflammation of the left shoulder. Dr. McFarland's February 11 and March 30, 2000 reports noted follow-up treatment that appellant received for his left shoulder.

In a February 28, 2000 report, Dr. Reischer stated that as a result of the March 1997 work-related injury:

> "[Appellant] suffered what has been found to be a massive tear of the right rotator cuff. As the result of that problem, he overused the left upper extremity, developing a left rotator cuff tear as well as taking long-term nonsteriodal and anti-inflammatory medications. [Appellant] has subsequently undergone surgery for his left rotator cuff tear, as well as abdominal surgery for what has been diagnosed as small intestinal inflammatory drug-related injury. As such, it is my opinion with a reasonable degree of medical probability that both the left rotator cuff injury and surgery, as well as the abdominal surgery and complaints are secondary ultimately to his work-related injury of March 1997, wherein he injured his right shoulder and rotator cuff."

Although appellant filed a claim alleging that he sustained a recurrence of disability due to his March 28, 1997 employment-related fractured right wrist, the evidence of record raises the question as to whether he sustained additional injuries that were the result of the accepted March 28, 1997 fall, as well as, consequential injuries to the left shoulder and nonsteroidal induced small bowel disease. The February 28, 2000 report from Dr. Reischer, appellant's treating physician, indicated that appellant suffered from a rotator cuff tear of his right shoulder in addition to the accepted right wrist condition and opined that this condition was causally related to appellant's accepted March 28, 1997 fall. In addition, Dr. Reischer opined that due to the right shoulder injury, appellant developed a rotator cuff tear in his left shoulder due to overuse. He further opined that as a result of long-time use of nonsteroidal and anti-inflammatory medications, he developed a gastrointestinal condition, requiring surgery.

Although Dr. Reischer's February 28, 2000 report is insufficient to discharge appellant's burden of establishing that his right shoulder condition is causally related to the accepted March 28, 1997 fall, that his left shoulder and gastrointestinal conditions are consequential injuries of the right shoulder condition, in the absence of medical evidence to the contrary, the Board finds that the medical evidence taken as whole constitutes sufficient evidence in support of appellant's claim to require further development of the record by the Office.[3] It is well established that proceedings under the Federal Employees' Compensation Act[4] are not

[3] *See John J. Carlone*, 41 ECAB 354 (1989).

[4] 5 U.S.C. §§ 8101-8193.

adversarial in nature[5] and while the claimant has the burden to establish entitlement to compensation the Office shares responsibility in the development of the evidence.[6]

On remand the Office should compile a statement of accepted facts and refer appellant, together with the complete case record and questions to be answered, to a Board-certified specialist for a detailed opinion on the relationship of appellant's right shoulder condition to his fall on March 28, 1997 and whether appellant sustained a consequential left shoulder and gastrointestinal conditions resulting from nonsteroidal and antiinflamatory medication that required surgery be issued. After such development as the Office deems necessary, a *de novo* decision shall be issued

The January 30, 2001 and June 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
September 5, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

[5] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

[6] *See Dorothy L. Sidwell*, 36 ECAB 699 (1985).