

¹ 5 U.S.C. § 8101 *et seq.*

accepted his claim for sprain of back, lumbar region and sprain of shoulder and upper arm, acromioclavicular, right. It later expanded its acceptance of the claim to include tendinitis of the right shoulder. Appellant received compensation for temporary total disability on the periodic rolls.

A magnetic resonance imaging (MRI) scan of the right shoulder, obtained on March 10, 2008, showed tendinosis of the supraspinatus without rotator cuff tear and chronic bursitis of the subacromial/subdeltoid bursa.

Dr. Ravi Kumar Ponnappan, the Board-certified orthopedic surgeon attending appellant's low back condition, examined appellant on April 22, 2010 and diagnosed L4-5 and L5-S1 stenosis with aggravation of radiculopathy, right lower extremity.

Dr. Bradford S. Tucker, the Board-certified orthopedic surgeon attending appellant's right shoulder condition, examined appellant that same day. He found a mildly positive Hawkins' test maneuver and diagnosed right shoulder chronic rotator cuff tendinosis. Dr. Tucker noted that appellant had been at maximum medical improvement since September 11, 2008.

OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Kenneth P. Heist, an osteopath specializing in orthopedic surgery, who examined appellant on November 15, 2011. Dr. Heist related the history of appellant's December 2007 work injury and medical treatment. He noted appellant's current complaints, including low back pain radiating into the right lower extremity. Appellant also had pain in his right shoulder and difficulty carrying heavy objects with his right upper extremity.

After reviewing appellant's medical record and describing his findings on physical examination, Dr. Heist diagnosed: (1) thoracic and lumbar sprains; (2) right shoulder sprain and; (3) preexisting degenerative disease of the lumbar spine and tendinitis of the right shoulder. It was his opinion that appellant's current complaints were related to his preexisting degenerative disease of the lumbar spine and not related to injuries sustained in the December 2007 slip and fall at work. "[Appellant] sustained sprains of his low back and right shoulder that I feel have since resolved. He has no injury from that injury."

Dr. Heist added that his clinical examination showed restriction of motion attributable to degenerative changes. There were no signs of acute lumbar radiculopathy or gross muscular weakness, atrophy or circulatory difficulty involving the lower extremities. All diagnostic tests were negative for pathology. Dr. Heist cleared appellant to return to full-time work with moderate work restrictions due to his preexisting lumbar degenerative disease.

On January 20, 2012 OWCP issued a notice of proposed termination of compensation. It found that the weight of the medical opinion evidence rested with Dr. Heist and established that the accepted conditions of lumbar sprain and right shoulder sprain had ceased or were longer injury related, based on a negative examination and lack of objective findings. "The weight of medical evidence supports that you have made a full recovery from the work-related injury of December 6, 2007."

Dr. Tucker examined appellant on February 14, 2012. He noted that he had seen appellant for several years, and appellant had always had chronic pain in his right shoulder. "Though [appellant] continues to have problems with his shoulder, it has never really gotten better, but he has no new injuries." After describing his findings on physical examination, Dr. Tucker diagnosed right shoulder chronic rotator cuff tendinosis. He observed that because appellant was complaining of continued pain, despite conservative treatment never getting any better, it was possible that the tendinosis had progressed to a tear.

An MRI scan obtained on February 29, 2012 showed findings consistent with a superior labral tear from anterior to posterior (SLAP); mild rotator cuff tendinosis with some bursal surface fraying distal supraspinatus; no discrete focal or full-thickness tendon tear; and tiny subacromial spur and mild acromioclavicular osteoarthritis.

In an April 16, 2012 supplemental report, Dr. Heist reviewed the recent MRI scan. There was no evidence of an acute rotator cuff tear. Dr. Heist clarified that his November 15, 2011 physical examination of appellant did document some right shoulder restriction of motion, which he attributed to degenerative changes. He added that there were multiple orthopedic examinations performed from the time of the December 2007 fall and his examination in November 2011, and these examinations were also negative for pathology and a reported diagnosis of right shoulder sprain and tendinitis. Further, there were no physical findings on examination from the time of the accident until the present. Dr. Heist's determination remained the same.

Dr. Tucker examined appellant again on April 19, 2012. He noted that appellant had chronic rotator cuff capsular tendinitis and was referred for an MRI scan to rule out a partial tear. The MRI scan, Dr. Tucker stated, showed rotator cuff tendinosis with no obvious partial tears or full-thickness tears. There was a little increased signal, which "just looks like degenerative." Dr. Tucker diagnosed right shoulder chronic rotator cuff tendinosis.

In a decision dated May 11, 2012, OWCP terminated appellant's compensation benefits. It found that the weight of the medical opinion evidence rested with Dr. Heist and established that the accepted medical conditions of lumbar sprain and right shoulder sprain had ceased or were no longer injury related.

Appellant filed a request for reconsideration, which that OWCP received on August 16, 2012. OWCP also received, among other things, an April 19, 2012 attending physician's form report completed by Dr. Tucker who diagnosed rotator cuff tendinosis and indicated with an affirmative mark that this condition was caused or aggravated by the December 2007 employment injury.

In a nonmerit decision dated September 14, 2012, OWCP denied appellant's reconsideration request. It explained that he submitted no new medical evidence to refute the termination of benefits and provided no new legal argument.

On appeal, appellant argues that there is a conflict of medical opinion with respect to his right shoulder. He also argues that Dr. Heist mentioned only a lumbar degenerative disc and nothing about his right shoulder and right wrist.²

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 It may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a traumatic low back injury on December 7, 2007 when he slipped and fell at work. It accepted his claim for sprain of back, lumbar region. It is therefore OWCP's burden to establish by the weight of the medical opinion evidence that appellant no longer suffers from this lumbar sprain.

OWCP did not accept that appellant's other diagnosed low back conditions were related to his December 2007 fall at work. For example, Dr. Ponnappan, the orthopedic surgeon attending appellant's low back condition, diagnosed L4-5 and L5-S1 stenosis with aggravation of radiculopathy, right lower extremity. These are not accepted medical conditions, and OWCP bears no burden of proof with respect to them. The only burden OWCP has with respect to appellant's low back is to establish that he no longer suffers from the accepted lumbar sprain.

When Dr. Ponnappan examined appellant in April 2010, he did not diagnose a lumbar sprain. When Dr. Heist, the second opinion osteopath, examined appellant in November 2011, he explained that the low back sprain sustained from the December 2007 fall at work had resolved with no residuals. Appellant's current complaints were related instead to his preexisting degenerative disease of the lumbar spine. There were no signs on examination of gross muscular weakness, atrophy or circulatory difficulty involving the lower extremities. There were no signs of acute lumbar radiculopathy. Appellant's restrictions were related not to a lumbar sprain in 2007 but to his preexisting lumbar degenerative disease. There is no medical opinion to the contrary.

OWCP provided Dr. Heist with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual history. Dr. Heist's conclusion appears sound, rational and logical and is supported with sufficient medical rationale

² OWCP accepted no right wrist condition.

³ 5 U.S.C. § 8102(a).

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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

that it is accorded the weight of the medical evidence. As the weight of the medical evidence establishes that the accepted sprain of back, lumbar region, has resolved with no residuals, the Board finds that OWCP has met its burden to justify the termination of compensation for this medical condition. The Board will therefore affirm OWCP's May 11, 2012 decision on the issue of lumbar sprain.

OWCP also accepted appellant's claim for sprain of shoulder and upper arm, acromioclavicular, right. When Dr. Tucker, the orthopedic surgeon attending appellant's right shoulder condition, examined appellant in April 2010, he did not diagnose a right shoulder sprain. When Dr. Heist examined appellant in November 2011, he explained that appellant had no residuals of the accepted right shoulder sprain, which had since resolved. He clarified in April 2012 that he did find some right shoulder restriction of motion, but he attributed this to degenerative changes, as reported on the February 29, 2012 MRI scan. Dr. Heist added that multiple orthopedic examinations reported no diagnosis of right shoulder sprain and there were no physical findings from the time of the accident until the present.

For the reasons stated earlier, the Board finds that Dr. Heist's opinion constitutes the weight of the medical evidence on the issue of right shoulder sprain and establishes that the accepted right shoulder sprain has resolved with no residuals. The Board finds that OWCP has met its burden of justifying the termination of compensation for this medical condition. The Board will therefore affirm OWCP's May 11, 2012 decision on the issue of right shoulder sprain.

OWCP accepted appellant's claim for more than lumbar and right shoulder sprains. It expanded its acceptance to include tendinitis of the right shoulder. When Dr. Tucker examined appellant in April 2010, he found a mildly positive Hawkins' test maneuver and diagnosed right shoulder chronic rotator cuff tendinosis. When Dr. Heist examined appellant in November 2011, he diagnosed "preexisting degenerative disease of the lumbar spine and tendinitis right shoulder." In his discussion, he acknowledged that appellant sprained his right shoulder, but he did not directly address the accepted tendinitis. Dr. Heist did state that all diagnostic tests were negative for pathology.

In February 2012, however, Dr. Tucker again diagnosed right shoulder chronic rotator cuff tendinosis. Having seen appellant for several years, he noted that appellant had always had chronic pain in his right shoulder. Dr. Tucker added that an MRI scan of the right shoulder documented appellant's tendinosis.

The Board finds that OWCP has not met its burden to terminate compensation for the accepted condition of tendinitis of the right shoulder. There appears to be a conflict between Dr. Tucker, the attending orthopedic surgeon, and Dr. Heist, the second opinion osteopath, concerning whether appellant continues to suffer from the accepted condition. Dr. Heist's observation that there were no physical findings on right shoulder examination from the time of the accident until the present does not appear entirely consistent with Dr. Tucker's April 22, 2010 report, which found a mildly positive Hawkins' maneuver. Further, the March 10, 2008 MRI scan showed tendinosis of the supraspinatus. The February 29, 2012 MRI scan showed

findings consistent with mild rotator cuff tendinosis. Dr. Tucker's February 14, 2012 report continued to support the diagnosis of right shoulder chronic rotator cuff tendinosis.⁶

As a question still remains whether appellant continues to suffer from the accepted right shoulder condition, the Board will reverse OWCP's May 11, 2012 decision on the issue of tendinitis of the right shoulder.

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

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁷ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.⁹ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS -- ISSUE 2

OWCP received appellant's reconsideration request on August 16, 2012, within one year of the May 11, 2012 decision terminating his compensation. Appellant's request is therefore timely. The question for determination is whether this request meets at least one of the three standards for obtaining a merit review of his case.

⁶ Neither Dr. Heist nor OWCP made clear the difference, if any, between tendinitis and tendinosis.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606.

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608.

Appellant's reconsideration request does not show that OWCP erroneously applied or interpreted a specific point of law. He identified no specific point of law and did not show how OWCP erroneously applied or interpreted it, nor does appellant's reconsideration request advance a relevant legal argument not previously considered by OWCP. Appellant offered no argument at all.

Instead, appellant submitted additional evidence. The issue in the case is a medical one: whether he continues to suffer residuals of the accepted medical conditions. The only evidence appellant submitted that was relevant to this issue was Dr. Tucker's April 19, 2012 attending physician's report, which supported a diagnosis of right shoulder tendinosis caused or aggravated by the December 2007 employment injury. This information, however, is repetitious and cumulative of the information contained in reports Dr. Tucker previously submitted and OWCP previously considered. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.¹¹

Because appellant's reconsideration request does not meet at least one of the three standards for obtaining a merit review of his case, the Board finds that OWCP properly denied that request. The Board will therefore affirm OWCP's September 14, 2012 decision.

CONCLUSION

The Board finds that OWCP has met its burden to justify the termination of compensation for the accepted conditions of lumbar and right shoulder sprain. OWCP has not met its burden, however, to justify the termination of compensation for the accepted condition of right shoulder tendinitis. The Board further finds that it properly denied appellant's reconsideration request.

¹¹ *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed on the issues of lumbar and right shoulder sprain but is reversed on the issue of right shoulder tendinitis. OWCP's September 14, 2012 decision is affirmed.

Issued: July 12, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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