

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. DUGAS and U.S. POSTAL SERVICE,
POST OFFICE, New Baltimore, MI

*Docket No. 03-1036; Submitted on the Record;
Issued November 7, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for surgery performed on September 13, 2001; and (2) whether appellant met his burden of proof to establish that he sustained a recurrence of disability beginning September 13, 2001 causally related to his employment-related right lateral epicondylitis.

On November 9, 2000 appellant, then a 51-year-old city carrier, filed an occupational disease claim alleging that factors of employment caused tennis elbow of the right upper extremity.¹ He did not stop work. By letter dated January 3, 2001, the Office accepted that appellant sustained employment-related right lateral epicondylitis. In a telephone inquiry of May 15, 2002, appellant related that his employment had terminated in December 2000 and he had undergone surgery in September 2001. By letter of that same day, the Office informed appellant that the surgery could not be accepted as employment related until he submitted sufficient medical evidence regarding the necessity for the procedure and its causal relationship to his accepted condition. The Office provided appellant with a Form CA-7 claim for compensation, which he submitted on May 30, 2002 claiming compensation for the period September 13 through November 8, 2001.

In a decision dated June 24, 2002, the Office denied that appellant sustained a recurrence of disability or required medical care beginning on September 13, 2001. The Office noted that appellant did not respond to the May 15, 2002 informational letter. On July 13, 2002 appellant requested reconsideration and submitted additional medical evidence, including an unsigned operative report dated September 13, 2001; unsigned treatment notes from Dr. Joseph Failla, a

¹ Appellant had several previous claims. On February 23, 1998 the Office accepted that he sustained neck, back, right elbow and right shoulder sprains on December 27, 1997. On June 2, 1998 the Office accepted that appellant sustained bilateral carpal tunnel syndrome. On October 20, 1999 the Office accepted that on October 1, 1999 appellant sustained an employment-related cervical strain. These claims were doubled and adjudicated by the Office under A9-436636. The instant case was adjudicated by the Office under file number 092003148.

Board-certified orthopedic surgeon, dating from February 21, 2000 to August 22, 2001; a prescription for physical therapy signed by Dr. Failla; and a signed disability slip dated November 7, 2001, in which Dr. Failla diagnosed right epicondylitis surgery and provided no restrictions to appellant's physical activity.

By decision dated September 6, 2002, the Office denied appellant's reconsideration request. The Office noted that the reports from Dr. Failla dated in 2000 were previously of record and were, therefore, duplicative. The Office found that his reports dated February 28, August 22, September 13 and November 17, 2001 were repetitive of reports previously of record. The Office therefore denied merit review. On November 22, 2002 appellant again requested reconsideration and submitted a report dated November 12, 2002 from Dr. Failla. By decision dated January 24, 2002, the Office denied modification of the prior decisions, finding that Dr. Failla failed to explain why appellant needed surgery or the period of disability commencing September 13, 2001. The instant appeal follows.

The Board finds that this case is not in posture for decision.

Section 8103 of the Federal Employees' Compensation Act² provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.³ In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act.⁴

The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁵ In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.

Proof of causal relationship must include a physician's rationalized medical opinion.⁶ Thus, in order for surgery to be authorized, appellant must submit evidence to show that such surgery is for a condition causally related to the accepted employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

² 5 U.S.C. § 8103.

³ *Id.*; see *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁴ See *Vickey C. Randall*, 51 ECAB 357 (2000).

⁵ *Claudia L. Yantis*, 48 ECAB 495 (1997).

⁶ See *Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

The Office accepted that appellant sustained employment-related right lateral epicondylitis based on his November 9, 2000 claim. He underwent surgery on September 13, 2001 for a right elbow release performed by Dr. Failla. He therefore established that the surgery was for a condition causally related to his employment injury. Regarding whether the surgery was medically warranted, the relevant medical evidence includes treatment notes from Dr. Failla dated August 22, 2001⁷ which addressed appellant's history of right elbow pain with a long history of treatment including multiple injections for chronic right lateral epicondylitis. Positive physical findings included tenderness with palpation of the lateral epicondyle and significant pain on gripping. The assessment provided was "status post right lateral epicondylitis, failed conservative treatment." The report also stated that treatment options were discussed and noted appellant "elected to undergo surgical intervention -- to include release of right tennis elbow. As noted above, on September 13, 2001, Dr. Failla performed a right tennis elbow release on appellant that day. The indications for surgery again noted that the condition was "resistant to conservative treatment," that multiple injections had provided transient relief, with continuing pain over the lateral epicondyle which increased with gripping and extension. In a November 12, 2002 report, Dr. Failla advised:

"[Appellant] was managed conservatively from February 21, 2000 thr[ough] September 13, 2001 for his right lateral epicondylitis. This treatment included injections, therapy and tennis elbow brace as well as work restrictions. He underwent surgery on September 13, 2001 for the same -- r[ight] tennis elbow release and was discharged on October 24, 2001."

The Board finds that, while Dr. Failla's reports lack detailed medical rationale sufficient to discharge appellant's burden of proof to establish by the weight of reliable, substantial and probative evidence that appellant's right shoulder surgery was medically warranted, this does not mean that they may be completely disregarded by the Office. It merely means that their probative value is diminished. In the absence of medical evidence to the contrary, the doctor's reports are sufficient to require further development of the record.⁸ It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁹ Dr. Failla advised that appellant was resistant to conservative management after 19 months of treatment with therapy and injections. He noted continued physical findings and observed that surgery was an option.

The case shall therefore be remanded for referral to an appropriate Board-certified specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing whether the surgery performed on September 13, 2001 was medically warranted. If on remand the Office determines that the September 13, 2001

⁷ It is noted that this unsigned report describes Dr. Failla as the care provider but indicates that the report was dictated by "Dr. Nesbitt."

⁸ *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989). The Board notes that the case record does not contain a medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case for a second opinion evaluation.

⁹ See *Jimmy A. Hammons*, *supra* note 8.

surgery was medically warranted, it should then determine if appellant is entitled to any disability therefrom. After this and such further development as deemed necessary, the Office shall issue a *de novo* decision.¹⁰

The decisions of the Office of Workers' Compensation Programs dated January 24, 2003 and September 6 and June 24, 2002 are hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
November 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ Because of the Board's disposition of the first issue, the second issue is deemed moot.