U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAE A. LOWE and DEPARTMENT OF THE ARMY,
ROCK ISLAND ARSENAL, Rock Island, IL

Docket No. 97-2139; Submitted on the Record;
Issued January 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs erred in finding that all residuals from her previously accepted right elbow condition had ceased and that she currently suffered from no condition or disability causally related to the accepted condition; (2) whether the Office properly denied appellant authorization for additional surgery on her right elbow.

On October 1, 1992 appellant, then a 36-year-old computer assistant, filed a Form CA-2 claim for benefits, alleging that she developed a severe tendinitis condition in her elbow as a result of lifting, pulling and carrying carts and tapes at her workplace and that she first became aware that this condition was related to her employment on February 1, 1992. The Office accepted appellant's claim for bilateral epicondylitis and decompression of the right elbow, and authorized surgery for her right elbow by letter dated June 11, 1993.

Dr. Ralph H. Congdon, a Board-certified orthopedic surgeon, performed right elbow decompression surgery on appellant on June 23, 1993. Dr. Congdon released appellant to return to work to full duty, without restrictions, on September 21, 1993.

In a memorandum dated September 9, 1993, the employing establishment stated that it had received an anonymous telephone call from a coworker of appellant who asserted that appellant was an avid bowler who bowled several times per week, despite the fact that she was currently receiving disability compensation based on her accepted elbow condition. In a memorandum dated November 2, 1993, the Office noted that the employing establishment had expressed concern because appellant continued to engage in bowling activities, although at the present time this was not an issue because she had returned to full-time duty without restrictions.

In a report dated August 24, 1994, Dr. Congdon reported that appellant had returned to him for treatment because she was experiencing increasing symptoms again in her right elbow, which he attributed to an increased work load. He related that appellant had fatigue-like

symptoms with aching and burning, with a rubbing sensation as she flexed and extended her arm or when she turned her hand up and down, as in pronation and supination. In a treatment note dated October 5, 1994, Dr. Congdon stated that appellant's symptoms had diminished, but that she related that her symptoms could be made worse by her activities at work which she had to continue doing. He referred her to Dr. Richard R. Ripperger, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated October 24, 1994, Dr. Ripperger stated that appellant complained of pain over the lateral aspect of the elbow, that this pain was sharp in character and radiated distally along the dorsal radial aspect of the forearm to the wrist level. He stated that the pain was intermittently present at rest but that it was regularly increased with heavier use of the upper extremity. Dr. Ripperger diagnosed recurrent right tennis elbow, and opined that, based on the degree and length of her symptoms, a repeat attempt to decrease her symptoms through another surgery would be reasonable.

In a report dated January 23, 1995, Dr. Congdon stated that appellant had been treated postoperatively with a conditioning program, that her symptoms gradually had been controlled and her pain temporarily decreased. He opined, however, that her improvement appeared to be attributable to the fact that she was not overloading her arm. Dr. Congdon stated that this approach had not yielded as much relief as he had hoped for, and had therefore referred appellant for a second opinion with Dr. Ripperger, who had recommended a repeat decompression surgery. He noted that appellant not been seen in his office since October 1993.[1]

An April 13, 1995 clinic treatment note from the employing establishment stated that appellant presented on that date with continued complaints and constant pain and discomfort in her right elbow, radiating down to her wrist. The note further stated that appellant was awaiting approval for repeat surgery in her right elbow and had submitted a note from Dr. Congdon which indicated that until April 26, 1995, she should be restricted to 4 hours of work per day and limited to lifting 10 pounds in her right arm.[2]

On April 15, 1995 appellant filed a claim for continuing compensation from April 13 through 15, 1995, based on a recurrence of her employment-related elbow condition. She also filed claims for continuing compensation based on this condition from April 17 to 28, April 30 to May 15, May 14 to 27, May 28 to June 10, June 12 to 23 and June 25 to July 8, 1995.

In a memorandum/second opinion worksheet dated May 2, 1995, the Office indicated that it was referring appellant for a second opinion examination with a Board-certified orthopedist. The Office indicated that the reason for this referral was that appellant's treating physician had recommended additional right elbow surgery and that because she was an avid bowler, it needed to know whether the recommended surgery was appropriate. On May 4, 1995

[1] This date is apparently a misprint or error, as Dr. Congdon's treatment notes indicate that appellant had been treated up until October 1994.

[2] An undated employing establishment worksheet indicated that appellant worked in accordance with these restrictions on the dates mentioned.

the Office referred appellant for a second opinion examination with Dr. Myron Stachniw, a Board-certified orthopedic surgeon, for May 25, 1995.

In a report dated May 17, 1995, Dr. Congdon reiterated that decompression surgery in June 1993 had failed to totally relieve the pain in appellant's right elbow and that Dr. Ripperger had recommended a second decompression surgery, for which she was awaiting authorization. He further stated that:

> "At this point in time [appellant] is unable to work a full day without exquisite pain. The pain is brought on by the demands of her working day and it is therefore only reasonable that she not be put through this pain and suffering by working a full working shift, but instead working a half shift, which she can tolerate."

In a report dated May 31, 1995, Dr. Stachniw reviewed the statement of accepted facts and stated his findings on examination. He stated that appellant apparently had made an uneventful recovery from her 1993 surgery, although she had experienced two episodes of infections which were treated with antibiotics and had apparently resolved. Dr. Stachniw noted that appellant had apparently returned to the same presurgery job but stated that she was only working half days and that she had asserted that her symptoms had returned to their previous presurgical level, namely pain on a daily basis aggravated by use of the arm. He indicated that appellant appeared to have normal range of motion on physical examination and that her x-ray results were unremarkable. Dr. Stachniw diagnosed recurrent lateral epicondylitis, with only a fair prognosis. He noted that it apparently had been recommended that appellant undergo a repeated surgical procedure and opined that appellant's work activities were somewhat related but that her bowling activities certainly could contribute to the recurrence or aggravation of lateral epicondylitis.

In a supplemental opinion dated June 26, 1995, Dr. Stachniw stated that he felt the indications for additional surgery on her right elbow were questionable and opined that if appellant was able to bowl twice weekly, she did not need to have additional surgery. He also advised that appellant could probably attempt to begin working six hours per day.

In a July 10, 1995 treatment note, Dr. Congdon released appellant to resume working 8 hours a day, with continued restrictions of no lifting over 10 pounds with her right arm.

The case file was subsequently referred to the Office medical adviser, who stated in a November 13, 1995 memorandum that it seemed most improbable that appellant had a surgical lesion of her epicondyle when she was able to bowl to the extent that had been reported in the statement of accepted facts. The Office medical adviser noted that the information regarding

appellant's bowling activities had been provided by investigators from her employing establishment.[3] He stated that appellant would have no restrictions in her ability to carry out the sedentary/light-duty work activities in her place of employment. The Office medical adviser noted that the treating physician restricted appellant's employment from April 13 through July 9, 1995, but that appellant was fully able to participate in bowling activities with no apparent discomfort, as noted by the employing establishment's investigator. He stated there would be no reason medically why appellant would have been restricted to four hours of work activity during the above period.

The Office determined that a conflict existed in the medical evidence between the opinions of Drs. Congdon and Stachniw, and referred appellant for an independent, referee medical examination pursuant to section 8123(a).[4] Appellant continued to periodically miss work and submit claims for continuing compensation for various periods based on her accepted elbow condition.

The Office scheduled an independent, referee medical examination for appellant with Dr. William Catalona, a Board-certified orthopedic surgeon, for August 8, 1996.

In a report dated August 9, 1996, Dr. Catalona advised that appellant admitted to having improved from her surgery and had been working 8 hours per day for the past year, doing limited lifting of no more than 10 pounds. He noted that appellant complained that her elbow and forearm still hurt, and that she still experienced sharp pain on occasion. Dr. Catalona related that appellant felt her elbow condition was staying the same or was getting slightly worse. He diagnosed residual extensor tendinitis of the right elbow and forearm, commonly known as "tennis elbow" syndrome, which was very common in industry and sports activities, secondary

[3] The statement of accepted facts dated July 8, 1994 and May 2, 1995 indicated that appellant was an avid bowler who participated in two different leagues per week. The statement of accepted facts was amended on October 24, 1995, however, to indicate that she had been observed bowling on March 8, 1995 and had bowled 84 games in a women's league; as of March 21, 1995, she had completed 75 games in a mixed league and had attained a very high average in both leagues; on March 22, 1995 appellant was observed bowling in a game and was videotaped for 2 frames. In an Office memorandum dated November 27, 1995, it was stated that "the [employing establishment] had advised, by memorandum dated November 20, 1995, that [appellant] has continued to bowl on 2 leagues for the last 5 to 12 weeks with very high scores, while she awaits approval of additional surgery." In an Office memorandum dated January 3, 1996, it was stated that, as of November 16, 1995, appellant was participating in two leagues per week, and that she had been observed bowling on November 17 and November 22, 1995. The Office further indicated that on both occasions, appellant was monitored through one entire game and part of a second game and at no time did she demonstrate signs of pain or discomfort while bowling. This information regarding appellant's bowling activities was derived from an investigative report authorized by the employing establishment, which was finalized on December 7, 1995. The report included a video which purportedly depicted appellant's bowling activities and was made part of the case file.

[4] The case was initially referred to Dr. Martin F. Roach, a Board-certified orthopedic surgeon, who examined appellant on February 21, 1996 and submitted a report on the same date. By letters dated March 5 and May 14, 1996, the Office advised Dr. Roach that it required a supplemental report and additional information regarding whether appellant's current's condition was causally related to her accepted elbow condition. Although Dr. Roach submitted a May 16, 1996 report in response to the Office's requests, the Office indicated by memorandum dated June 11, 1996 that "Dr. Roach provided a letter dated May 16, 1996, but has still not address [sic] the specific issues in this case and has still not viewed the video which was sent to him." The Office therefore scheduled appellant for an appointment with another independent medical examiner.

to repeated strain of elbow and wrist extension. Dr. Catalona opined that appellant's "tennis elbow" syndrome was the result of her extensive bowling activities as much as her work activities. With regard to the question of whether appellant required or would benefit from additional elbow surgery, Dr. Catalona opined that the natural history of this condition would not support a very good prognosis. He advised that limited use of the elbow, wrist and hand from working as well as bowling would be as effective as surgery in his opinion.

Regarding appellant's ability to work only four hours per day from April 13 through July 9, 1995, Dr. Catalona advised that bowling contributed as much to her elbow condition as did working, except that working required more repetitive use of the elbow. He concluded that, considering the restrictions recommended by his physicians, appellant could have worked eight hours a day during this period. Lastly, with regard to continuing restrictions, Dr. Catalona reiterated that the natural history of "tennis elbow" syndrome was one of persistent and increasing pain leading to severe degeneration and ultimately degeneration of the elbow extensor tendon origin. He emphasized that appellant should avoid straining her elbow both at work and bowling.

In a supplemental report dated November 5, 1996, Dr. Catalona stated that the only objective findings on examination were the presence of the incisional scar on the lateral aspect of the elbow which was well healed and subjective local tenderness. He also noted that appellant also demonstrated subjective weakness of the elbow on resisting extension and supination of the elbow and wrist. Dr. Catalona stated that there were few if any objective findings to support a diagnosis of overuse syndrome and that his diagnosis of appellant was based on past history and records of previous attending physicians and treatment. He advised that appellant's continuing symptoms were related as much to her off-duty activities as to her work.

Appellant submitted a December 18, 1996 report from Dr. Congdon, who noted that he had not seen appellant for a year and seven months. He stated that appellant related that she was no longer performing some of the aggressive tasks which used to irritate her symptoms, as in carrying multiple spools of computer tape. Dr. Congdon also stated that appellant indicated that in the past few months, for no particular reason, her symptoms had increased. Appellant reported a constant ache, with pain when she fully extended her elbow from a flexed posture after any type of reduction in activity, and that any sort of initiation of motion following rest increased her pain. Dr. Congdon stated that her range of motion was still reasonable, although it was accompanied by discomfort with extension. He noted that extension of appellant's wrist against resistance both dorsally and towards the radial aspect increased her symptoms in the same place about the lateral epicondylar ridge. Dr. Congdon reiterated his and Dr. Ripperger's recommendation for a second decompression surgery on her right elbow.

In a notice of proposed termination dated January 16, 1997, the Office, based on the opinion of Dr. Catalona, the independent medical examiner, found that any residual disability appellant sustained as a result of her employment-related elbow condition had resolved. The Office allotted appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not respond to this notice within 30 days.

By decision dated February 18, 1997, the Office terminated appellant's compensation, finding that she had no residuals from her employment-related elbow condition and found that

appellant was not entitled to compensation based on loss of wages from April 13 through July 9, 1995. The Office also denied authorization for further surgery on her elbow.

The Board finds that the Office erred in finding that all residuals from her previously accepted right elbow condition had ceased and that she currently suffered from no condition or disability causally related to the accepted condition.

The Board initially notes that the Office was not required to submit a pretermination notice to appellant, as the burden shifted to appellant to establish continuing disability and supporting medical evidence following her return to work on September 23, 1993.[5] According to the Federal (FECA) Procedure Manual, a pretermination notice must be provided in cases where the Office has accepted appellant's claim, unless termination of wage-loss compensation is based on the death of the claimant, the claimant's return to work or where the claimant has engaged in certain activities which result in a forfeiture or suspension of compensation.[6] The Board notes that, in this instance, a pretermination notice was not necessary, as appellant returned to work following surgery for her employment-related right elbow condition.

An employee seeking benefits under the Federal Employees' Compensation Act[7] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[8] As part of this burden, the claimant must present rationalized medical evidence based upon a complete factual and medical background showing causal relationship.[9]

In this case, appellant established that she was an employee of the United States, that her claim was timely filed, and that she sustained a tennis elbow condition in her right elbow in the performance of duty. Appellant established initially that her resulting disability from work was causally related to her employment-related condition, and that the surgery she underwent on June 23, 1993 was causally related to this condition. Dr. Congdon, her treating physician who performed the surgery, supported total disability until September 21, 1993, when he released appellant to return to work to full duty without restrictions.

Following her return to work, appellant maintained the burden of establishing entitlement to continuing disability which was related to the employment-related condition. On April 13, 1995 she submitted a note to her employing establishment's medical clinic from Dr. Congdon

[5] *Donald Leroy Ballard*, 43 ECAB 876 (1992).

[6] *See Donald Leroy Ballard*, *supra* note 5; *see* Federal (FECA) Procedure Manual, Chapter -- 1400, Part 2 -- *Claims*, para. 10(a) (April 1995).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *Joseph T. Gulla*, 36 ECAB 516 (1985).

which indicated that until April 26, 1995, she should be restricted to 4 hours of work per day, and limited to lifting 10 pounds in her right arm. Appellant thereafter filed claims for continuing compensation based on her employment-related elbow condition from April 13 through July 9, 1995. The issue of whether appellant was entitled to compensation based on disability causally related to her accepted condition on these dates was ultimately presented to Dr. Catalona, the independent, referee medical examiner, who emphasized in both his original and supplemental reports that her "tennis elbow" was caused by both work and her bowling activities, except to the extent that her job as a computer assistant required more repetitive use of the elbow. With regard to continuing restrictions, Dr. Catalona reiterated that the natural history of "tennis elbow" syndrome was one of persistent and increasing pain leading to severe degeneration and ultimately degeneration of the elbow extensor tendon origin. He emphasized that appellant should avoid straining her elbow both at work and bowling. In his November 5, 1996 supplemental report, Dr. Catalona reiterated that appellant's continuing symptoms were related as much to her off-duty activities as to her work. The Board therefore reverses the Office's finding that appellant is no longer entitled to continuing compensation based on her right elbow condition, and remands for further development of the medical evidence regarding the issue of whether appellant is entitled to continuing compensation for the period April 13 through July 9, 1995.

The Board further finds that the case requires further development of the medical evidence regarding the issue of whether appellant requires additional surgery on her right elbow.

In light of Dr. Catalona's referee opinion that appellant's right elbow condition was caused by both work and her bowling activities, and that her continuing symptoms were related as much to her work activities as nonwork-related activities, the case requires further development of the medical evidence in order to determine whether appellant requires additional corrective surgery to ameliorate her chronic elbow condition. Dr. Catalona stated in his August 9, 1996 report that appellant would probably not benefit from additional elbow surgery because the natural history of a tennis elbow condition would not support a very good prognosis, and that limited use of the elbow, wrist and hand from working as well as bowling would be just as effective as surgery in reducing her symptoms. There is contrary medical evidence in the record, however, which indicates that appellant requires additional surgery. Her treating physician, Dr. Congdon, stated in his May 17, 1995 report that decompression surgery in June 1993 had failed to totally relieve the pain in appellant's right elbow, and noted in his May 17, 1995 and December 18, 1996 reports that Dr. Ripperger had recommended a second decompression surgery, for which she was awaiting authorization. Dr. Congdon also emphasized that appellant was unable to work a full day without exquisite pain, which was caused by the demands of her work. The Office should, therefore, on remand, refer the case to an appropriate medical specialist to submit a rationalized medical opinion on whether appellant requires additional surgery for her right elbow. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The February 18, 1997 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
January 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member