

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMY RIGMAIDEN and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Oakdale, La.

*Docket No. 96-1214; Submitted on the Record;
Issued July 21, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained a recurrence of disability commencing on or after October 31, 1994 causally related to his accepted August 27, 1987 left shoulder injury.

The Office of Workers' Compensation Programs accepted that on August 27, 1987 appellant, then a 34-year old correctional officer, sustained a left shoulder strain, left elbow strain, a left rotator cuff impingement, and left ulnar neuritis. He returned to light duty as a front entry officer/mobile patrol officer on November 8, 1992. On January 13, 1993 the Office determined that the position of front entry officer/mobile patrol officer fairly and reasonably represented appellant's wage-earning capacity as he had been reemployed with retained earnings, and that therefore he had no loss of wage-earning capacity.¹ On October 31, 1994 appellant stopped work and took leave; on January 26, 1995 he filed a Form CA-8 claiming compensation for wage loss commencing January 15, 1995. On February 7, 1995 appellant's request for disability retirement was approved by the Office of Personnel Management.

In support of his claim appellant submitted a January 25, 1995 report from Dr. Michael C. Genoff, a Board-certified hand surgeon, which noted that appellant was seen in his office on January 19, 1995, that he was complaining of left greater than right shoulder pain and spasms of the shoulder muscles, and that appellant had tenderness to palpation over the antero and postero lateral acromion with palpable trigger points in the trapezius and supraspinatus muscles. Dr. Genoff referred appellant to his former Board-certified treating

¹ The Board notes that this decision is not before the Board on the present appeal as the Board's jurisdiction extends only to final decisions of the Office rendered within one year of the date of the filing of an appellant's appeal; *see* 20 C.F.R. § 501.3(d)(2). As appellant's appeal was filed on March 5, 1996 the only final decisions before the Board are those rendered on and after March 5, 1995, *i.e.*, the May 3, 1995 denial of appellant's recurrence of disability claim and subsequent December 28, 1995 decision denying modification of the May 3, 1995 decision.

orthopedic surgeon, Dr. Michael Brunet at Tulane. Dr. Genoff also completed a Form CA-20a attending physician's supplemental report in which he diagnosed left shoulder impingement syndrome, described his findings as "diffuse trigger points about left shoulder girdle," indicated by checking "yes" that appellant's condition was due to the injury for which compensation was claimed, and indicated by checking "no" that appellant was not totally disabled for his usual work.

Appellant also submitted a July 29, 1994 letter from human resources indicating that at that time he had completed sufficient time to be eligible for disability retirement, and the human resource manager suggested that appellant seriously consider applying for disability retirement. A September 9, 1994 agency certification of accommodation efforts indicated that appellant was not reassigned to any vacant position at the same grade or pay level and tenure as there were no vacant positions at the same grade or pay level to which he could be reassigned. The human resource manager indicated that all institutional positions required employees to be able to physically restrain inmates.

Appellant further submitted a September 12, 1994 supervisor's statement which indicated by checking "no" that appellant's attendance had not stopped for apparent medical reasons, but which stated that appellant had been in a temporary light-duty assignment intended to be for the time he needed to recover, but that his physician believed appellant's injury to be permanent and did not anticipate that appellant would ever recover to the point where he could resume full duties of his present position.

Additionally submitted was a February 8, 1995 report from Dr. Brunet indicating that appellant was seen for a follow up of his left shoulder with increasing symptoms. Dr. Brunet stated that as of August 1994 appellant had been medically disabled relative to the left shoulder symptomatology he was experiencing, and that appellant had had two months of occupational therapy for the shoulder which failed to improve his symptoms. Dr. Brunet noted that physical examination revealed overt rotator cuff findings but no true impingement findings *per se*, and no high riding of the humeral head against the acromion was revealed upon x-rays. Dr. Brunet opined: "Due to the increased weakness that is apparent on his clinical exam[ination] and increasing symptoms, I am concerned that his rotator cuff may be starting to break down as the source of his increased pain."

Appellant also submitted an April 2, 1991 operative summary, a December 23, 1992 impairment evaluation and record review by Dr. L. Lazaro, III, a Board-certified hand surgeon, and an August 31, 1994 report from Dr. Lazaro which stated that he would not feel that appellant would move towards any significant improvement, that he did not anticipate that appellant would overcome the impairment previously assigned, but would remain static, and that appellant was at maximum medical improvement. Dr. Lazaro stated that he did not feel appellant would go on to a full recovery, that appellant would have to restrict himself within his physical capabilities, and that appellant was left with the previously assigned impairment and earlier restrictions at the time of original discharge. Dr. Lazaro stated that, after talking with appellant and going over his condition that date, looking at the position description and the suggestion of retirement, he would support that appellant go ahead and consider taking the supervisor's advice at that time.

Dr. Lazaro stated that he would not like to see appellant put in a position where he would be “pushed into an injury situation and a down hill condition.”

By decision dated May 3, 1995, the Office rejected appellant’s recurrence of disability claim finding that the evidence of record failed to demonstrate a change in the nature and extent of the injury-related condition or a change in the nature of the light-duty job requirements which would entitle appellant to compensation for lost wages on or after October 31, 1994. The Office noted that appellant took leave from October 31, 1994 through January 14, 1995 and filed for compensation commencing January 15, 1995.

On December 2, 1995 appellant requested reconsideration and submitted a July 6, 1995 form report from Dr. Brunet. Dr. Brunet answered “November 1, 1994” to the question of the date appellant ceased work because of disability, noted present condition as “shoulder pain,” and diagnosed “impingement syndrome left shoulder; status post arthroscopy arthrotomy [with] acromioplasty and repair of deltoid tendon left shoulder April 27, 1990.” Dr. Brunet noted that appellant was last seen June 5, 1995, that he was unimproved, and he checked “yes” to the questions of whether appellant was then totally disabled for his own occupation or for any occupation. Dr. Brunet checked “never” to the question of when appellant would be able to resume work. In a June 5, 1995 narrative report, Dr. Brunet reviewed appellant’s medical history, noted that his symptoms had more recently worsened, and indicated that they were worried about breakdown/failure of the rotator cuff. Dr. Brunet noted that a February 1995 magnetic resonance imaging (MRI) scan showed no rotator cuff tear which reassured appellant, and opined that his condition was probably pretty much status quo and would not change with time. Dr. Brunet opined that appellant would not get any worse but certainly would not improve, and he opined that appellant had a permanent impairment of his left upper extremity.

Appellant also submitted a July 6, 1995 report from Dr. Brunet which recommended that enrollment in a pain clinic might have some benefit for appellant, as he had nothing else to offer him.

Appellant additionally submitted an October 16, 1995 report from Dr. Miguel Garcia, a Board-certified internist working in rehabilitation medicine, which stated that appellant had to retire in July 1995 on the advice of his superiors because he could not physically defend himself if the need arose. Dr. Garcia indicated that appellant stated that pain was present all the time, that he could not sleep at night, and that he was depressed because he could not work. Physical examination was reported as showing severe spasm of the trapezius bilaterally, more severe on the left, paraspinal cervical area spasm, but good range of motion when appellant used effort. Dr. Garcia noted tenderness to palpation over the left subacromial area and the left occipital group, noted diminished shoulder range of motion in internal and external rotation due to pain, and noted multiple trigger points in the left trapezius area, “the levator scapula, subacromial area, paraspinal, cervical.” Dr. Garcia stated that all of those trigger points made radiation of the pain to all areas not only in the area of tenderness. Dr. Garcia diagnosed depression, myofascial pain syndrome, and left shoulder problems, and recommended analgesics, an antidepressant, iontophoresis in the left subacromial area, rotator cuff exercises, and a referral to a psychologist. He indicated that appellant’s prognosis was guarded, and indicated that the longer the syndrome was in place, the more difficult it was to take care of.

Appellant further submitted duplicates of evidence previously of record.

By decision dated December 28, 1995, the Office denied modification of the May 3, 1995 decision finding that the evidence submitted was not sufficient to warrant modification. The Office found that the medical evidence submitted did not establish that there had been a material change in appellant's injury-related condition.

The Board finds that appellant has failed to establish that he sustained a recurrence of total disability commencing on or after October 31, 1994, causally related to his accepted August 27, 1987 left shoulder injury.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative, and substantial evidence and to show that he cannot perform the light duty.² As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.³ Appellant has not met that burden in this case.

In support of his recurrence of disability claim, appellant submitted a January 25, 1995 report from Dr. Genoff which merely reported his symptoms, but did not discuss how they had changed from his earlier complaints or how they were disabling for his light-duty position. This report, therefore, does not demonstrate a change in the nature or extent of his injuries. A form report completed at that time merely provided a diagnosis previously of record and opined "yes" to the question of causal relationship. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causal relationship.⁴ Appellant's burden includes the necessity of furnishing an affirmative opinion from a physician who supports his conclusion with sound medical reasoning. As Dr. Genoff did no more than check "yes" to a form question, his opinion on causal relationship is of little probative value and is insufficient to discharge appellant's burden of proof to establish an injury-related change in the nature or extent of his partial disability. Further, the Board notes that Dr. Genoff checked "no" to the question of whether appellant was totally disabled for his usual work, which does not support appellant's recurrence claim.

Appellant submitted a February 8, 1995 report from Dr. Brunet which stated that as of August 1994 appellant was medically disabled due to his left shoulder, but the report failed to address why, if appellant was totally disabled at that time, he continued to work until October 31, 1994 without reported problems. This discrepancy diminishes the probative value of the report such that it is insufficient to establish appellant's recurrence claim. The Board also notes that the

² *Terry R. Hedman*, 38 ECA 222, 227 (1986).

³ *Id.*

⁴ *E.g., Lillian M. Jones*, 34 ECAB 379 (1982).

report is speculative about whether appellant's rotator cuff was starting to break down, which further diminishes its probative value.⁵ Further, this report includes no objective evidence of a change in appellant's injury-related condition, which is required to establish a recurrence of disability after an appellant has returned to light duty.

Appellant also submitted several reports from Dr. Lazaro, none of which identified a material change in his partially disabled condition, but which instead, supported that appellant's partially disabled condition was static and would remain so. These reports, therefore, do not support a material change in appellant's partially disabled condition.

Additionally submitted were employing establishment reports, none of which actually stated that appellant was removed from his light-duty position due to a material worsening of his partially disabled condition, or due to a change in his light-duty requirements. Instead these reports merely suggested that appellant was eligible for disability retirement, which was his choice. These reports, therefore, do not support appellant's recurrence claim.

Accordingly, the May 3, 1995 Office decision was proper under the law and facts of the case.

Thereafter appellant submitted another form report without explanation or rationale, which merely gave November 1, 1994 as a date when appellant ceased work due to his disability. No material change in his partially disabled condition was identified. Subsequent disability for all work was indicated but explanation and rationale was lacking, as were any descriptions of material changes in appellant's condition or in his light-duty requirements which precluded his performance of those duties. Consequently, this form report also in insufficient to support appellant's recurrence claim. A subsequent narrative report was vague and speculative on the status of appellant's rotator cuff, and included MRI evidence that the rotator cuff was not torn, which did not support that there was a material change in appellant's partially disabled condition. Consequently these reports are not adequate to establish appellant's recurrence claim.

Dr. Garcia's October 16, 1995 report, merely discussed appellant's symptomatology at that time and did not discuss how or when it had changed from what it was before. Consequently, this report also fails to support that appellant experienced a material change in the nature of his partially disabled condition causing a recurrence of total disability.

As nothing further was submitted to establish appellant's recurrence of disability claim, he has failed to meet his burden of proof.

⁵ See *Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated December 28 and May 3, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 21, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member