

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STANLEY N. THOMAS and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, El Centro, CA

*Docket No. 97-2863; Submitted on the Record;
Issued July 20, 1999*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden to rescind acceptance of appellant's claim for a right shoulder or right upper extremity condition; (2) whether the Office properly terminated appellant's benefits for a chest wall sprain; and (3) whether the Office properly denied appellant's request for a hearing.

On February 3, 1994 appellant, then a 47-year-old recreational specialist, filed a notice of traumatic injury alleging that he injured his back while demonstrating a weight machine. In describing the nature of the injury, appellant stated that he strained his left back muscle. The Office eventually accepted the claim for chest wall sprain, right shoulder impingement, right rotator cuff repair and right shoulder arthroscopic surgery.

On February 4, 1994 Dr. Krishna K. Goyal, a hematologist, examined appellant and recorded a history of his injury which indicated that appellant was lifting weights, sneezed and subsequently pulled muscles in his left upper and middle back. He noted pain in the left upper and middle back and diagnosed myofibrositis/sprain of the left posterior chest wall. On February 8, 1994 Dr. Goyal repeated her diagnosis. On examination she noted very mild tenderness in the left posterior chest wall, mostly on the medial side of the left scapula and also over the inferior side of the left scapula.

On March 22, 1994 appellant sought treatment from a nurse practitioner for pain in his right shoulder, lower back. Appellant also complained of tingling and numbness in his right arm.

On March 23, 1994 Dr. Veerinder S. Anand, a Board-certified orthopedic surgeon, examined appellant and recorded a history of injury to the low back and right shoulder. He noted that appellant complained of pain to his right shoulder and low back. Dr. Anand diagnosed right shoulder impingement syndrome. In an expanded report, Dr. Anand indicated that appellant was lifting weights on February 2, 1994 and felt a sharp pain in his left thorax and

shoulder. He noted complaints of left shoulder pain and nonradiating left rib pain. During his examination, he noted tenderness over the acromioclavicular joint of the right shoulder.¹ He diagnosed right shoulder impingement syndrome and left rib cage tendinitis with sprain/strain and possibly, stress fracture. Dr. Anand opined that appellant's symptoms were directly related to his injury. He advised an injection of appellant's right shoulder and hot packs for his left ribs.

On April 13, 1994 Dr. Renee Glass, a Board-certified radiologist, reviewed a magnetic resonance imaging (MRI) of appellant's right shoulder. She diagnosed an impingement anatomy, tendinitis and full thickness tear.

On April 18, 1994 Dr. Anand noted that appellant was status post injury to his right shoulder. He noted that appellant's shoulder was painful and that he had difficulty using his right arm. He stated that the MRI showed evidence of impingement syndrome with tendinitis and a rotator cuff tear-full thickness. Dr. Anand subsequently requested Office approval for right shoulder surgery which the Office approved. On April 21, 1994 appellant underwent surgery for a right rotator cuff repair and right shoulder arthroscopy with acromioplasty. Dr. Anand diagnosed right shoulder internal derangement after surgery. On April 25, 1994 Dr. Anand indicated that appellant was status post right shoulder surgery. On May 2, 1994 Dr. Anand stated that appellant was status post surgery to his left shoulder. On May 18, 1994 Dr. Anand indicated that appellant was status post injury to his right shoulder and thoracic spine. He noted that appellant had arthroscopic surgery to his right shoulder and that appellant continued to complain of right forearm pain and discomfort. On June 6 and June 17, 1994 Dr. Anand indicated that appellant was status post right acromioclavicular joint surgery. He also noted problems with right elbow pain.

On June 29, 1994 the Office requested a second opinion examination from Dr. James E. McSweeney, a Board-certified orthopedic surgeon.

On July 8 and July 29, 1994, Dr. Anand continued to indicate that appellant was status post right shoulder surgery.

On August 3, 1994 Dr. McSweeney provided his second opinion examination. He recorded that appellant indicated on his notice of traumatic injury dated February 3, 1994 that he "strained left back muscle." He further noted that Dr. Goyal examined appellant on February 3, 1994 for a "pulled muscle in his left upper and middle back." Dr. McSweeney indicated that a nurse practitioner treated appellant for complaints of pain in his right shoulder and low back tingling with numbness in his right arm on March 22, 1994. He noted that Dr. Anand subsequently examined appellant and noted a different history, that appellant sneezed and felt a sharp pain in his left thorax and left shoulder. At his examination, Dr. McSweeney indicated that appellant told him he sustained his injured when he was lifting weights, sneezed and injured his right shoulder and low back. He stated that appellant indicated that he could not raise his right arm or, cough or laugh. He noted appellant's present symptoms of pain in the right shoulder and upper arm and pain in the left superior iliac crest region. Dr. McSweeney then

¹ Dr. Anand initially indicated that he was examining appellant's left shoulder, but changed this portion of his examination to indicate that he treated appellant's right shoulder in an addendum dated April 27, 1994.

conducted a comprehensive physical examination and reviewed the medical records of record. He diagnosed left latissimus dorsi muscle strain occurring on February 2, 1994; a resolved myofibrositis/sprain, left posterior chest wall, related to his work injury; a right shoulder impingement syndrome and rotator cuff tear, status post right shoulder arthroscopy, acromioplasty and rotator cuff repair, nonindustrial related; and right cubital tunnel syndrome, nonindustrial related. Dr. McSweeney indicated that he could not relate appellant's injury to his right shoulder to the February 2, 1994 work incident because appellant did not report such an injury on his notice of traumatic injury or report such an injury to his initial treating physician, Dr. Goyal. He stated that he did not anticipate any residuals of the employment-related left latissimus dorsi sprain or myofibrositis sprain, left posterior wall.

On August 15, 1994 Dr. Anand diagnosed right shoulder impingement and indicated that it was due to appellant's work injury.

On August 18, 1994 and September 6, 1994 the Office requested that Dr. Anand review and assess Dr. McSweeney's conclusions.

On September 6, 1994 Dr. Anand stated that appellant's symptomatology related to his mid lateral back and right upper extremity were causally related to the injury he sustained at work on February 2, 1994. He again diagnosed status post surgery for right shoulder impingement and left mid latissimus dorsi strain/sprain.

On September 12, 1994 Dr. McSweeney reexamined appellant and reviewed additional medical records. He indicated that appellant was capable of resuming his usual work. He restated that there was no evidence supporting an industrial-related right shoulder injury on February 2, 1994. He indicated that the latissimus dorsi strain had resolved and that there were no residuals from the February 2, 1994 injury.

After reviewing Dr. McSweeney's opinions, Dr. Anand changed his opinion to reflect that he no longer believed that appellant's right shoulder problems were related to the injury of February 2, 1994. Dr. Anand noted that he had been supplied an incorrect injury history which stated that appellant experienced right shoulder pain immediately after the February 2, 1994 work incident. He noted that appellant did not complain of right shoulder pain when initially treated by Dr. Goyal. He indicated that appellant's latissimus dorsi strain and all other conditions related to the February 2, 1994 injury had resolved and that they did not preclude appellant from returning to his usual work. On October 10, 1994 Dr. Anand repeated his assessment that appellant could return to his usual work without restriction.

On July 31, 1996 the Office issued a "Notice of Proposed Termination of Entitlement to Compensation and Medical Benefits." The Office indicated that it intended to rescind acceptance of appellant's right shoulder condition and terminate entitlement to all benefits because injury residuals have resolved. In an accompanying memorandum, the Office indicated that both Dr. McSweeney, the second opinion physician and Dr. Anand, appellant's treating physician, agreed that appellant had no right shoulder injury or upper extremity condition related to his February 2, 1994 injury and that all the conditions arising from that injury had resolved.

On September 26, 1996 the Office rejected appellant's claim because the record established that appellant did not sustain a right shoulder condition as a result of his February 2, 1994 work injury and therefore the acceptance of that condition should be rescinded. In addition, the Office found that left latissimus dorsal strain sustained on February 2, 1994 had resolved.

In a letter marked "received May 7, 1997," appellant requested a review of the written record. This letter was forwarded from Congressman Jerry Lewis' office on June 9, 1997. The Office indicated that it received this correspondence on June 24, 1997. In support of his request for a review, appellant sent a letter dated September 23, 1996 in which he urged that he sustained a right shoulder injury on February 2, 1994. Appellant resubmitted reports from Drs. Goyal, Anand, Glass and McSweeney and other medical evidence, including physical therapy notes. He also resubmitted correspondence between himself and the Office. Appellant also submitted an article from a weight-lifting magazine on shoulder injuries and a September 19, 1996 letter from Dr. Goyal indicating that it was medically probable that appellant's right shoulder injury was related to his February 2, 1994 employment injury.

By decision dated July 24, 1997, the Office denied appellant's request for a hearing because it was not received within 30 days of its September 26, 1996 decision. The Office further denied appellant's request for the reason that the issue involved could be equally resolved by requesting reconsideration and the submission of additional evidence.

The Board initially finds that the Office met its burden to rescind acceptance of appellant's claim for an employment-related condition of his right shoulder or right upper extremity.

The Board has upheld the Office's authority to reopen at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.³ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁴ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence, or through new legal argument and/or rationale.⁵

In the present case, the Office accepted that appellant sustained right shoulder impingement, right rotator cuff repair and right shoulder arthroscopic surgery as a result of his

² *Eli Jacobs*, 32 ECAB 1147 (1981).

³ *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁴ *See Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *See Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonzo Walker*, 42 ECAB 129 (1990), *petition for recon. Denied*, 42 ECAB 659; *Beth A. Quimby*, 41 ECAB 683 (1990).

employment injury on February 2, 1994. Dr. McSweeney, a Board-certified orthopedic surgeon, however, provided a second opinion examination and reasonably concluded that appellant did not suffer these injuries on February 2, 1994 because appellant did not mention these injuries in his notice of traumatic injury dated February 3, 1994 and did not seek treatment for these conditions when he sought medical treatment from Dr. Goyal, an internist, immediately after the alleged injury. Both the notice of traumatic injury and Dr. Goyal's initial report dated February 4, 1994 indicated that appellant injured his left back muscles rather than any part of his right shoulder or right upper extremity. Dr. Anand, appellant's treating physician and a Board-certified orthopedic surgeon, initially supported appellant's claim for an injury to his right shoulder or upper extremity stemming from the February 2, 1994 injury. Dr. Anand, however, changed his opinion upon considering Dr. McSweeney's well-rationalized opinion. He also concluded that appellant could not have suffer an injury to his right shoulder or upper extremity on February 2, 1994 because appellant did not report such an injury in his notice of traumatic injury or when he initially sought treatment from Dr. Goyal. Because all the physicians addressing the issue concluded that appellant did not suffer a right shoulder or right upper extremity condition on February 2, 1994, the Office has met its burden to rescind its acceptance of these conditions.

The Board further finds that the Office properly terminated appellant's benefits for his claim for chest wall sprain.

In addition to accepting appellant's claim for a right shoulder or right upper extremity condition, the Office accepted that appellant sustained a chest wall sprain stemming from his February 2, 1994 injury. As mentioned above, the Office has the burden of justifying termination or modification of compensation.⁶ In this case, both Dr. Anand and Dr. McSweeney agreed in their most recent and well-reasoned opinions that appellant's accepted condition of a latissimus dorsi strain had resolved and that there were no residuals from the February 2, 1994 injury. Inasmuch as the record contains no contradictory evidence, the Office has established that appellant's chest wall sprain has resolved. It, therefore, met its burden to terminate appellant's compensation for this condition.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁷

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or

⁶ See *Frank J. Mela, Jr.*, *supra* note 4; *Harold S. McGough*, *supra* note 4.

⁷ 5 U.S.C. § 8124(b)(1).

deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁸

In this case, the Office issued its last decision rescinding appellant's claim for a right shoulder condition and terminating appellant's compensation on September 26, 1996. Appellant, however, requested a review of the written record in a letter forwarded from Congressman Jerry Lewis' office on June 9, 1997. The letter indicated that it was received in the congressman's office on May 7, 1997. Because appellant clearly did not request a hearing within 30 days of the Office's September 26, 1996 decision, he was not entitled to a review of the written record under section 8124 as a matter of right. The Office also exercised its discretion, but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting additional relevant evidence. Consequently, the Office properly denied appellant's hearing request.

The decisions of the Office of Workers' Compensation Programs dated July 24, 1997 and September 26, 1996 are affirmed.

Dated, Washington, D.C.
July 20, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *Henry Moreno*, 39 ECAB 475 (1988).