United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 08-1438**
	)	**Issued: November 14, 2008**
DEPARTMENT OF DEFENSE, FINANCE & ACCOUNTING SERVICES, Columbus, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 1, 2007 and March 21, 2008 merit decisions, denying his claim for a period of employment-related total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was totally disabled for the period August 21 to September 7, 2007.

FACTUAL HISTORY

The Office accepted that in late 2004 appellant, then a 46-year-old document imaging technician, sustained a right shoulder strain and rotator cuff tear due to lifting heavy boxes and mail tubs. He began performing light-duty work for the employing establishment and the Office paid compensation for periods of disability.

On January 27, 2005 Dr. Robert A. Martin, an attending Board-certified orthopedic surgeon, performed a right shoulder arthroscopy with acromioplasty and superior labral repair. The surgery revealed that appellant had a partial-thickness tear of one centimeter in his right superior labrum and this tear was repaired during the procedure. On February 1, 2005 he returned to work for the employing establishment with restrictions of no lifting more than two pounds with his right arm. On April 20, 2007 Dr. Martin performed a repeat right shoulder arthroscopy with acromioplasty and debridement. The surgery repaired a tear of the right superior labrum.[1]

In June 2007, Dr. Martin recommended that appellant engage in physical therapy in the form of water therapy, which the Office authorized. On August 8, 2007 appellant returned to light-duty work which restricted him from reaching, lifting, pushing or pulling with his right arm.

On August 20, 2007 Dr. Martin stated that appellant reported having an immediate onset of worsening pain in his right shoulder after doing some adduction activities during water therapy. He indicated that a follow-up evaluation would take place after magnetic resonance imaging (MRI) scan testing was obtained. On August 20, 2007 Dr. Martin completed a note taking appellant off work for four to six weeks. Appellant stopped work on August 21, 2007 and filed a claim for compensation (Form CA-7) for wage loss beginning on August 21, 2007.

The findings of an August 29, 2007 MRI scan of appellant's right shoulder showed degenerative changes at the acromioclavicular joint region and distal supraspinatus tendinopathy and a small partial-thickness articular surface tear involving the distal-anterior supraspinatus enthesis. On September 5, 2007 Dr. Martin stated that the findings of the MRI scan testing were consistent with appellant having an "exacerbation of his pain and injury" after his therapy sessions a few weeks prior. He stated that appellant was doing better from a clinical standpoint and was ready to start therapy again. On September 7, 2007 appellant returned to light-duty work for the employing establishment.

On September 24, 2007 Dr. Martin indicated that appellant had been off work from August 21 to September 7, 2007 due to pain.

In an October 1, 2007 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that his disability for the period August 21 to September 7, 2007 was related to his accepted injury. It stated that appellant did not establish that he was unable to perform his light-duty work due to a material worsening of his accepted work-related condition.

[1] Dr. Martin indicated that there was "a little bit of fraying of the superior aspect of the right rotator cuff but no significant partial-thickness or certainly no full-thickness tearing." Both of appellant's surgical procedures were authorized by the Office.

In a September 25, 2007 report, Dr. James H. Rutherford, a Board-certified orthopedic surgeon and Office referral physician, described his findings on examination. He opined that appellant could perform light-duty work with no lifting over five pounds, no above-shoulder work and no repetitive pushing or pulling with the right arm.[2]

In an October 17, 2007 report, Dr. Martin stated that appellant reported having increasing problems in his right shoulder. He noted that appellant reported that he was progressing in therapy until he seemed to regress after one of the therapy visits. On August 20, 2007 appellant had reduced strength and motion of his right arm and pain radiating into his right wrist. Dr. Martin recommended that appellant remain off work and undergo MRI scan testing. He stated that appellant was taken off of work because "he was having difficulty with increasing pain and problems after an injury he had or exacerbation of an injury he had in therapy." Dr. Martin suspected that appellant had reinjured his rotator cuff through a muscle strain or sprain. He indicated that the MRI scan testing showed a partial tear of the rotator cuff tendon that now required a repeat arthroscopy of his right shoulder.

Appellant submitted a December 7, 2007 statement describing activities he performed during August 9, 15 and 20, 2007 therapy sessions, which caused increased pain in his right shoulder. The activities included moving plastic paddles, holding Styrofoam barbells underwater and having his therapist move his right arm in different directions.[3]

Appellant requested a telephonic hearing before an Office hearing representative. During the January 9, 2008 hearing, he testified that while attending physical therapy sessions in August 2007 he started to experience extreme pain in his right shoulder. He indicated that MRI scan testing taken after undergoing physical therapy showed a rotator cuff tear and asserted that Dr. Martin's reports established that he reinjured his arm while attending physical therapy.

In a January 22, 2008 report, Dr. Martin described appellant's medical history and recommended that he undergo a repeat arthroscopy of his right shoulder. On February 10, 2008 Dr. Jason David Eubanks, a Board-certified orthopedic surgeon who served as an Office medical adviser, indicated that he had reviewed the record. He stated that appellant had complained of increasing pain with physical therapy. Dr. Eubanks noted, however, that the pain described by appellant did not seem to represent a rotator cuff pathology. Appellant indicated that his description of pain in the right shoulder blade and shooting down his right arm was more typical of cervical pathology. Dr. Eubanks stated that the presence of a partial thickness rotator cuff tear on MRI scan testing is "neither here nor there" as many people with tendinisis go on to have a partial thickness tear with or without treatment. He noted that Dr. Rutherford described some decreased sensation in the fingers of appellant's right hand and indicated that he suspected that he might have some nonwork-related cervical pathology, such as spondylosis, radiculopathy or other nerve entrapment phenomenon, contributing to his pain. Dr. Eubanks opined that appellant's right shoulder condition needed further evaluation before the MRI scan and physical examination findings could be associated with the physical therapy sessions.

[2] Appellant indicated that he had decreased sensation on the fingers of his right hand.

[3] The record contains documents showing that appellant was scheduled for therapy sessions on those dates.

In a March 21, 2008 decision, the Office hearing representative affirmed the Office's October 1, 2007 decision. He indicated that Dr. Martin did not submit rationalized medical evidence showing that appellant had employment-related total disability for the period August 21 to September 7, 2007.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[6]

A recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[7] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[8] 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.[9]

[4] 5 U.S.C. §§ 8101-8193.

[5] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[7] 20 C.F.R. § 10.5(x).

[8] *Id.*

[9] *John R. Knox*, 42 ECAB 193, 196 (1990).

ANALYSIS

The Office accepted that in late 2004 appellant sustained a right shoulder strain and rotator cuff tear due to lifting heavy boxes and mail tubs. On January 27, 2005 Dr. Martin, an attending Board-certified orthopedic surgeon, performed a right shoulder arthroscopy with acromioplasty and superior labral repair. On April 20, 2007 Dr. Martin performed a repeat right shoulder arthroscopy with acromioplasty and debridement. The surgery repaired a tear of the right superior labrum. Appellant stopped work on August 21, 2007 alleging that he sustained employment-related total disability beginning that date. He returned to work for the employing establishment on September 7, 2007.

Appellant submitted an August 20, 2007 report in which Dr. Martin stated that he reported having immediate onset of worsening pain in his right shoulder after doing some adduction activities during water therapy. On August 20, 2007 Dr. Martin completed a note indicating that he was taking appellant off work for four to six weeks. On September 5, 2007 he stated that the findings of August 29, 2007 MRI scan testing were consistent with appellant having an "exacerbation of his pain and injury" after his therapy sessions a few weeks prior.[10] On September 24, 2007 Dr. Martin indicated that appellant had been off work from August 21 to September 7, 2007 because he stated that he was experiencing a great deal of pain. On October 17, 2007 he noted that appellant was taken off of work on August 20, 2007 because "he was having difficulty with increasing pain and problems after an injury he had or exacerbation of an injury he had in therapy." Dr. Martin stated that he suspected that appellant had reinjured his rotator cuff through a muscle strain or sprain.

The Board notes that Dr. Martin has not asserted that appellant sustained a recurrence of total disability on or after August 21, 2007 due to worsening of the accepted rotator cuff tear or sprain of his right shoulder. His reports and the other medical evidence of record do not indicate that appellant sustained a spontaneous recurrence of these conditions without an intervening injury or new exposure.[11]

Rather, Dr. Martin noted that appellant sustained total disability beginning August 21, 2007, due to a consequential employment injury, *i.e.*, an injury arising from Office-authorized physical therapy for his right shoulder.[12] However, he has not provided rationalized medical evidence supporting such injury or disability and therefore his reports are of limited probative value on the relevant issue of the present case.[13] Dr. Martin did not provide any notable

[10] The findings of August 29, 2007 MRI scan testing of appellant's right shoulder showed degenerative changes at the acromioclavicular joint region and distal supraspinatus tendinopathy and a small partial-thickness articular surface tear involving the distal-anterior supraspinatus enthesis.

[11] *See supra* note 7 and accompanying text. In fact, the tear observed in the August 29, 2007 MRI scan testing is in a different area of the right rotator cuff process than the tears that Dr. Martin operated on. Moreover, appellant has not alleged that a change in his light-duty work caused a recurrence of total disability. *See supra* note 8 and accompanying text.

[12] *See supra* note 9 and accompanying text. It does not appear that appellant ever formally filed a claim for such an injury. The record reflects that appellant's August 2007 physical therapy sessions were authorized by the Office.

[13] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

description of the physical therapy activities implicated by appellant, provide detailed objective examination findings or explain the mechanism through which the physical therapy activities could have caused injury,[14] nor did he explain why appellant's reported symptoms and claimed total disability between August 21 and September 7, 2007, were not related to some nonwork-related condition.[15]

In fact, Dr. Martin appears to have placed appellant off work beginning August 21, 2007 due to his subjective complaints of increased pain. The Board has held that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between a claimed condition and employment factors.[16] For these reasons, appellant has not established that he sustained employment-related total disability for the period August 21 to September 7, 2007.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained employment-related total disability for the period August 21 to September 7, 2007.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 21, 2008 and October 1, 2007 decisions are affirmed.

Issued: November 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[14] Dr. Martin suggested that the right supraspinatus tear seen on the August 29, 2007 MRI scan was caused by the August 2007 physical therapy activities, but he did not provide any explanation for this apparent opinion.

[15] On February 10, 2008 Dr. Eubanks, a Board-certified orthopedic surgeon, who served as an Office medical adviser, indicated that appellant's complaints in August 2007, including pain shooting down his right arm, were more typical of cervical pathology than a rotator cuff pathology. The Office has not accepted an employment-related cervical condition.

[16] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

Michael E. Groom, Alternate Judge, concurring:

I join in the finding by the majority that appellant did not submit sufficient medical opinion evidence to establish that his disability commencing August 21, 2007 constituted a recurrence of his accepted injury. However, the statements provided by appellant and the medical evidence submitted in support of his claim never attributed his disability to a "spontaneous recurrence" of his medical condition. In this respect, the claim was not properly adjudicated below. Rather, appellant submitted a *prima facie* claim that his disability arose from a consequential injury sustained while undergoing approved physical therapy during August 2007. Appellant attributed his disability to physical activities during water therapy. Dr. Martin noted an onset of worsening pain to the right shoulder following adduction activities during therapy. A follow-up MRI scan revealed a partial-thickness tear involving the distal-anterior supraspinatus muscle. It is well established that letters and statements from an appellant in amplification and expansion of a claim are as much part of a claim as the claim form itself.[1] Whether or not a separate claim form should have been submitted by appellant, the evidence of record presents a claim for compensation due to a consequential injury.[2] Technical requirements of pleading are inconsistent with the remedial purposes of the statute.[3] Proceedings under the Federal Employees' Compensation Act are not adversarial in nature.[4] On return of the record, the Office should further consider the evidence and adjudicate this issue.

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

[1] *See Josephine B. Lampariello*, 8 ECAB 626 (1956); *Peter Abate*, 8 ECAB 539 (1956).

[2] *See Wilfred M. Hamilton*, 41 ECAB 524 (1990).

[3] *Id. See also Frederick A. Hill*, 7 ECAB 611 (1955).

[4] 20 C.F.R. § 10.121.