

**United States Department of Labor
Employees' Compensation Appeals Board**

B.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
White Plains, NY, Employer**

)
)
)
)
)
)
)
)

**Docket No. 08-948
Issued: October 2, 2008**

Appearances:

*Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 7, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 28, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of his accepted right shoulder condition as of July 18, 2006.

FACTUAL HISTORY

On January 20, 2006 appellant, a 70-year-old custodial laborer, experienced a pull in his right shoulder while dumping garbage into a trash compacter. He filed a claim for benefits on January 21, 2006, which the Office accepted for sprain/strain of the right arm/shoulder.

In a May 3, 2006 Form CA-17 duty status report, Dr. Mark Kramer, Board-certified in physical and rehabilitative medicine and appellant's treating physician, released appellant to

return to work with restrictions of intermittent lifting with the right arm not exceeding 70 pounds.

In a May 5, 2006 letter to the employing establishment, appellant stated:

“I asked the doctor to let me back to work (Big Mistake). I’ve not known this kind of pain since the V.A. hospital. But my family is destitute we were and are living off of handouts.... I do not know how long I will be able to work. But I need to know what to do now -- and what to do if I just can’t keep it up....”

On May 5, 2006 appellant accepted a modified custodial position from the employing establishment tailored to the restrictions indicated in Dr. Kramer’s May 3, 2007 report. The job allowed him to resume his former bidded assignment as a custodial laborer with restrictions of no overhead lifting and no lifting above 70 pounds with the right arm.

In a July 18, 2006 report, Dr. Kramer stated that appellant complained of severe right-sided neck and shoulder pain. He noted that appellant wanted to have surgery to ameliorate the condition.

On July 27 and August 12, 2006 appellant filed CA-7 forms claiming compensation for leave without pay from July 18 to August 25, 2006. He stated on the July 27, 2007 form that he had stopped working light duty “for surgery.”

In reports dated September 5 and October 3, 2006, Dr. Kramer noted continued complaints of right shoulder pain with limited range of motion in the shoulder. He advised that appellant was permanently disabled from his usual job.

On September 22, 2006 in order to determine appellant’s current condition, the Office referred appellant to Dr. Andrew Bazos, a specialist in orthopedic surgery, for a second opinion examination. In a report dated October 12, 2006, Dr. Bazos noted that appellant had experienced chronic right shoulder tendinitis condition prior to his January 20, 2006 work injury, which aggravated his condition. He related that appellant underwent a magnetic resonance imaging (MRI) scan on February 16, 2006, which indicated a rotator cuff tear; specifically, a compromise of the subacromial space secondary to severe acromioclavicular joint arthropathic changes, in addition to a chronic, complete full thickness tear of the supraspinatus tendon. Dr. Bazos also noted that appellant had returned to light duty from May 4 to July 18, 2006, when he claimed a recurrence of his work-related right shoulder sprain. He opined that appellant had a mild orthopedic disability noted on physical examination, but was capable of working light duty at his usual job with the restriction of no overhead lifting with his right shoulder. Dr. Bazos concluded that appellant had a resolved right shoulder sprain.

In reports dated September 5 and October 3, 2006, Dr. Kramer noted continued complaints of right shoulder pain with limited range of motion in the shoulder. He advised that appellant was permanently disabled from his usual job.

By letter dated October 31, 2006, the Office requested additional information from appellant in support of his recurrence claim. It requested evidence from appellant showing that there was a change in the nature and extent of his work-related condition and that there was

change in the nature and extent of his light-duty requirements. The Office also requested a medical opinion from appellant's treating physician supporting his claim that a worsening in his work-related condition had occurred.

On November 13, 2006 appellant filed a Form CA-2a claim for benefits, alleging that he sustained a recurrence of disability as of July 18, 2006 causally related to his accepted right shoulder condition. On the form, the employing establishment stated that it had accommodated appellant's work restrictions with a job that required no use of his right arm at work, no reaching above the shoulder, no kneeling and no climbing, no lifting more than two pounds, in a limited-duty position.

In a November 21, 2006 report, Dr. Kramer related that appellant had rejected his recommendation for ameliorative right shoulder surgery because the prognosis for full recovery was less than 60 percent. He stated:

"[Appellant] is incapable of returning to work because he is right-handed, unable to utilize his right arm to lift, carry, or be elevated above the shoulder level. Weight restriction for the right upper extremity is less than five pounds. In addition to which, his generalized medical condition which includes advanced osteoarthritis to the cervical and lumbar spines, which is a separate and unrelated issue to this, is causing him to have some incapacitating pain. So in total, [appellant] is incapable of returning to work and has a permanent total disability."

In a report dated December 4, 2006, Dr. Bazos asserted:

"As stated previously, [appellant] has a chronic RCT [rotator cuff tear] that preceded this January 20, 2006 injury. The January 20, 2006 incident temporarily aggravated the preexisting condition by stretching surrounding tissue, self-limited. The January 20, 2006 injury is now resolved. Work restrictions are due to [appellant's] preexisting injury."

In a statement received by the Office on December 13, 2006, appellant asserted that it was his responsibility in his light-duty job to clean, dust and vacuum all cubicles; clean all bathrooms and bathroom walls; empty and carry off all the garbage to the compactor room; mop and use a treated mop in the hallways; wash all the hallway walls; and set up the conference rooms, washing the walls. He stated:

"I was damaging my right shoulder and not helping my left.... I was constantly in pain...."

* * *

"I also work out front of 2 South the flag is also my responsibility -- there is no duty where you do not use your arms and hands."

By decision dated December 19, 2006, the Office denied appellant compensation for a recurrence of his accepted right shoulder condition. The Office found that appellant failed to

meet his burden to establish that the May 2006 job offer exceeded his work restrictions or that on July 18, 2006 appellant had an objective worsening of his work-related right shoulder condition.

In a report dated December 19, 2006, Dr. Kramer advised that appellant continued to experience pain in his right shoulder and that his findings on examination were unchanged.

In an August 2, 2007 report, Dr. Kramer related appellant's history of injury and described the evolution of appellant's right shoulder condition. He stated:

"[Appellant] was first evaluated by me on March 7, 2006 ... subsequent to [an] injury sustained in an industrial accident which occurred on January 20, 2006. [He] had advised me on the date that[,] while lifting an object at work, he began to experience excruciating pain in his right shoulder and he was unable to elevate his arm subsequent to that pain. [Appellant] denied any past history of right shoulder problems and the pain remains unbearable and he had diminished mobility in that shoulder. Additionally, he has tingling and numbness in his right upper extremity, to his right and discomfort in his neck. I continued to evaluate [appellant] and on that first date, he provided me with an MRI [scan] which revealed a torn rotator cuff with 5 [to] 6 mm [millimeters] of retraction and a possible atrophy. I sent him for x-ray evaluation. [Appellant] had an x-ray of his right shoulder on May 16 which revealed minor osteoarthritic changes. I continued to counsel him as to the severity of this injury.... [Appellant] continues to have limited mobility of his shoulder and inability to elevate his right arm....

"I advised him that surgical intervention at that point in time would have only approximately 60 percent chance of success reestablishing and completely correcting the rotator cuff and in all likelihood he would need a graft. For financial reasons, [appellant] returned to work, with restriction. I saw him on June 28, July 18, July 25, August 1 and September 5, 2006. In addition to pain in his right shoulder and limited mobility of his right shoulder, [appellant] was experiencing neck pain.... Eventually, as my records which I have previously provided with you, he underwent arthroscopic surgery on April 9, 2007 and again it revealed a massively torn rotator cuff which was not repairable.... As a direct result of the accident on January 20, 2006, [appellant] sustained a massive rupture of his right rotator cuff and a sprain of the cervical spine resulting in severe pain in his neck and right shoulder and his inability to elevate his arm. He is unable to lift more than three pounds with his right hand and he is unable to elevate his right hand above the mid chest level and he is right-handed. Therefore, [appellant] remains and is totally disabled as a direct result of the work-related accident of January 20, 2006. Please note that he advised me when I first evaluated him that he had no prior history of right shoulder pain, weakness, or lack of mobility."

By letter dated August 22, 2007, appellant's attorney requested reconsideration. Counsel contended that there was a conflict in the medical evidence between Drs. Kramer and Bazos and that the Office erred in failing to resolve the conflict by referring the case to a referee medical examiner.

By decision dated November 28, 2007, an Office hearing representative affirmed a December 19, 2006 decision.

LEGAL PRECEDENT

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 establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, the employee must show either 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

ANALYSIS

In the instant case, appellant has not met his burden to provide a medical opinion showing a change in the nature and extent of his injury-related condition. He has failed to submit a rationalized, probative report which relates his condition or disability as of July 18, 2006 to his employment injury. For this reason, he has failed to establish his claim that he sustained a recurrence of disability as a result of his accepted employment injury.

Appellant submitted Dr. Kramer's periodic reports which opined that appellant was totally disabled from work, including the November 21, 2006 report indicating that appellant refused to have right shoulder surgery because it was not expected to produce a full recovery. Dr. Kramer advised that appellant could not return to work because he is right-handed, was unable to use his right arm to lift or carry, and could not elevate his right arm above shoulder level. He also stated that appellant had "some incapacitating pain" caused by advanced osteoarthritis of the cervical and lumbar spines. However, Dr. Kramer stated that these conditions were separate and unrelated to appellant's work-related shoulder condition. He did not provide any rationalized, probative medical opinion sufficient to establish that appellant's claimed total disability as of May 4, 2006 was causally related to his accepted right shoulder condition. Moreover, Dr. Bazos indicated in his October 2006 reports that appellant had preexisting chronic right rotator cuff tendinitis which was temporarily aggravated by the January 20, 2006 right shoulder sprain, and had since resolved. He noted on examination that appellant had a mild orthopedic disability, but believed he was capable of working light duty at his usual job with the restriction of no overhead lifting with his right shoulder. Thus, the weight of the medical evidence indicated that there had been no change in the nature and extent of appellant's injury-related condition. In addition, appellant did not submit any evidence to show that there was a change in the nature and extent of his work requirements. The Office therefore properly found in its December 19, 2006 decision that appellant did not meet his burden to establish a recurrence of disability as of May 4, 2006.

Following the December 19, 2006 decision, appellant submitted Dr. Kramer's August 2, 2007 report. The report indicated that, when he first examined appellant in March 2006, a February 2006 MRI scan indicated he had a severely torn right rotator cuff. Dr. Kramer stated that appellant eventually underwent arthroscopic surgery for his right shoulder in April 2007,

¹ *Terry Hedman*, 38 ECAB 222 (1986).

which he declined to undergo in 2006, which also revealed the rotator cuff tear. However, he failed to provide a medical opinion which sufficiently described appellant's light job duties or explained the medical process through which such duties would have been competent to cause the claimed recurrence of disability. Dr. Kramer's reports do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment injury and his alleged recurrence of disability. Causal relationship must be established by rationalized medical opinion evidence. The reports submitted by appellant failed to provide an explanation in support of his claim that he was totally disabled as of May 4, 2006. These reports did not establish a worsening of appellant's condition, and therefore do not constitute probative, rationalized opinion evidence demonstrating that a change occurred in the nature and extent of the injury-related condition.²

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that he no longer was physically able to perform the requirements of his light-duty job. The record indicates the appellant returned to work for the employing establishment from May 4 to July 18, 2006 at a modified custodial job with restrictions entailed by his work-related right shoulder condition. While he continued to claim that the job forced him to exceed his work restrictions, thus contributing to the aggravation of his right shoulder condition, the employing establishment denied these assertions. Appellant failed to submit factual evidence supporting his claim that the light-duty job exceeded his work restrictions and resulted in a recurrence of his work-related disability.

Accordingly, as appellant has not submitted any factual or medical evidence supporting his claim that he was totally disabled from performing his light-duty assignment as of July 18, 2006 as a result of his accepted right shoulder condition, he failed to meet his burden of proof. Contrary to his argument, there is no conflict in medical opinion evidence requiring an impartial medical evaluation. Appellant was not entitled to compensation based on a recurrence of his employment-related disability. The Board will affirm the November 28, 2007 decision.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he was entitled to compensation for a recurrence of disability as of July 18, 2006 causally related to his accepted right shoulder condition.

² *William C. Thomas*, 45 ECAB 591 (1994).

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 2, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board