U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of S. REED TOLTON and DEPARTMENT OF THE ARMY, TOOELE ARMY DEPOT, Tooele, Utah

Docket No. 97-1259; Submitted on the Record;
Issued March 25, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained cholecystitis or cholelithiasis causally related to sequelae of treatment for a September 7, 1988 right rotator cuff tear; (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's November 8, 1996 request for a merit review of the Office's May 6, 1996 decision; and (3) whether the Office properly denied reimbursement for Prozac, an anti-depressant medication, on the grounds that its use was not causally related to the accepted conditions.

This is the second appeal before the Board in this case. By decision and order issued October 25, 1995,[1] the Board found that the case was not in posture for a decision regarding the causal relationship of the claimed cholecystitis or cholelithiasis to the accepted injury, due to a conflict of medical evidence between Dr. Alvin E. Harris, an attending general surgeon, and an Office medical adviser. The Board found the opinion of Dr. Nathan Markowitz, a Board-certified gastroenterologist appointed as impartial medical examiner, was incomplete and speculative, and therefore insufficient to resolve the conflict. The Board therefore remanded the case to the Office for referral of appellant, the record and a new statement of accepted facts to a new impartial medical examiner to resolve the conflict of medical opinion. The law and facts of the case as set forth in the Board's October 25, 1995 decision and order are incorporated by reference.

At the time appellant filed the present appeal with the Board on February 14, 1997, the Office accepted a right rotator cuff tear, gastric ulcers secondary to medications prescribed for treatment of the rotator cuff tear, and right carpal tunnel syndrome requiring April 11, 1989 surgery.[2]

---

[1] Docket No. 94-827.

[2] Appellant received a September 4, 1991 schedule award for a 17 percent impairment of the right upper

In a January 28, 1993 report, Dr. I. Ray Thomason, an attending Board-certified gastroenterologist, noted that appellant had "increasing symptoms while on Carafate, Creon, Pepcid and bethanechol." Endoscopy revealed esophageal reflux, a gastric bezoar, a "slightly stenotic gastrojejeunal anastomosis and a postanatomic stenosis. In light of these findings and his B-I anastomosis," Dr. Thomason recommended revision of the gastrojejeunal anastomosis by performing a Roux-en-Y hook-up. This surgery was performed on March 26, 1993.

In an April 8, 1994 report, Dr. Alvin E. Harris, an attending general surgeon, noted that, since 1983, appellant underwent a truncal vagotomy with B-1 anastomosis, a Hill hiatal hernia repair, and 1989 cholecystectomy with common duct exploration "probably precipitated" by the 1983 vagotomy as explained in his March 5, 1992 report.[3] Dr. Harris noted that periodic endoscopies showed "[s]tomal narrowing with ulceration and continuing reflux. On March 26, 1993 appellant underwent a resection of the "gastric proximal stoma leaving a gastric pouch of approximately two ounces and a forty centimeter jejeunal limb (Roux-en Y) to the pouch," to treat reflux esophagitis, marginal ulcers, gastritis and bleeding. Dr. Harris stated that following surgery, appellant "developed an anastamotic leak" requiring surgical repair and drainage, and had since been followed by Dr. Randall J. Ryser, a Board-certified gastroenterologist, "for continuing nausea, vomiting and epigastric pain with persistent esophagitis and gastrojejeunal ulceration and melena with good control on medication."

On April 11, 1996 the Office referred appellant, the medical record and a statement of accepted facts, to Dr. Kelley Thueson, an internist, to resolve the outstanding conflict in medical opinion. In an April 23, 1996 report, Dr. Thueson provided a history of appellant's gastrointestinal conditions, surgery and treatment. He noted that appellant was unable to vomit, and had alteration of bowel movements. On examination, Dr. Thueson found a "ventral hernia below the right diaphragm ventrally and a diathesis recti overlying the midline incision."[4] Dr. Thueson opined that appellant still "suffered from gastric erosion secondary to the Feldene" prescribed in 1988 for the accepted rotator cuff tear. The March 26, 1993 surgery demonstrated small ulcerations at the stomach margin "absolutely … caused by the use of the nonsteroidal

---

extremity. He requested reconsideration on April 6, 1992, denied by July 9, 1992 decision. Appellant again requested reconsideration, denied again by October 21, 1992 decision.

[3] In the March 5, 1992 report, Dr. Harris explained that the 1983 truncal vagotomy interrupted the nerve going to the gallbladder from the vagus, thereby producing cholecystitis in the gallbladder. A super-saturated solution of bile with cholesterol and or bilirubin pigment causes a crystal formation in the gallbladder with stone formation and subsequent obstruction of the cystic and or common bile ducts leading to cholecystitis and requiring subsequent cholecystectomy … stones can subsequently form in the hepatic and or common bile duct.… [Appellant] has experienced this sequence of events and that his cholecystitis and lithiasis has a high medical probability of being related to the truncal vagotomy performed for his stress ulceration of the stomach…." The Board notes that the 1983 truncal vagotomy was not accepted by the Office as occupationally related.

[4] Dr. Thueson also noted limited range of motion of the right shoulder joint, decreased grip strength of the right hand, "markedly decreased strength over the right shoulder, and "decreased sensory examination to vibration in the fingers of the right hand. However, Dr. Thueson did not provide a schedule award calculation for impairment of the right upper extremity, or refer to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

medications," and was therefore work related. Dr. Thueson added that the "stenosis noted were indeed caused by further ulceration in [appellant's] stomach with subsequent scarring … most likely … due to continued use of the nonsteroidal anti-inflammatory medications, such as Feldene. Dr. Thueson opined that 20 percent of appellant's "current gastrointestinal complaints [were] due to the Feldene induced ulceration and the anatomical ulcerations caused by the surgeries in 1993, and 80 percent of his gastrointestinal problems [were] due to the initial surgery in 1983." Dr. Thueson stated that appellant's cholecystitis and lithiasis were related to the 1983 vagotomy and antrectomy, which were not work related, and not to the use of Feldene.

By decision dated May 6, 1996, the Office denied appellant's claim for cholecystitis with subsequent cholecystectomy on the grounds that causal relationship was not established, based on Dr. Thueson's report as the weight of the medical evidence.[5]

In an October 12, 1996 letter, appellant asserted that his pharmacy had not been reimbursed for Prozac, an anti-depressant prescribed by Dr. Ryser, and requested that the Office immediately reimburse the providing pharmacy.

In a November 8, 1996 letter, appellant requested reconsideration of the May 6, 1996 decision. Appellant did not submit additional medical evidence concerning causal relationship of his gallbladder problems to the accepted injury prior to issuance of the December 3, 1996 decision.

In a November 21, 1996 letter, Dr. Ryser stated that appellant's "treatment with Feldene" caused severe ulcer disease requiring multiple surgeries, leading to "stenosis at the outlet of the stomach" and "chronic gastrointestinal dysfunction," which in turn caused "emotional problems and distress which have responded well to treatment with Prozac."

By decision dated December 3, 1996, the Office denied appellant's request for a merit review of the May 6, 1996 decision on the grounds that he submitted no additional medical evidence.[6]

---

[5] In a May 15, 1996 letter, appellant requested reinstatement of all leave used relating to absences for gastric surgery. He also reiterated a previous request for a schedule award for permanent impairment of the wrist, stomach and gallbladder. In a May 30, 1996 letter, the Office stated that there were no provisions under the Federal Employees' Compensation Act for schedule awards for "a gastro condition," and that "[n]o further action will be taken on possible additional schedule award entitlement without proper pursuit of [his] appeal rights." Regarding the leave buy back, the Office noted processing appellant's request on March 17, 1992, but then appellant changed his mind and returned the check on February 24, 1993, writing in a June 14, 1993 letter that he did not wish to pursue leave buy back, and had returned a check related to the leave buy back. The Office noted appellant needed to submit a new claim for leave buy back along with a corrected leave analysis. In a June 19, 1996 letter, appellant again claimed a schedule award for his gastric conditions, and requested reconsideration of the schedule award for carpal tunnel syndrome. Appellant also stated that he did not wish to buy back his leave, but would accept the employing establishment's "share in cash." He submitted an account of leave used for intermittent periods from December 12, 1988 to July 29, 1992. In a July 30, 1996 letter, the Office advised appellant that there was no provision for granting him the employing establishment's "share in cash" of leave used, and that no further action would be taken unless appellant stated that he wished to pursue leave buy back. The Office noted that appellant did not state which of his appeal rights he wished to pursue, and referred him to the appeal rights accompanying the May 6, 1996 decision.

By decision dated December 12, 1996, the Office denied appellant's request for reimbursement of medical expenses for Prozac, as causal relationship was not established between the accepted right shoulder injury, its sequelae, and the need for this medication. The Office found that they had not accepted either an emotional condition or "chronic gastrointestinal dysfunction," and that therefore the need for Prozac did not appear work related.

Regarding the first issue, the Board finds that appellant has not met his burden of proof in establishing that he sustained cholecystitis or cholelithiasis causally related to sequelae of treatment for a September 7, 1988 right rotator cuff tear.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[7] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[8] and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9] The medical opinion must be one of reasonable medical certainty,[10] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

In this case, appellant's attending physician and the government's impartial medical examiner both opined that the claimed cholecystitis and cholelithiasis were not related to the accepted conditions. In an April 8, 1994 report, Dr. Harris, an attending general surgeon, noted that appellant's 1989 cholecystectomy with common duct exploration was "probably precipitated" by the 1983 vagotomy. However, the Office did not accept that the 1983 surgery or its precipitating condition were work related. Thus, appellant's physician negates a causal relationship between the gallbladder pathology and surgery and the accepted conditions. Similarly, Dr. Thuesen, the impartial medical examiner, opined in his April 23, 1996 report that appellant's cholecystitis and choleclithiasis were related to the 1983 vagotomy and antrectomy, which were not work related, and not to the use of Feldene. Thus, the medical evidence indicates that the claimed conditions of cholecystitis and cholelithiasis were not related to the accepted conditions or their sequelae.

---

[6] The Office noted that there was no provision under the Act for a cash settlement of the leave buy-back issue.

[7] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[8] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979). The Office, as part of its adjudicatory function, must make findings of fact and a determination as to whether the implicated working conditions constitute employment factors prior to submitting the case record to a medical expert; *see John A. Snowberger*, 34 ECAB 1262, 1271 (1983); *Rocco Izzo*, 5 ECAB 161, 164 (1952).

[9] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

[10] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[11] *See William E. Enright*, 31 ECAB 426, 430 (1980).

Regarding the second issue, the Board finds that the Office properly denied appellant's November 8, 1996 request for a merit review of the May 6, 1996 decision on the grounds that no new medical evidence was submitted in support of the request.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
>
> "(ii) Advancing a point of law or fact not previously considered by the Office, or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[12]

Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[13]

The only new evidence submitted in support of appellant's November 8, 1996 request for a merit review is the November 8, 1996 letter itself. This letter did not constitute or contain new, relevant evidence not previously considered by the Office, and did not advance a novel point of law or fact. Following his submission of the November 8, 1996 letter, appellant did not submit additional medical evidence concerning causal relationship of his gallbladder problems to the accepted injury prior to issuance of the December 3, 1996 decision. Therefore, the Office's December 3, 1996 decision denying appellant's request for a merit review does not constitute an abuse of discretion.

Regarding the third issue, the Board finds that the Office properly denied reimbursement for Prozac, an anti-depressant medication, on the grounds that its use was not causally related to the accepted conditions.

Section 8103(a) of the Act provides, in pertinent part:

> "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and *supplies prescribed or recommended by a qualified physician*, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation…." (Emphasis added.)

[12] 20 C.F.R. § 10.138(b)(1).

[13] 20 C.F.R. § 10.138(b)(2).

The Office's obligation to pay for medical treatment under section 8103 of the Act extends only to treatment of employment-related conditions. The burden of proof rests with the claimant in establishing that the requested treatment is necessitated by the effects of an accepted work-related condition. Such proof must include the submission of rationalized medical opinion evidence explaining the causal relationship between the accepted injury and the condition for which treatment is sought, and why the treatment is required in order to cure, give relief, or reduce the severity of the accepted condition.[14]

In support of his request for reimbursement for the cost of Prozac, a prescription anti-depressant, appellant submitted a November 21, 1996 report from Dr. Ryser, an attending Board-certified gastroenterologist. Dr. Ryser proposed a three-step chain of events: the 1983 and two 1989 surgeries, causing "stenosis at the outlet of the stomach;" and "chronic gastrointestinal dysfunction," causing an emotional condition responsive to Prozac. However, the Office has not accepted an emotional condition related to the sequelae of the right rotator cuff tear, or a chronic gastrointestinal dysfunction. Therefore, the pathophysiologic link is not established between the two 1989 gastric surgeries for the accepted ulcer condition, and the need for Prozac. Thus, the Office properly exercised its discretion in denying reimbursement for Prozac, as no causal relationship was established between the emotional condition remedied by the drug and the accepted conditions.

The decisions of the Office of Workers' Compensation Programs dated December 12, 3 and May 6, 1996 are hereby affirmed.

Dated, Washington, D.C.
March 25, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Debra S. King,* 44 ECAB 203 (1992).