

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

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**JOHN J. RENO, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Honolulu, HI, Employer**

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**Docket No. 04-198  
Issued: March 8, 2004**

*Appearances:*  
*John J. Reno, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On October 20, 2003 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated May 15, 2003 and October 23, 2002, terminating his compensation and medical benefits. Pursuant to 20 C.F.R.<sup>1</sup> §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office met its burden of proof in terminating appellant's compensation and medical benefits.

**FACTUAL HISTORY**

On February 10, 2001 appellant, then a 27-year-old mail handler, filed a traumatic injury claim alleging that on February 3, 2001 he injured his left shoulder when he attempted to move

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<sup>1</sup> The Code of Federal Regulations.

heavy boxes. The Office accepted his claim for a left shoulder strain. Appellant was placed on the periodic compensation roll to receive compensation for temporary total disability effective July 15, 2001.

The employing establishment provided copies of investigative memoranda that reported that appellant applied for a position as an immigration inspector with the Immigration & Naturalization Service (INS) in June 2001 and was tentatively selected but the job offer was withdrawn in February 2002 when he failed to schedule a drug test. He also applied for an air marshal position with the Federal Aviation Administration in November 2001 and the duties of that position included carrying firearms and making arrests. Appellant was observed using both hands and arms to lift large suitcases at home and at an airport in May 2002.

On July 18, 2002 the Office referred appellant, together with a statement of accepted facts and a list of questions, to Dr. Barry Lotman, a Board-certified orthopedic surgeon and an Office referral physician, for an examination and opinion as to whether he had any residual medical condition or disability causally related to his February 3, 2001 employment injury.

In an August 14, 2002 report, Dr. Lotman provided a history of appellant's condition and detailed findings on examination. He noted appellant's statement that he had recently undergone a physical examination and was accepted for a position at the INS. Dr. Lotman stated:

“Physical examination demonstrates a highly muscular young man in no acute distress. He demonstrates no muscular asymmetry. He denies extensive weight lifting except when he was playing football in Hawaii and states that he is only doing some ‘toning’ exercises at present. His physical examination belies this report as he has exceptionally well-developed biceps, latissimus, trapezius and paraspinals.

“On examination there is no periscapular atrophy or pain.... He does have tenderness in the left biceps tendon in its groove approximately three fingerbreadths below the acromioclavicular joint. The tenderness in this area is made worse by both supination and pronation of the forearm against resistance. Supination is more painful than pronation.

“There is no glenohumeral instability or pain on glenohumeral stress. Active range of motion of the left shoulder includes forward flexion of 95 [degrees] and abduction of 40 [degrees]. Posteriorly, he can reach to the level of L3 versus L1 with the left arm.

“On active range of motion, there is no crepitation. On passive range of motion, there is some lateral subacromial crepitation. Passive range of motion includes forward flexion to 150 [degrees] and abduction to 130 [degrees]. After I was done performing passive range of motion of the shoulder, I left it forward flexed about 130 [degrees] and abducted about 110 [degrees].... [Appellant] was able to maintain this position without difficulty and without voicing any complaints of pain.

“Following our examination, [appellant] put his jersey back on. He did so by putting it over his head and then elevating the left arm in forward flexion to 170 [degrees] allowing it to slide through the left sleeve. This position as well as others are positions that [appellant] said he could not perform when asked to do so because of his pain.

CLINICAL IMPRESSION:

1. Left shoulder strain, resolved.
2. Symptom magnification/malingering.

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“I do not believe that the injury of February 3, 2001 resulted in anything other than a left shoulder strain. Although it had been approved, [appellant] never underwent shoulder arthroscopy.

“Although [appellant] alleges significant pain in the shoulder, he demonstrates no evidence of atrophy and definite evidence of symptom magnification/malingering. As such, I believe that his left shoulder strain has completely resolved.

“According to the information in the [s]tatement of [a]ccepted [f]acts, [appellant’s] job requires ... intermittent lifting/carrying up to 70 pounds, intermittent standing, ... walking, ... bending/stooping, ... pulling/pushing, simple grasping, fine manipulation and intermittent reaching above the shoulder. Based on this job description, I believe that [appellant] is capable of performing his date[-]of[-]injury job.”

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“I believe that [appellant] has completely resolved his left shoulder strain and that further Orthopedic treatment is not indicated or necessary.”

In a supplemental report to the Office dated September 5, 2002, Dr. Lotman stated:

“You have asked.... “[W]hy [appellant] was on disability if he was soon to be employed by the INS? What was his response?”... I did not specifically ask him why the INS accepted him for employment despite [his] disability. My report indicates that [appellant] did have to take a physical [examination] and apparently passed it.”

On September 23, 2002 the Office advised appellant that it proposed to terminate his wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence established that his work-related left shoulder strain had resolved.

By letter dated October 15, 2002, appellant responded that he disagreed with the opinion of Dr. Lotman. He alleged that Dr. Lotman examined him for only five minutes, did not take an x-ray and “fabricated on the medical evaluation.” Appellant stated that he was still having pain in his shoulder and could not perform his date-of-injury job.

By decision dated October 23, 2002, the Office terminated appellant's compensation and medical benefits on the grounds that the weight of the medical evidence, represented by the opinion of Dr. Lotman, established that he had no residual disability or medical condition causally related to his February 3, 2001 employment-related left shoulder strain.

Appellant requested reconsideration and submitted additional evidence including a report of a January 7, 2003 magnetic resonance imaging (MRI) scan of the left shoulder that indicated a rotator cuff tear. Appellant also submitted notes from a physical therapist and a March 4, 2003 report of Dr. Nicholas J. Giori, an attending Board-certified orthopedic surgeon.

In his March 4, 2003 report, Dr. Giori provided a history of appellant's condition and findings on examination. He indicated that appellant told him the left shoulder injury occurred "about a year ago." Dr. Giori stated:

"Physical examination reveals a very robust and healthy muscular appearing man who obviously lifts weights. Examination of the left arm itself reveals no tenderness over the AC [acromioclavicular] joint. Mild tenderness over the anterolateral corner of the acromion. Positive Hawkin's sign. He is quite strong with external rotation and supraspinatus isolation causes him quite a bit of pain. The strength exam[ination] is tough to tell because he was so strong in his arms anyway.

"X-RAYS: [T]he x-ray reveals a normal appearing association between the glenoid and humeral head. He has some sclerosis in the area of the greater tuberosity. The MRI scan ... which he brought in ... for me to review reveals an abnormality in the rotator cuff in the distal part of the supraspinatus. It was read as a rotator cuff tear...

"[Appellant] has what appears to be at least a partial rotator cuff tear on the left side ... I think he is a reasonable candidate for [surgery]."

By decision dated May 15, 2003, the Office affirmed its October 23, 2002 decision.

### **LEGAL PRECEDENT**

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.<sup>2</sup>

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<sup>2</sup> *Alfonso G. Montoya*, 44 ECAB 193 (1992).

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.<sup>3</sup>

### ANALYSIS

In the present case, Dr. Lotman, a Board-certified orthopedic surgeon, who served as an Office referral physician, reviewed the statement of accepted facts and performed a thorough physical examination of appellant. He noted that appellant was highly muscular with no signs of atrophy and his physical condition was not consistent with his statement that he did not perform extensive weight lifting and only performed toning exercises.<sup>4</sup> Dr. Lotman found no objective findings to support appellant's complaints of pain in his left shoulder and indicated evidence of magnification of his symptoms. He provided sound medical rationale in support of his opinion that appellant no longer had employment-related residuals by explaining that his left shoulder strain was the type of injury that would have resolved. Dr. Lotman determined that appellant was capable of performing his date-of-injury position. The Board finds that the Office properly determined that Dr. Lotman's opinion constituted the weight of the medical evidence and established that appellant had no residual disability or medical condition causally related to his February 3, 2001 employment injury.

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability that continued after termination of compensation benefits.<sup>5</sup> The evidence submitted by appellant in this case did not discharge his burden of proof.

Appellant submitted a report of a January 7, 2003 MRI scan of the left shoulder that indicated a rotator cuff tear. However, this report does not explain how this condition is related to appellant's accepted left shoulder strain on February 3, 2001 or address the issue of whether he had any residual disability or medical condition causally related to his February 3, 2001 employment injury.

Dr. Giori, indicated in his March 4, 2003 report, that appellant told him the left shoulder injury occurred "about a year ago." However, this is not accurate as the accepted shoulder injury occurred in February 2001, two years previously. He provided findings on examination and made a tentative diagnosis of a rotator cuff tear. However, Dr. Giori did not address the issue of

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<sup>3</sup> *Wiley Richey*, 49 ECAB 166 (1997); *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>4</sup> Dr. Giori, an attending Board-certified orthopedic surgeon, indicated in his March 4, 2003 report that appellant was a very robust individual who "obviously lifts weights." Also, as noted above, appellant apparently applied for and was tentatively accepted for, physically demanding positions with the FAA and INS while receiving compensation for total disability.

<sup>5</sup> *Wentworth M. Murray*, 7 ECAB 570 (1955).

whether appellant had any residual disability or medical condition causally related to his February 3, 2001 employment-related left shoulder strain.

Appellant also submitted notes from a physical therapist. However, physical therapists are not physicians under the Federal Employees' Compensation Act and are not qualified to provide the necessary medical evidence to met appellant's burden of proof.<sup>6</sup>

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits based on the opinion of Dr. Lotman that he had no continuing disability or medical condition causally related to his February 3, 2001 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 15, 2003 and October 23, 2002 are affirmed.

Issued: March 8, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>6</sup> *Jane A. White*, 34 ECAB 515 (1983).