United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 08-2204**
	)	**Issued: July 8, 2009**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, San Jose, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 7, 2008 appellant filed a timely appeal of the June 5, 2008 merit decision of the Office of Workers' Compensation Programs terminating his compensation benefits as of June 2, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective June 2, 2008.

FACTUAL HISTORY

On August 16, 2002 appellant, then a 44-year-old mail handler, sustained injury to his left shoulder and neck while lifting a bundle of magazines. The Office accepted the claim for left shoulder strain and authorized surgery, on January 31, 2003, for left shoulder open acromioplasty and distal clavicle resection. Compensation benefits were paid and appellant was

released to full-modified work on March 24, 2003. At the time of the August 16, 2002 injury he was working full-time light duty due to a previous left shoulder work injury in 1993.[1]

In an August 23, 2003 report, Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon and Office referral physician, reviewed a statement of accepted facts, appellant's medical record and presented findings on examination. He provided an impression of left shoulder impingement syndrome and adhesive capsulitis of the left shoulder. Dr. Wirganowicz advised that appellant continued to have residuals of the August 16, 2002 work injury in terms of pain, weakness, and limited range of motion in the shoulder. He opined that appellant's condition was an aggravation of a preexisting condition. However, the aggravation which caused the left shoulder strain was temporary and would have ceased approximately six weeks after the August 16, 2002 injury. Dr. Wirganowicz further opined that appellant's work-related injuries in 1993 and 2002 may have accounted for the shoulder impingement and adhesive capsulitis but the eventual partial tear of the supraspinatus tendon would be a natural progression of the underlying disease. He concluded that appellant had a preexisting disability from the 1993 work-related left shoulder injury.

In a January 23, 2004 report, Dr. Frank De Mayo, an attending Board-certified orthopedic surgeon, noted that a magnetic resonance imaging (MRI) scan showed possible tear of the supraspinatus. He stated that appellant was considered permanent and stationary since he declined surgery. Dr. De Mayo noted that appellant could work, but was not able to perform any overhead activities, and could push or pull no more than 40 pounds. He continued to see appellant.

In a June 11, 2004 report, Dr. De Mayo noted that appellant continued to have pain in the left shoulder. He advised that appellant had de Quervain's tenosynovitis in the left hand which he opined was work related due to his repetitive activities of grabbing bundles and steering a forklift. On September 3, 2004 Dr. De Mayo noted that appellant had left-side neck pain with radiation into the shoulder. In a November 10, 2004 report, appellant continued to have pain in the trapezius region as well as some crepitus in the anterior subacromial space and pain laterally in the acromial area. Dr. De Mayo also noted that appellant had carpal tunnel symptoms in the upper extremities. As appellant wished to try pain management before surgery, he referred him to Dr. Min Zheng, a Board-certified physiatrist.

In an October 29, 2004 report, Dr. Zheng noted appellant's complaints of left neck pain radiating to the left upper extremity and presented findings on examination. She noted that the November 4, 2002 MRI scan of the cervical spine showed no abnormalities. Dr. Zheng diagnosed chronic left cervicalgia with left arm radicular pain probably secondary to the cervical spine etiology with radiculitis, probable myofascial pain syndrome and left shoulder pain status post surgery.

In a July 23, 2007 report, Dr. De Mayo advised that nerve conduction studies were consistent with bilateral carpal tunnel syndrome and left C7 radiculopathy.

[1] The claim involving the 1993 injury is not before the Board on the present appeal.

On August 20, 2007 Dr. De Mayo stated that appellant continued to have severe pain in the left side of his neck with neck stiffness, radiating down the arm bilaterally with numbness mainly on the left arm radiating down to dorsum of the hand to all five fingers. He noted that the previous electromyogram (EMG) showed evidence of C7 radiculopathy on the left. Dr. De Mayo advised that the recent MRI scan of the neck did not show definite disc herniation. He stated that appellant's shoulder pain clinically appeared to be mostly cervical in nature. An August 9, 2007 MRI scan of the cervical spine showed mild degenerative changes at several levels, with the most significant findings at C6-7 with no stenosis of the central canal or neural foramina.

On September 17 and October 16, 2007 Dr. De Mayo reiterated that appellant continued to have pain in the neck, left shoulder and left arm. He stated that appellant had pain in the neck from the beginning of the work injury and the worsening of the pain was not a new condition as it has been present since the beginning with various degrees of severity. Dr. De Mayo opined that appellant's cervical pain resulted directly from the work injury. He explained that there were no preexisting conditions or other injuries and no other reason to base his pain on any other case.

On October 15, 2007 the Office received an August 20, 2007 report from Dr. Zheng, which noted that appellant had a history of bilateral shoulder injury status post surgery and was last seen on July 18, 2007 for left neck pain radiating to the left top of shoulder down to the lateral upper arm. Dr. Zheng noted that appellant stated his symptoms began in 2002 with his second work-related injury and reported that the MRI scan of the cervical spine in 2002 showed no abnormalities. She indicated that the electrodiagnostic studies of July 9, 2007 showed bilateral mild to moderate carpal tunnel syndrome and left C7 chronic radiculopathy and the MRI scan of the cervical spine dated August 9, 2007 was not available for review. Dr. Zheng provided an impression of chronic left cervicalgia with exacerbation and left C6-7 radicular pain and paresthesia secondary to cervical degenerative disc disease and disc protrusion, left C7 radiculopathy, and mild to moderate carpal tunnel syndrome bilaterally.

On October 29, 2007 the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion, who was provided with a copy of appellant's medical records, a statement of accepted facts and a list of questions.

In a November 20, 2007 report, Dr. Swartz reviewed the medical record and statement of accepted facts. He stated that a left shoulder MRI scan report of September 5, 2002 noted a small tear of the supraspinatus muscle at its insertion with smaller cortical defect and irregularity and a mild degenerative change in the acromioclavicular joint. Dr. Swartz further noted that an MRI scan report of the cervical spine dated November 2, 2002 showed no abnormalities. In reference to the left shoulder injury, he noted that an MRI scan report of September 5, 2002 and Dr. De Mayo's October 16, 2002 report, documented degenerative changes on the acromioclavicular (AC) joint and a small partial tear which were preexisting conditions that were aggravated. The MRI scan study of the cervical spine revealed a normal study. Dr. Swartz found that appellant sustained a soft tissue strain related to the claim by direct cause. He noted that there was no evidence of a preexisting condition to the cervical spine. Dr. Swartz opined that the aggravation of the preexisting left shoulder condition and the soft tissue strain of the cervical spine were both temporary conditions that would have ceased by September 30, 2002

after appropriate medical treatment as was noted by Dr. Wirganowicz. Based on his review of the medical records, Dr. Swartz opined that appellant did not have any continuing residuals of the August 16, 2002 work injury. He concurred with Dr. Wirganowicz's conclusion that the aggravation of the left shoulder ceased on September 30, 2002. Dr. Swartz also opined that the soft tissue strain of the cervical spine also ceased on that same date. He opined that appellant's problems with the cervical spine were primarily related to his bilateral carpal tunnel syndrome and unrelated to the August 16, 2002 work injury. With respect to ongoing left shoulder pain, Dr. Swartz noted that Dr. De Mayo had advised in an August 20, 2007 report that the pain appeared cervical in nature and was not a surgical problem. Dr. Swartz stated that his examination did not reveal any surgical indications; however, he found chronic degenerative changes in the left shoulder which were related to appellant's preexisting condition. Dr. De Mayo opined that appellant could work eight hours a day with prophylactic restrictions on reaching above the shoulder no more than four hours and pushing, pulling, and lifting no more than four hours and not above 25 pounds.

In a December 27, 2007 letter, the Office informed appellant that a cervical condition was never accepted as part of the August 16, 2002 work injury. It provided him a copy of November 20, 2007 report from Dr. Swartz and requested that his physician provide a response.

On January 4, 2008 the Office received Dr. Zheng's September 12, 2007 report. Dr. Zheng noted appellant's work injury and treatment and discussed the results of the electrodiagnostic studies of July 9, 2007 and the MRI scan of the cervical spine dated August 9, 2007. She listed an impression of chronic left cervicalgia with exacerbation, left C6-7 radicular pain and paresthesia secondary to the cervical degenerative disc disease with disc protrusion left C7 radiculopathy and mild to moderate carpal tunnel syndrome bilaterally.

In reports dated January 17 and February 18, 2008, Dr. De Mayo stated that, while appellant may have had some cervical disc disease as an underlying factor to his injury, he had no symptomatology until his work activities caused his neck and shoulder symptoms. He opined that appellant's work caused enough repetitive motion of his neck and shoulder to cause severe radiculopathy. Dr. De Mayo opined that appellant's work activities caused a permanent aggravation of his preexisting cervical condition.

By notice dated April 30, 2008, the Office proposed to terminate appellant's wage-loss and medical benefits as the weight of the medical evidence demonstrated that the accepted conditions ceased without residuals. It accorded determinative weight to the opinion of Dr. Swartz, the second opinion specialist.

In a March 5, 2008 report, Dr. De Mayo noted appellant's complaints of pain in his neck and numbness in both hands. He advised that appellant had bilateral carpal tunnel syndrome and cervical pain. Dr. De Mayo stated that appellant's left shoulder remained painful in the area of the distal clavicle and acromion with some limitation of motion. He noted that appellant might ultimately need shoulder surgery but that he first wanted further evaluation of appellant's neck. Dr. De Mayo stated that appellant's work status was unchanged.

By decision dated June 5, 2008, the Office terminated appellant's wage-loss and medical benefits, effective June 2, 2008, finding that the accepted injury had ceased without residuals.

LEGAL PRECEDENT

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[5]

ANALYSIS

The Office accepted that appellant sustained a left shoulder strain as a result of an injury on August 16, 2002 and authorized a January 31, 2003 surgery for left shoulder open acromioplasty and distal clavicle resection. The record reflects that appellant had a previous work-related injury to his left shoulder in 1993. The Office terminated appellant's compensation benefits effective June 2, 2008 on the grounds that the accepted condition had resolved without residuals. It accorded determinative weight to the opinion of Dr. Swartz, the second opinion specialist.

The Board finds there is a disagreement between Dr. De Mayo, appellant's treating physician, and Dr. Swartz, the second opinion examiner, regarding the aggravation of appellant's preexisting left shoulder condition. In reports dated January 17 and February 18, 2008, Dr. De Mayo opined that appellant's work entailed repetitive motion to the neck and shoulder which caused severe radiculopathy. He stated that appellant's work permanently aggravated appellant's preexisting degenerative disease. Dr. Swartz stated that, while the October 16, 2002 work injury resulted in a left shoulder condition and a soft tissue strain of the cervical spine, such aggravation was temporary and ceased by September 30, 2002. When such conflicts in medical opinion arise, 5 U.S.C § 8123(a) requires the Office to appoint a third or referee physician, also known as an impartial medical examiner.[6] The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation due to an unresolved conflict in medical opinion.

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[2] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[3] *Id.*

[4] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[5] *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

[6] 5 U.S.C. § 8123(a).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective June 2, 2008 as there is an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2008 decision of the Office of Workers' Compensation Programs is reversed**.**

Issued: July 8, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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