

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVA W. GONZALES and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

*Docket No. 97-376; Submitted on the Record;
Issued October 15, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on October 23, 1995.

On September 14, 1992 appellant, then a 42-year-old distribution clerk, filed a claim of traumatic injury alleging that on September 12, 1995 she tried to pick up a package from a hamper which she felt was too heavy. In the process of moving several other packages in order to see the addresses, appellant incurred pain in both arms, but mostly her right arm and shoulder. The Office accepted appellant's case for right shoulder strain.

On September 14, 1992 Dr. Donald G. Roberts, a family practitioner at the Medical Centers of Colorado, diagnosed a strain of the shoulder.

Appellant was referred to Dr. Joan K. Szynal, who is Board-certified in physical medicine and rehabilitation, for continued treatment, which included physical therapy and a pain management clinic from October 1992 to August 1993. In a February 8, 1993 report, Dr. Szynal stated that the neurological examination was negative and the range of motion of the shoulder was excellent. Dr. Szynal stated that she thought appellant had some evidence of a mild shoulder strain and should be on some type of mild permanent restrictions. Dr. Szynal stated that maximum medical improvement had been reached on April 8, 1993. In an April 8, 1993 report, Dr. Szynal stated that there were no objective findings regarding appellant's condition, but that her complaints of pain were continuous.

Because of the lack of objective findings to support continuing residuals from the work injury, by letter dated March 22, 1994, the Office requested a second opinion of Dr. Willard B. Schuler, an orthopedic surgeon, and enclosed questions and a statement of accepted facts.

By report dated April 11, 1994, Dr. Schuler noted that appellant was involved in a motor vehicle accident in August 1989 and had a magnetic resonance imaging (MRI) scan which

diagnosed a ruptured disc at C5-6. Surgery was recommended, but appellant declined. Dr. Schuler further noted that appellant was involved in another motor vehicle accident in June 1991 which aggravated her symptoms. Appellant went through a myelogram and a computerized tomography (CT) scan and appellant again declined the recommended surgery. Appellant experienced continual headaches from these accidents. Dr. Schuler reported no objective findings on appellant's physical examination. He diagnosed chronic myofascial neck, interscapular, and upper extremity pain aggravated by her work-related injury of September 12, 1992 and status post cervical disc disease. Although Dr. Schuler noted that there were no objective findings for myofascial complaints, he opined that appellant had work restrictions and her condition was permanent.

By letter dated July 21, 1994, the Office requested clarification from Dr. Schuler regarding any residuals specifically from the work injury of September 12, 1992 as he failed to report any objective findings to support his opinion.

By letter dated August 22, 1994, Dr. Schuler changed his diagnosis to myofascial injury and reiterated that there were work restrictions due to the work injury. Dr. Schuler failed to respond to the question of what objective findings supported his opinion.

The Office determined that there was a conflict in medical opinion as Dr. Schuler introduced a new diagnosis and referred appellant, along with a statement of accepted facts and medical records, to Dr. Jack H. Akmakjian, a Board-certified orthopedic surgeon, to perform an independent medical evaluation.

By report dated December 3, 1994, Dr. Akmakjian reiterated appellant's history of work injury and the injuries sustained in the nonwork-related motor vehicle accidents. Appellant's physical examination was essentially normal, with notations that a review of cervical spine x-rays showed degenerative changes as well as a herniated disc at the C5-6 level based on the CT myelogram. Dr. Akmakjian further noted that there were no records with regard to appellant's motor vehicle accidents. Dr. Akmakjian diagnosed chronic right shoulder strain, but he noted that the only objective findings was subjective complaints of tenderness to palpation along the anterior aspect of the distal acromium. With deltoid testing and impingement testing, appellant's complaints were minimal and she exhibited a full range of motion of the shoulder and had a normal neurologic examination. Dr. Akmakjian imposed a restriction of limitation of overhead reaching and lifting of about 35 to 40 pounds maximum. Dr. Akmakjian stated that he would be interested in identifying how much treatment appellant received to her cervical and to her upper shoulder regions and how long the complaints were present in regards to her previous accidents and asked that these records be obtained so that he could identify the exact nature of appellant's complaints. Dr. Akmakjian additionally recommended that appellant be evaluated by an orthopedic surgeon who specializes in shoulder problems.

By letter dated January 31, 1995, the Office requested appellant to submit copies of all medical treatment she received as a result of the motor vehicle accidents of August 1989 and June 1991. Appellant was given 15 days to respond. By letter dated May 18, 1995, the Office noted that they received appellant's release for medical information, but that she failed to furnish the name of the treating sources. Appellant was given 30 days to submit the requested information. The Office did not receive the requested information.

By letter dated June 19, 1995, the Office requested Dr. Akmakjian to issue a supplemental report based on the evidence of record as appellant has failed to cooperate in either submitting the records or furnishing the names of the treating sources and signing an appropriate release for these records.

In a supplemental report dated June 26, 1995, Dr. Akmakjian stated that the work restrictions he imposed were primarily preventive in nature and that was the only reason he recommended them as there were no objective findings to support continuing residuals due to the work injury of September 12, 1992.

In a letter dated September 20, 1995, the Office advised appellant that they proposed to terminate medical benefits on the basis that the weight of the medical evidence of record established that appellant no longer suffers any residuals attributable to her employment. Appellant was given 30 days in which to submit additional evidence.

In response, appellant submitted the previously requested medical records of her treatment for the motor vehicle accidents of 1989 and 1991. These records show that as a result of the 1989 accident, appellant sustained a right cervical spine strain and a herniated disc at C5-6. It is also noted that at that time appellant complained of pain radiating into her right shoulder. The records further show that appellant was rear-ended on July 5, 1991 and that in an August 7, 1991 report Dr. Michael Grier diagnosed chronic neck difficulty.

By decision dated October 23, 1995, the Office terminated medical benefits, effective October 23, 1995, on the basis that the medical evidence of record established that appellant no longer had any residual disability as a result of her September 12, 1992 employment injury. Within the memorandum accompanying the decision, the Office found that the additional evidence submitted was not sufficient to warrant any change in the proposed termination.

Appellant, through her attorney, requested reconsideration. In support of her reconsideration request, appellant submitted arguments for error in the interpretation of the medical evidence and provided a new medical report, not previously considered, along with numerous duplicate reports which were already in the record prior to the October 23, 1995 decision.

In a November 9, 1995 medical report, Dr. Robert R. Rokicki, a Board-certified orthopedic surgeon, diagnosed cervical strain as the result of motor vehicle accidents in 1989 and 1991 and bilateral shoulder injuries as the result of a work injury on September 12, 1992. Multiple muscles were involved in the strain, including a strain to the rotator cuff, the proximal biceps and the extensor muscles of both forearms. Dr. Rokicki indicated that the shoulder examination on the right side revealed the acromioclavicular (AC) joint to be nontender. There was no pain with crossed adduction of the arm. There was tenderness to palpation over the biceps groove and along the proximal biceps muscle. Yergason test for pain was positive, but Speed test was negative, or at least +/- . Tests for rotator cuff include pain with external rotation was positive, and also weakness with forceful external rotation was noted, but there was no pain with forceful abduction. Impingement maneuver was negative. Range of motion was basically within normal limits. Examination of the left shoulder was also carried out, which revealed findings almost exactly the same to the right shoulder, but to a much lesser extent. Complete

radiographs were obtained, which revealed a type I acromion. Dr. Rokicki also reviewed the outside cervical x-rays, myelogram, CT and MRI scans and noted a moderate disc bulge at C5-6 and some mild arthritic changes. Dr. Rokicki opined that appellant “does not have a straightforward case of rotator cuff tendinitis that would be amenable to steroid injections, decompression, etc. [Appellant] reports that she is able to tolerate her level of pain quite well provided she does not perform repeated lifting activities and that she remains on a light-duty work status. *** This condition in the shoulders appears to be chronic.”

Medical notes of October 27, 1995 indicate that Dr. D.G. Roberts of Medical Centers of Colorado examined appellant on the same date and diagnosed cumulative trauma disorder. He also related the diagnosed condition to the September 12, 1992 incident of picking up a parcel.

In a decision dated February 1, 1996, the Office denied modification of the October 23, 1995 decision.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits on October 23, 1995.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.³

In the present case, the Office accepted appellant’s claim for right shoulder strain due to her September 12, 1992 employment incident. Appellant’s treating physician, Dr. Szynal, opined that appellant reached maximum medical improvement on April 8, 1993 for her shoulder strain and, although there were no objective findings regarding her condition, appellant should have permanent work restrictions. The Office referred appellant to Dr. Schuler, an orthopedic surgeon, who initially diagnosed myofacial complaints then changed his diagnosis to myofascial injury while opining that there were work restrictions due to the work injury.

Section 8123(a) of the Federal Employees’ Compensation Act⁴ provides, “If there is 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.” Because of the introduction of a new diagnosis by Dr. Schuler, the Office found a conflict of medical opinion between the reports of Dr. Szynal and Dr. Schuler, and properly

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

³ *Id.*

⁴ 5 U.S.C. § 8128 *et seq.*

referred appellant, along with the case record, a statement of accepted facts and a list of specific questions, to a third doctor for an impartial medical examination pursuant to section 8123(a) of the Act.

Dr. Akmakjian, a Board-certified orthopedic surgeon, selected as the impartial medical specialist to resolve the conflict in medical opinion, concluded that there were no objective findings to support continuing residuals due to appellant's work injury of September 12, 1992. He further stated that the work restrictions he imposed were primarily preventive in nature. The Office accorded this report the special weight granted an impartial medical examiner⁵ and based its termination of appellant's compensation on this report.⁶

On reconsideration, appellant's attorney argued that because Dr. Akmakjian recommended that appellant be evaluated by an orthopedic surgeon who specializes in shoulder problems, the Office erred by proceeding to a final decision without scheduling appellant for such an evaluation. Although Dr. Akmakjian did recommend that appellant undergo further evaluation to help define more objective parameters in regards to her complaints, Dr. Akmakjian specifically negated a causal relationship between appellant's shoulder condition and her September 12, 1992 employment injury. Dr. Akmakjian unequivocally stated that the only objective finding he found on his examination was a subjective complaint of tenderness to palpation along the anterior aspect of the distal acromium and that the work restrictions he imposed were primarily preventative in nature as there was no objective findings to support continuing residuals due to the work injury of September 12, 1992. Thus, so long as the Office properly determines that the evidence fails to establish the requisite causal relation, its obligation under the Act has been met.⁷ Moreover, the Office tried to obtain the motor vehicle accident reports that Dr. Akmakjian requested in order to aid his understanding of the actual process of healing and treatment prior to the September 12, 1992 work injury, but was unable to obtain the records from appellant during the requested time period.

Appellant's attorney next argues that the Office's decision was based on a nonmedical findings, *i.e.*, that since nothing could be done for appellant's condition, she is no longer injured. Inasmuch as review of the examiner's decisions does not reflect such a basis for the pretermination or termination decision, the Board rejects appellant's argument as the premise upon which it is based is false.

Appellant's attorney also avers that her September 12, 1992 job injury involved both shoulders and the Office erred in only accepting a right shoulder injury. Although the record reflects that appellant mentioned both shoulders hurting at the time of the injury, appellant attributed the majority of her pain to her right arm and shoulder and her attending physician

⁵ Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background is entitled to special weight. *Henry J. Smith*, 43 ECAB 524 (1992); *reaff'd on recon.*, 43 ECAB 892 (1992).

⁶ *Brady L. Fowler*, 44 ECAB 343 (1992).

⁷ *Meyer Klein*, 27 ECAB 304 (1976).

diagnosed only a right shoulder strain. The Office is limited to accepting job injuries which the attending physician believes significant as a medical condition to couch as a medical diagnosed condition. Moreover, it is claimant's burden to furnish 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.⁸ In this case, only a right shoulder strain was deemed to be medically significant to result in a medically diagnosed condition.

Furthermore, the evidence submitted in support of appellant's reconsideration request which were not previously of record are insufficient to overcome Dr. Akmakjian's well-rationalized report. In the present case, Dr. Akmakjian's reports constitute the weight of the rationalized medical evidence because they are based upon a complete and well-documented history of the condition,⁹ and complete examinations of appellant, they are consistent and of reasonable medical certainty,¹⁰ and were well rationalized and supported by physical evidence noted in the record.¹¹ Accordingly, the Office has discharged its burden of proof to justify termination of appellant's compensation on October 23, 1995.

The motor vehicle records submitted after Dr. Akmakjian rendered his supplemental report of June 26, 1995 would not change the results of the final determination, as the impartial medical examination still demonstrated no objective findings and nothing to warrant continuing benefits for medical treatment or wage loss. Moreover, as previously noted, these reports were requested to help provide insight into the actual process of healing and treatment prior to the September 12, 1992 job injury.

In his November 9, 1995 medical report, Dr. Rokicki stated that there was some indication for rotator cuff problems, affirmed that there was no impingement syndrome and stated that range of motion was normal. Although he attributes a "strain" in both shoulders, the proximal biceps and the extensor muscles of both forearms, he failed to provide an explanation as how such a strain could have lasted this long.¹² Moreover, the record reflects that medical treatment was discontinued in February 1993 and the reports from the second opinion and impartial examiner confirm that there are no objective findings to support continuing residuals due to the work injury of September 12, 1992.

The October 27, 1995 medical report from the Medical Centers of Colorado which provides a diagnosis of cumulative trauma disorder causally related to the September 12, 1992 work incident is based upon appellant's subjective complaints without any supporting objective findings. Subjective complaints of symptoms unsupported by objective physical findings of

⁸ See *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁹ *William Nimitz, Jr.*, 30 ECAB 567 (1979).

¹⁰ See *Morris Scanlon*, 11 ECAB 384 (1960).

¹¹ See *William E. Enright*, 31 ECAB 426 (1980).

¹² *Kathryn Haggerty*, 45 ECAB 383 (1994); see 20 C.F.R. § 10.110(a).

disability diminish the probative value of the medical report.¹³ Moreover, cumulative trauma disorder is not a medical diagnosis, *per se*, and, for the purposes of this traumatic injury claim, is not associated with one time event but rather is associated with ongoing repetitive motions.

As the weight of the medical evidence of record supports that appellant does not have any continuing disability related to her September 12, 1992 work-related injury after October 23, 1995, the decisions of the Office of Workers' Compensation Programs dated February 1, 1996 and October 23, 1995 are affirmed.

Dated, Washington, D.C.

October 15, 1998

George E. Rivers

Member

David S. Gerson

Member

Michael E. Groom

Alternate Member

¹³ *John L. Clark*, 32 ECAB 1618 (1981); *Charles D. Wallace*, 21 ECAB 347 (1970).