

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

A.W., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Peekskill, NY, Employer

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**Docket No. 10-2380
Issued: August 3, 2011**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 27, 2010 appellant, through her representative, filed a timely appeal from the August 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the termination of her compensation for the accepted right shoulder injury. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated compensation for the accepted right shoulder injury; and (2) whether it properly denied compensation for appellant's left shoulder condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 8, 2007 appellant, then a 57-year-old clerk, injured her right shoulder in the performance of duty while pushing and trying to turn a postal container. OWCP accepted her claim for right shoulder impingement, right shoulder tendinitis and right rotator cuff tear. On January 10, 2008 appellant underwent arthroscopic decompression, full thickness rotator cuff repair and excision of the distal clavicle. She received temporary total disability on the periodic rolls.

In December 2008 Dr. Howard Luks, an attending orthopedic surgeon, found that appellant was starting to recover quite well following her rotator cuff repair. Physical examination showed 160 degrees of forward elevation with minimal pain at the extremes. There was no pain with resisted external rotation or abduction. Appellant advised that she was continuing to progress well.

In January 2009, Dr. Luks again found that appellant was progressing quite well following her right rotator cuff repair. Physical examination revealed full forward elevation, full external rotation and abduction and almost full internal rotation. Appellant had slightly limited strength against resisted external rotation and weakness against resisted abduction.

Appellant reported fairly significant left shoulder pain slowly progressing over the last few months “as she depended on the left shoulder to compensate for her right shoulder during recovery.” Dr. Luks felt that she might be developing a rotator cuff tear on the left side.

By May 2009 appellant’s left rotator cuff tendinosis had become very symptomatic. Dr. Luks felt she was an appropriate candidate for left shoulder arthroscopy, distal clavicle excision and a debridement or decompression.

On June 25, 2009 Dr. Luks diagnosed significant residual left shoulder pain secondary to appellant’s acromioclavicular (AC) joint and rotator cuff. He connected the left shoulder condition to the May 8, 2007 right shoulder injury:

“With regards to causation, the patient’s pain in her left shoulder is likely related to the right shoulder because of the burden placed on the left shoulder during the recuperative phase from her right shoulder surgery. With regards to the AC joint in particular, this was an aggravation of preexisting degenerative arthrosis. With regards to the rotator cuff, this was a precipitating cause of her pain.”

In August 2009, Dr. Luks saw appellant for follow-up of her left shoulder pain. He noted that she was doing very well with regards to her right shoulder, which he did not examine.

On August 18, 2009 Dr. Joseph Laico, an orthopedic surgeon and OWCP referral physician, examined appellant for the third time since June 2008. Appellant reported no significant symptoms related to her right shoulder, only occasional discomfort. Dr. Luks reviewed her chart and described normal findings on physical examination of the right shoulder.² With respect to the right shoulder, he found that appellant was no longer disabled; she was able to perform her regular work duties as of that date.

With respect to appellant's left shoulder, however, Dr. Laico found tenderness on compression of the AC joint and greater tuberosity. Supraspinatus, Neer and Hawkins tests were positive for impingement. Dr. Laico noted loss of flexion, extension, abduction and internal rotation. He found no causal relationship to appellant's May 8, 2007 right shoulder injury. Dr. Laico noted that x-rays on January 20, 2009 showed cystic changes and erosion of the distal left clavicle, possibly related to rheumatoid arthritis or posttraumatic osteolysis. Appellant also had cuff tendinosis and bursitis of the left shoulder as a result of preexisting severe AC arthrosis and a fragmented subacromial spur. Dr. Laico explained that these conditions were of longstanding duration and predated the May 8, 2007 incident. They were not caused by favoring the right shoulder: "These findings are too severe to be explained on that basis."

In a decision dated March 15, 2010, OWCP terminated compensation for the accepted right shoulder injury effective that date. It found that the weight of the medical opinion evidence rested with Dr. Laico and established that the accepted right shoulder conditions had resolved with no residuals or disability.

Dr. Luks examined appellant the following day and found right shoulder tenderness over the AC joint, mild tenderness over the biceps, positive Neer's and Hawkins' impingement tests and pain with resisted external rotation and resisted abduction. Examination of the left shoulder also showed tenderness over the AC joint and pain with resisted external rotation and abduction, but no tenderness over the bicipital groove and no positive Neer's or Hawkins' impingement tests. Dr. Luks, nonetheless, diagnosed left greater than right shoulder pain, the latter secondary to the work-related incident.

In a decision dated August 17, 2010, OWCP's hearing representative affirmed the termination of compensation for the accepted right shoulder injury. Its hearing representative found that the weight of the medical evidence rested with Dr. Laico and established that appellant had no medical condition in either extremity causally related to the May 8, 2007 employment injury.

² Examination of the right shoulder revealed well-healed arthroscopy scars over the anterior, lateral and posterior aspects. The scars were freely moveable and nontender. There was no tenderness on compression of the bicipital groove, AC joint or greater tuberosity. There was no atrophy of the shoulder girdles. Deep tendon reflexes were present and equal in the biceps, triceps and brachioradialis. There was no decreased sensation to light touch in the upper extremities. No crepitus was noted on range of motion. Drop test and apprehension tests were negative. There was no anterior/posterior or superior/inferior instability of the right shoulder. Supraspinatus, Neer and Hawkins tests were negative for impingement. Range of motion in the right shoulder showed 180/180 degrees abduction, 180/180 degrees flexion, 50/50 degrees extension, 50/50 degrees adduction and 60/90 degrees internal and external rotation. There was no evidence of arm, forearm or intrinsic muscle hand atrophy. Both biceps measured 13½ inches in circumference, both forearms 12½ in circumference at their greatest diameter.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Having accepted a claim and initiated payments, OWCP may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.⁶

ANALYSIS -- ISSUE 1

OWCP terminated compensation for appellant's right shoulder injury effective March 15, 2010. It therefore has the burden of proof to justify that termination.

Dr. Laico, an orthopedic surgeon and OWCP referral physician, had examined appellant on two occasions following her surgery and was well acquainted with her history and progress. When he saw her again on August 18, 2009, appellant reported no significant symptoms related to her right shoulder, only occasional discomfort. Dr. Laico's physical examination of the right shoulder was entirely normal. He reviewed appellant's medical chart and concluded that she was no longer disabled as a result of the accepted right shoulder injury. Appellant was able to perform her regular work duties as of that date insofar as her right shoulder was concerned.

Dr. Laico based his opinion on a proper factual and medical history. His conclusion was not only internally consistent with appellant's complaints and with his findings on physical examination, it was also consistent with the prior nine months of treatment notes from Dr. Luks, an attending orthopedic surgeon. In December 2008, Dr. Luks found that appellant was starting to recover quite well following her rotator cuff repair. Appellant had 160 degrees of forward elevation with minimal pain at the extremes, and there was no pain with resisted external rotation or abduction. She reported that she was continuing to progress well. In January 2009, Dr. Luks confirmed this progress. Indeed, this was the only time in 2009 that appellant followed up with him for her right shoulder condition. From that point forward, she and Dr. Luks would focus on her left shoulder. In August 2009, Dr. Luks reported that appellant was doing very well with regards to her right shoulder, which he did not feel the need to examine.

Even prior to OWCP's termination of compensation on March 15, 2010, Dr. Luks was effectively no longer seeing appellant for the accepted right shoulder injury. Appellant was

³ 5 U.S.C. § 8102(a).

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (March 2010).

doing very well, was reporting no right shoulder complaints to her attending physician and was no longer being examined for her right shoulder. This was consistent with appellant's lack of significant complaints on August 18, 2009, with Dr. Laico's normal findings on physical examination and with his opinion that appellant no longer had any disability with respect to her right shoulder.

As the clear weight of the medical evidence established that appellant no longer had disability for work or the need for regular medical attention attributable to the accepted right shoulder injury, the Board finds that OWCP met its burden of proof to terminate compensation for the accepted right shoulder injury. The Board will affirm its August 17, 2010 decision on the issue of termination.

On March 16, 2010 one day after OWCP terminated compensation for appellant's right shoulder injury, Dr. Luks examined her right shoulder and found tenderness over the AC joint, mild tenderness over the biceps, positive Neer and Hawkins impingement tests and pain with resisted external rotation and resisted abduction. This was not consistent with his earlier reports or with Dr. Laico's August 18, 2009 examination. Indeed, when Dr. Luks examined appellant's right shoulder as far back as December 2008, he found no pain with resisted external rotation or abduction. Appellant now had pain with resisted external rotation and abduction as well as positive impingement tests. Because Dr. Luks did not explain why her right shoulder appeared to have worsened significantly since August 2009, when he reported that she was doing very well, the Board finds that Dr. Luks' March 16, 2010 report has diminished probative value and is not sufficient to create a conflict with Dr. Laico with respect to the status of appellant's right shoulder condition.⁷

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause attributable to the employee's own intentional conduct.⁸

A claimant seeking compensation under FECA has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,⁹

⁷ Although Dr. Luks reported greater findings on the right (on the left appellant had no tenderness over the bicipital groove and no positive Neer's or Hawkins' impingement tests), he diagnosed left greater than right shoulder pain. He should explain.

⁸ *John R. Knox*, 42 ECAB 193 (1990); *Lee A. Holle*, 7 ECAB 448 (1955).

⁹ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

including that she sustained an injury in the performance of duty as alleged and that her claimed disability for work, if any, was causally related to the employment injury.¹⁰

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.¹¹

ANALYSIS -- ISSUE 2

OWCP accepted appellant's claim of a right shoulder injury and therefore had the burden of proof to justify the termination of compensation for that injury. It did not accept that she sustained a left shoulder injury as a consequence. Appellant bears the burden of proof to establish such a causal relationship.

Dr. Luks, the attending orthopedic surgeon, concluded that appellant's left shoulder condition was likely a consequence of the accepted right shoulder injury. He reasoned that it resulted from the burden placed on the left shoulder during the recuperative phase from her right shoulder surgery. This caused, in Dr. Luks' opinion, an aggravation of appellant's preexisting degenerative arthrosis in the left AC joint and it precipitated her left rotator cuff pain.

Dr. Laico, the orthopedic surgeon and OWCP referral physician, disagreed. He found no causal relationship with appellant's right shoulder injury. Dr. Laico reasoned that the cystic changes and erosion of the distal left clavicle, possibly related to rheumatoid arthritis or post-traumatic osteolysis, as well as cuff tendinosis and bursitis of the left shoulder as a result of preexisting severe AC arthrosis and a fragmented subacromial spur, were longstanding conditions that predated the May 8, 2007 incident. Such findings, he argued, were too severe to be explained by favoring the right shoulder.

The Board finds a conflict between Dr. Luks and Dr. Laico on the issue of whether the accepted right shoulder injury caused a consequential left shoulder injury. Such a conflict warrants referral to an impartial medical specialist under 5 U.S.C. § 8123(a). The Board will therefore set aside OWCP's August 17, 2010 decision on the issue of consequential injury and will remand the case for further development of the medical evidence. As such further development as may become necessary, OWCP shall issue an appropriate final decision on the issue of consequential left shoulder injury.

CONCLUSION

The Board finds that OWCP properly terminated compensation for the accepted right shoulder injury. The Board also finds that this case is not in posture for decision on the issue of consequential left shoulder injury. Further development of the medical evidence is required.

¹⁰ *Elaine Pendleton*, 40 ECAB 1143 (1989); see *Daniel R. Hickman*, 34 ECAB 1220 (1983).

¹¹ 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The case is remanded for further action consistent with this opinion.

Issued: August 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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