

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. FULGHUM and DEPARTMENT OF AGRICULTURE,
FOOD, SAFETY & INSPECTION SERVICE, Atlanta, Ga.

*Docket No. 97-1257; Submitted on the Record;
Issued January 8, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request to repurchase 207 hours of annual leave.

On May 12, 1995 appellant, then a 49-year-old food inspector, filed a claim for an occupational disease, Form CA-2, stating that he became aware that he sustained a work-related injury to his left shoulder on December 31, 1993 and worked until May 5, 1995 when he stopped working. Appellant underwent surgery to his left shoulder on September 27, 1995 which consisted of acromioplasty with a coracoacromial ligament resection and a distal clavicle excision. On September 27, 1995 the Office accepted appellant's claim for bilateral impingement syndrome.

Appellant submitted claims for compensation on account of traumatic injury, Forms CA 7, one dated October 12, 1995 requesting disability compensation from September 27 to November 25, 1995 and another dated October 24, 1995 requesting compensation from December 31, 1993 "to the present." Attached to the October 24, 1995 CA-7, appellant submitted a record of the leave he took from February 18, 1994 through September 27, 1995 which indicates that he used 207 hours of annual leave and 137 hours of sick leave. Appellant seeks to repurchase the 207 hours of annual leave.

By letter dated December 6, 1995, the Office informed appellant that it required medical evidence establishing that he was disabled from December 31, 1993 through October 24, 1995. Appellant submitted evidence to support his claim. In a report dated May 11, 1995, Dr. James D. Peters, a Board-certified orthopedic surgeon and appellant's treating physician, considered appellant's history of injury, performed a physical examination and reviewed x-rays showing some degenerative changes within the acromioclavicular joint and some sclerosis of the greater tuberosity. He diagnosed long-standing impingement syndrome of the left shoulder with coexisting adhesive capsulitis, early impingement syndrome of the right shoulder and degenerative joint disease of the left acromioclavicular joint. Dr. Peters stated that appellant was

apparently on vacation that week but he gave him a work excuse for two weeks and the record contains a two-week disability note dated May 11, 1995 from Dr. Peters.

In progress notes dated from May 25 through September 26, 1995, Dr. Peters documented appellant's ongoing left shoulder pain despite the use of a subacromial injection and physical therapy. In his May 25, 1995 progress note, he stated that appellant was improving but he would continue to keep appellant off work. In his June 8, 1995 progress note, Dr. Peters stated that appellant had returned to work on June 1, 1995 and had a recurrence of his left shoulder impingement pain. He recommended a "four to six [hour] layoff from [appellant's] current activities in order to rest his shoulder," decrease the inflammation and "hopefully make [appellant] less symptomatic." Dr. Peters stated that appellant's shoulder impingement might continue to be aggravated with his present job type activities and a change in job description might be necessary. In the September 26, 1995 note, he recommended surgery and stated that he had filled out some slips such that appellant could have some unpaid medical leave until November 15, 1995. On August 31, 1995 Dr. Peters noted that surgery had been scheduled for September 27, 1995 and that appellant would likely be off work for four to six weeks and require job modification upon his return.

In an attending physician's supplemental report, Form CA-20, dated January 4, 1996 Dr. Peters diagnosed impingement syndrome of the left shoulder and degenerative joint disease of the acromioclavicular joint and checked the "yes" box that the condition was work related. He noted that appellant underwent shoulder surgery on September 27, 1995 and could attempt a "trial of work" on January 15, 1996.

In progress notes dated October 4, 1995 through January 4, 1996, Dr. Peters documented appellant's recovery from the surgery and in the January 4, 1996 note stated that appellant still had posterior capsular tightness and reiterated a "trial of work" commencing January 15, 1996.

By letter dated January 22, 1996, the Office informed appellant that it required medical evidence establishing disability for work during the period November 26, 1995 through January 13, 1996.

In a report dated January 22, 1996, which was received by the Office on February 6, 1996, Dr. Peters reiterated his diagnoses of appellant's left shoulder and stated that it was nearly four months since appellant's surgery and he believed appellant's shoulder condition had stabilized. He stated that appellant would most likely experience recurrent shoulder discomfort if he were to return to his inspection type job activities. Dr. Peters opined that appellant should perform light-duty work for a year following the date of his surgery with restrictions of no repetitive internal and external rotation of the bilateral shoulders, limited repetitive lifting from waist to shoulder height and limited overhead type activities.

By letter dated February 2, 1996, appellant stated that Dr. Peters had placed him on light duty with restrictions but his job description did not provide for light duty so he applied for immediate disability retirement.

By letter dated April 9, 1996, the Office informed appellant that he was entitled to temporary disability benefits from December 31, 1993 through the date of the letter. By letter

dated May 31, 1996, after conducting a telephone conference with appellant and the employing establishment on May 30, 1996, the Office confirmed that the employing establishment had no light duty for appellant and recommended that the case be referred for rehabilitation services. In the memorandum of the telephone conference dated May 30, 1996, the Office stated that appellant had been receiving compensation for total disability since September 27, 1995.

By decision dated July 10, 1996, the Office denied the claim, stating that the evidence of record did not support that appellant was temporarily totally disabled from December 31, 1993 through September 26, 1995 and therefore he was not entitled to buy back annual leave for that period of time.

The Board finds that appellant is entitled to buy back 80 hours of annual leave but otherwise is not entitled to the other 127 hours of annual leave he requested.

The Board has held that the requirement for buying back leave is that appellant must present evidence establishing that he was disabled due to his employment-related injury on the relevant dates.¹

In the present case, in his May 11, 1995 report and disability note, Dr. Peters indicated that appellant should be off work for two weeks due to his long-standing impingement syndrome and degenerative joint disease of the acromioclavicular joint. In his May 25, 1995 progress note, Dr. Peters indicated he would continue to keep appellant off work due to his shoulder condition. In his June 8, 1995 report, he noted that appellant had returned to work on June 1, 1995 and had a recurrence of his shoulder impingement pain. Dr. Peters stated that appellant should have a “four to six [hour] layoff from his current activities” in order to rest his shoulder and subsequently stated that appellant’s shoulder impingement might continue to be aggravated with his current job type activities. Dr. Peters’ August 31, 1995 progress note revealed that because appellant’s shoulder was not improving by conservative treatment, and he subsequently scheduled surgery on September 27, 1995. The Office subsequently accepted appellant’s claim for benefits and paid appellant temporary total disability benefits following the September 27, 1995 surgery. The Board finds that this evidence is supportive of appellant’s claim for disability related to his shoulder condition. Further, the employing establishment had no job opening for appellant within Dr. Peters’ restrictions and referred appellant for rehabilitation services.

Dr. Peters specifically stated as of May 11, 1995 that appellant should not work for two weeks, then in the May 25, 1995 note stated appellant should continue to stay off work. His August 1995 progress note suggests appellant should not work due to his shoulder impingement and although his note is a little unclear, it supports that appellant was disabled for work due to his accepted shoulder condition. Dr. Peters’ progress notes dated May 11 through September 25, 1995 establish that he did not release appellant to return to work from May 11, 1995 until after the surgery and then he released appellant to light-duty work. From May 11 through September 25, 1995, appellant used 80 hours of annual leave. Appellant therefore is entitled to buy back 80 hours of annual leave for that time period.

¹ See *Kathy P. Roberts*, 45 ECAB 553-554 (1994).

The decision of the Office of Workers' Compensation Programs dated July 10, 1996 is hereby affirmed in part and reversed in part, as we hold that appellant is entitled to buy back 80 hours of annual leave consistent with this decision.

Dated, Washington, D.C.
January 8, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member