U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY L. ZEMAN and U.S. POSTAL SERVICE,
POST OFFICE, Madison, Wis.

Docket No. 96-1340; Submitted on the Record;
Issued March 26, 1998

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant had any disability after May 3, 1994, causally related to his January 21, 1994 accepted employment condition of temporary aggravation of preexisting scapulothoracic syndrome.

Appellant's request for an appeal to the Board was postmarked March 21, 1996. Therefore, the Board's jurisdiction is limited to consideration of the November 1, 1995 Office of Workers' Compensation Programs decision denying appellant's claim for injury residuals after May 3, 1994. The Board may not now reopen and reconsider the Office's June 21, 1994 decision accepting appellant's claim and determining the May 3, 1994 date of injury cessation.[1]

On June 21, 1994 the Office accepted that appellant sustained temporary aggravation of preexisting scapulothoracic syndrome which ceased by May 3, 1994.

Appellant had filed CA-8 claims for compensation for intermittent days during the periods April 30 through May 13, 1994, May 14 through 27, 1994, July 4 through 13, 1994 and August 1, 1994. He also submitted multiple medical bills for chiropractic treatment, for treatment after May 3, 1994 and continuing, and outstanding pharmacy bills.

In support of his claim of continuing disability after May 3, 1994 appellant submitted a May 3, 1994 prescription from Dr. William M. Hebble, a Board-certified orthopedic surgeon, stating that he should continue current restrictions until further notice. A May 24, 1994 report from Dr. Hebble noted that he last saw appellant on May 3, 1994, that he "seemed to be improving," and that he was discharged at that point. Dr. Hebble did not explain the need for continuing work restrictions after he discharged appellant. Appellant also submitted a May 19, 1994 report from Dr. Kimball S. Fuiks, a Board-certified neurosurgeon, which noted that appellant's initial injury took place in May 1993, that he was diagnosed as scapular outlet

[1] *See* 20 C.F.R. § 501.3(d)(2).

syndrome, that he continued to complain of posterior cervical pain radiating into the right medial scapula and along the posterolateral aspect of his right proximal arm, that he had numbness and tingling involving all fingers of the right hand, and that the pain was worsened by activities and alleviated by rest. Dr. Fuiks recommended continued light duty. On June 7, 1994 Dr. Fuiks recommended that appellant remain off work until June 13, 1994 due to recovery from cervical radiculopathy. A June 7, 1994 narrative diagnosed appellant as having cervical degenerative disc disease. A June 28, 1994 follow-up, however, indicated that appellant was much improved.

An August 1, 1994 occupational medicine report diagnosed appellant as having chronic myofascial pain of the right shoulder medial scapulature, and indicated that he could return to work with lifting restrictions. Date of injury was noted as January 21, 1994. Another August 1, 1994 report from Dr. Kenneth L. Klein, a physical medicine and rehabilitation specialist, noted appellant's history of his May 1993 shoulder injury and his January 21, 1994 increased symptomatology, detected increased shoulder pain on activities above 90 degrees of abduction and on external rotation, and diagnosed chronic rotator cuff tendinitis. Resting the rotator cuff and avoidance of over the shoulder activities was recommended and Dr. Klein referred appellant for psychological evaluation for chronic pain management. Reports dated September 1 and November 1, 1994 stated similarly and noted improvement. Dr. Klein discharged appellant on December 30, 1994. On January 9, 1995 Dr. Michael Kaye, a psychologist, found no psychological restrictions.

Appellant also submitted multiple chiropractic reports from John G. Schoenenberger, a chiropractor. A February 18, 1994 report noted that x-rays were not taken and that he was going from previous x-ray analysis, and noted appellant's diagnoses as: "E927 + 839.08 + 723.2 + 729.2." A March 16, 1995 letter from Dr. Schoenenberger stated that he diagnosed cervical subluxation and right shoulder rotator cuff injury, that he coded subluxation on his billing, and that x-rays were taken by appellant's medical doctor's clinic. A March 25, 1994 report did not include x-rays and noted the diagnoses "E927 + 839.06 + 840.4." A May 10, 1994 report did not include x-rays and again noted some numerical codes of certain diagnoses.

On June 15, 1995 the Office determined that a conflict in medical opinion evidence existed among appellant's treating physicians, and it referred appellant for a "referee examination." The Board notes that a conflict in medical opinion evidence can only occur between an appellant's physician and a physician making an examination for the United States, which was not evident in this case.[2] Consequently, the Office's referral merely constitutes the acquisition of a second opinion evaluation.

By report dated August 1, 1995, Dr. David D. Mellencamp, a Board-certified orthopedic surgeon, noted that appellant's examination was essentially normal except for some mid arm hypesthesia on the right, and he speculated that appellant "may have had a mild shoulder strain." Dr. Mellencamp stated that he could not address the diagnosis of scapulothoracic syndrome, and he opined that appellant's neck symptoms were a temporary aggravation of his preexisting

[2] The Federal Employees' Compensation Act at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

degenerative disc disease of his cervical spine. Dr. Mellencamp speculated that appellant's January 1994 condition was a temporary disability and "could have ended at least 12 weeks post-injury, that is in the March/April of 1994." He further opined that appellant needed no treatment at that point.

By decision dated November 1, 1995, the Office rejected appellant's claim for any medical condition after May 3, 1994, finding that the weight of the medical evidence established that appellant's accepted condition ceased by May 3, 1994, and that subsequently submitted medical evidence was vague and equivocal with regard to diagnosis and the relationship with appellant's employment.

The Board finds that the medical evidence submitted for the period after May 3, 1994 does not establish that appellant continued to have disability due to his accepted condition of temporary aggravation of preexisting scapulothoracic syndrome during that period.

After the Office meets its burden of proof to terminate compensation benefits, the burden of proving continuing disability shifts to the employee claiming injury residuals. In this case, the Office's decision determining the date of cessation of the accepted condition is not now before the Board on this appeal due to jurisdictional limitations. Therefore, the Board's review is limited to the issue of whether appellant has established that he continued to suffer from injury residuals after the date of cessation determined by the Office. An individual who claims continuing disabling injury residuals or a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[3] Causal relationship is a medical issue and can be established only by medical evidence.[4]

In the present case, none of the medical evidence submitted by appellant contains such rationalized medical opinion. Dr. Hebble's reports state that appellant's work restrictions should be continued but fail to attribute these limitations specifically to the accepted condition of temporary aggravation of preexisting scapulothoracic syndrome, as opposed to the limitations being prophylactic against further injury due to appellant's preexisting cervical degenerative disc disease or due to his 1993 injury. He stated that appellant was improving and he discharged him from care. These reports do not support continued disability due to appellant's temporary aggravation of preexisting scapulothoracic syndrome.

Dr. Fuiks discussed appellant's 1993 injury and diagnosed appellant's condition at the present time as cervical radiculopathy, a condition not accepted by the Office as being employment related. His supplemental reports added nothing further relating appellant's

[3] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[4] *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

continuing problems to the accepted condition of temporary aggravation of preexisting scapulothoracic syndrome. Consequently these reports do not support that appellant continues to be disabled due to his accepted temporary aggravation condition.

Dr. Klein's reports diagnosed chronic rotator cuff tendinitis, another condition not accepted by the Office as being employment related, and he recommended work restrictions on that basis. These reports also do not support that appellant continues to be disabled due to temporary aggravation of scapulothoracic syndrome.

Dr. Kaye's report does not even address appellant's work injuries, and hence it is not probative on the issue of whether appellant continues to suffer injury residuals.

Further, the multiple reports from Dr. Schoenenberger do not constitute probative medical evidence as he cannot be considered to be a physician under the Act. Section 8101(2) of the Act provides that the term "'physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."[5] In this case, none of Dr. Schoenenberger's reports included x-rays demonstrating the presence of a subluxation, such that he cannot be considered to be a physician under section 8101(2) of the Act. Consequently, his reports have no probative value.

Additionally, the Office's second opinion physician, Dr. Mellencamp did not support that appellant continued to suffer injury residuals of his accepted employment aggravation. As none of the medical evidence submitted supports that appellant continues to suffer disabling residuals of his temporary aggravation of preexisting scapulothoracic syndrome, he has failed to establish his claim.

[5] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 1, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 26, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member