

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE A. FASANELLO and U.S. POSTAL SERVICE,
POST OFFICE, West Roxbury, MA

*Docket No. 99-991; Oral Argument Held February 20, 2001;
Issued August 27, 2001*

Appearances: *Vincent A. Murray, Jr., Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant met her burden to establish that her alleged recurrence of disability as of June 1991 through March 1994 was caused or aggravated by her accepted May 13, 1989 employment injury.

Appellant, a 41-year-old letter carrier, filed a claim for benefits on May 17, 1989, alleging that she injured her right shoulder while carrying mail on May 13, 1989. Appellant was examined on May 15, 1989 by Dr. Michael F. Zito, Board-certified in internal medicine, who stated:

"I have examined [appellant] in my office today for evolution of pain in the [right] lateral neck radiating to the shoulder. Exam[ination] is suggestive of cervical spondylosis with a "pinched nerve." I have recommended 10 days of light duty only -- no lifting, pushing or carrying heavy bundles [weighing more than 10 to 12 pounds]."

In a follow-up report dated May 26, 1989, Dr. Zito noted that appellant continued to experience right shoulder and neck pain. He referred appellant to Dr. William A. Mitchell, a Board-certified orthopedic surgeon, who stated in an August 8, 1989 report that appellant began experiencing progressive onset of painful active use of her right shoulder with repetitious use of her arm in an overhead position, as a letter carrier and lifting her mail. In report dated August 14, 1989, Dr. Mitchell stated that appellant had a strain of her levator scapular muscles from repetitious use of her arm, involving an overuse dysfunction related to her employment. The Office of Workers' Compensation Programs accepted her claim for right scapulo-cervical strain on December 1, 1989. Appellant returned to limited-duty work for four hour per day in May 1989 and received appropriate compensation for intermittent periods of disability.

In a report dated January 11, 1991, Dr. George B. McManama, a Board-certified surgeon, stated that based on his examination appellant had some positive impingement signs and diagnosed a very mild impingement syndrome irritation in her right shoulder, although he advised that she could work an eight-hour day.

On June 25, 1991 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on June 21, 1991 which was causally related to her May 13, 1989 employment injury. In support of her claim, appellant submitted several reports from Dr. Mitchell, who indicated that she was experiencing tendinitis in her right shoulder. These included a July 10, 1991 Form CA-20, in which he diagnosed supraspinatus and tendinitis and a July 30, 1991 report, indicating that she had persistent dysfunction of her shoulder and pain which had not responded to conservative treatment. Dr. Mitchell further stated:

“[Appellant] injured her arm in May of 1989, diagnosed as supraspinatus tendinitis and right shoulder strain. This was the result of overuse and repetitious lifting activities. She has been intermittently off-duty and limited duty. She has had persistent dysfunction of her shoulder and pain, not responding to conservative modalities, including physical therapy, anti-inflammatory medication and intermittent off-duty status.

“Her prognosis is poor, given her current condition. I have recommended that, in order to attempt to restore useful and normal function to her shoulder, she [should] consider [arthroscopic] surgical decompression of her chronically inflamed rotator cuff tendon. This can be done as an outpatient procedure. The postop[erative] rehab[ilitation] period of up to three months would be an attempt to restore normal strength, power, [endurance] and to assess the appropriateness of the patient resuming work requiring active use of her upper extremities.”

In a report dated October 26, 1991, Dr. Barry W. Levine, Board-certified in internal medicine and an Office medical adviser, stated that Dr. Mitchell found no evidence of an impingement syndrome and was not anatomically specific with regard to the nature of her work injury. He rejected Dr. Mitchell’s recommendation that appellant undergo surgery on her right shoulder and recommended that the Office refuse authorization for such surgery.

Dr. Mitchell indicated in reports dated December 11 and 30, 1991 and February 26, 1992, that appellant was disabled from work due to her right shoulder condition, which he reiterated was a supraspinatus tendinitis.

In a report dated April 13, 1992, Dr. McManama advised that appellant was currently disabled, but stated that he was unable to make a definitive diagnosis of impingement syndrome of the right shoulder on the basis of her current subjective complaints. He recommended, however, that appellant undergo another magnetic resonance imaging (MRI) scan of the right shoulder so as to establish a definitive anatomic diagnosis and to determine the necessity of corrective surgery on her right shoulder.

By decision dated June 1, 1992, the Office denied appellant's claim for a recurrence of disability commencing on or after June 21, 1991 causally related to her accepted May 13, 1989 employment injury.

By letter dated July 15, 1992, appellant's attorney requested reconsideration. In support of her claim, appellant submitted a July 1, 1992 report from Dr. Mitchell, who restated his previous recommendation that appellant undergo surgery for decompression of the rotator cuff tendon and opined that appellant remained totally disabled for work pending surgery. Dr. Mitchell stated that her total disability was causally related to her May 13, 1989 work injury and indicated that the recommended surgery was medically necessary and directly related to her injury. In addition, he enclosed an April 16, 1992 report of an MRI scan, which stated findings consistent with "mild tendinitis or degenerative type changes of the rotator cuff tear."

By decision dated October 16, 1992, the Office denied modification of the June 1, 1992 decision.

By letters dated October 20 and 21, 1992, the Office referred appellant to Dr. James E. O'Neil, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. O'Neil was requested to respond to whether appellant still had residuals of the employment-related condition, whether the surgery proposed by Dr. Mitchell was warranted and whether appellant was able to perform the duties of her modified position.

In a report dated November 13, 1992, Dr. O'Neil stated:

"In my opinion, [appellant] has reached an end result. The subjective complaints are not supported by the positive findings today, in my opinion and I believe that she could return to work as a postal clerk. I would agree that she probably has some residual chronic tendinitis in her right shoulder, but I very seriously doubt that surgical decompression would relieve her symptoms after this long period of time. I feel that she could return to work, probably should not go back to carrying the mailbag on her right shoulder and delivering mail on a walking route, but I feel that she could certainly do light duty inside the [employing establishment]. She should not do repeated lifting of her right arm above shoulder level, but could do this on an intermittent basis.

"In view of the long period of disability, I feel that the prognosis for her actually returning to work is quite poor. I feel, however, that we should not carry out a surgical procedure, which I do not feel would relieve her symptomatology. I, therefore, feel that she is not a surgical candidate at this time. I feel that there is not a great deal of motivation for her to return to work."

In a December 16, 1992 supplemental report, Dr. O'Neil advised that appellant had some residual chronic tendinitis in her right shoulder, a condition subject to recurrences. He, therefore, recommended that appellant not return to carrying a mailbag on her right shoulder, but that she certainly could do light duty inside the [employing establishment]. Dr. O'Neil further stated that the MRI scan findings were consistent with a degenerative type of wear and tear and that she could probably do the full-time work of a letter carrier, whose duties included carrying a mail

satchel weighing up to 35 pounds over her shoulder while intermittently walking, standing, bending, stooping, twisting and climbing stairs without restrictions, if she could perform these duties without a recurrence of the shoulder condition for a period of about six months. He opined that there was no evidence of any rotator cuff tear and that surgery was not an appropriate treatment for appellant's condition.

In reports dated May 27 and June 14, 1993, Dr. Mitchell expressed his disagreement with Dr. O'Neil's conclusions, which he considered flawed because they were based primarily on the MRI scan results and reiterated that arthroscopic surgery was necessary to clarify the causal relation of appellant's shoulder complaints. Dr. Mitchell, in his May 27, 1993 report, stated:

"An [MRI scan] that was performed followed the [May 13, 1989] injury concluded tendonopathy of the rotator cuff was present. The [MRI scan] on [April 16, 1992] that I personally reviewed demonstrated evidence that swelling within the musculotendinous rotator cuff with a static view demonstrating a stenotic interval of the rotator cuff was most consistent with my findings and conclusions.... [As] a shoulder expert, experienced in interpreting [MRI scan] studies related to physical findings and correlating these findings with arthroscopic procedures and consistent results for pathology involving tendinitis disorders of the cuff with arthroscopic techniques, I thoroughly endorsed this approach on [appellant]."

In his June 14, 1993 report, Dr. Mitchell stated:

"Please be advised that the painful tendinitis disorder [appellant] is complaining about was diagnosed in an MRI scan that I ordered and personally reviewed, as the result of an injury on [May 13, 1989].... The MRI [scan] done on April 16, 1992, as I reviewed it and as accurately described the radiologist, a tendinitis and degeneration of the right rotator cuff was present. The degenerative wear problem obviously has persisted, further compromising ultimate outcome for managing her shoulder problems at such a chronic and delayed time.... You should note that tendinitis disorders characterized by impingement, as evidenced by an MRI scan and clinical exam[ination], could also be in combination with ligament dysfunction, further confusing an accurate diagnosis and treatment plan for [appellant]."

On August 5, 1993 the Office determined that there was a conflict in medical opinion between Drs. Mitchell and O'Neil regarding whether appellant was capable of performing full-time employment and whether she required corrective shoulder surgery and it, therefore, referred her to Dr. Charles A. DiCecca, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 17, 1993, Dr. DiCecca, after reviewing appellant's medical history, the statement of accepted facts and stating findings on examination, diagnosed chronic tendinitis or rotator cuff degeneration of the right shoulder with impingement and no evidence of a rotator cuff tear. He stated:

"I find no causal relationship between the development of the condition existing in [appellant's] right shoulder and the work-related activity that she was involved in. I do find that [appellant] probably did develop a temporary aggravation of this preexisting condition related to her work activity. This did not impose any form of permanent physical harm upon the preexisting condition but instead resulted in a temporary aggravation of it. No functional impairment resulted."

Dr. DiCecca advised that there was no indication for the diagnosis of right scapuloacervical strain, as was accepted by the Office. He further stated that appellant was currently able to perform work in a limited capacity and indicated that appellant could work eight hours per day as long as she was restricted from lifting above the shoulder and lifting more than 20 pounds. Dr. DiCecca opined that arthroscopic surgery would not be the most direct route for resolution of appellant's shoulder complaints; he recommended cortisone injection treatment be attempted and, if not beneficial, then Dr. Mitchell's recommendation for surgery would be a reasonable consideration.

In a letter dated November 17, 1993, appellant, through her counsel, submitted a November 10, 1993 report from Dr. Mitchell, who expressed his disagreement with Dr. DiCecca and again requested approval for corrective surgery. Appellant also requested that she be compensated for four hours of total disability as of June 24, 1991.

By letter dated November 23, 1993, the Office requested a supplemental report from Dr. DiCecca, requesting that he state his opinion as to whether the residual impairment in appellant's right shoulder was due to "her nonwork-related chronic tendinitis or rotator cuff degeneration."

In a report dated February 23, 1994, Dr. DiCecca clarified his opinion, stating that appellant's shoulder condition represented a preexisting disease process, which was temporarily aggravated during the period of time in which she was working at her employment. He stated that, with the cessation of work activity, the condition returned to its former state and had not been accelerated by her employment activities. Dr. DiCecca concluded that any residual impairment affecting her right shoulder was not due to the May 13, 1989 employment injury and opined that her current symptomatology resulted entirely from the preexisting chronic tendinitis or rotator cuff degeneration.

Appellant returned to work in a full-time modified carrier position on March 28, 1994.

By letter dated August 2, 1994, appellant's attorney contended that she was entitled to compensation benefits from June 24, 1991, the date her total disability benefits were reduced to partial disability, to the date of her return to full-time work effective March 29, 1994. By letter dated January 24, 1995, the Office informed appellant that she was not entitled to compensation for the period June 24, 1991 to March 29, 1994.

In a letter to the Office dated July 17, 1995, appellant's attorney stated that a decision on her request for reconsideration of the Office's October 16, 1992 decision had never been received by her attorney.

By decision dated October 3, 1995, the Office found that appellant's July 17, 1995 request for reconsideration of the October 16, 1992 decision, was not timely as the request was not filed within a year of that decision. The Office also found that appellant's request for reconsideration failed to demonstrate clear evidence of error.

By decision dated April 28, 1998, the Board reversed the Office's March 28, 1991 and October 3, 1995 decisions, finding that the Office improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) and applied an improper standard. The Board found that the Office abused its discretion in denying appellant's reconsideration request, stating that, following issuance of the October 16, 1992 decision, the Office received additional medical and factual evidence into the record and conducted further development on the merits of appellant's claim by referring her to Dr. O'Neil for a second opinion medical examination on the issue of disability and the necessity for surgery and subsequently to Dr. DiCecca for an impartial medical evaluation. The Board, therefore, found that the Office abused its discretion under 5 U.S.C. § 8128 in denying reconsideration under the clear evidence of error standard, instead of applying 20 C.F.R. § 10.138(b)(1) and conducting a merit review of the claim. Accordingly, the Board, therefore, remanded for a merit review of the evidence under section 8128(a).

By decision dated December 19, 1998, the Office affirmed the October 16, 1992 decision denying benefits for a recurrence of disability beginning June 24, 1991, finding that the evidence of record did not warrant modification of the previous decision.

The Board finds that the case is not in posture for decision.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

In this case, the Office relied on Dr. DiCecca's referee medical opinion in finding that appellant failed to establish a change in the nature and extent of her injury-related condition. 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.² In this case, the referee medical examiner, stated in his September 17, 1993 report that appellant had

¹ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

² *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a).

chronic tendinitis or rotator cuff degeneration of the right shoulder with impingement, but found no causal relationship between the development of this condition and factors of her employment. Dr. DiCecca opined that, although she experienced a temporary, work-related aggravation of this preexisting shoulder condition, this did not result in any permanent worsening of the condition. He further stated in his February 23, 1994 report that, with the cessation of work activity, appellant's shoulder condition returned to its former state. Dr. DiCecca advised that any residual impairment affecting appellant's right shoulder was not causally related to the May 13, 1989 employment injury and stated that her current symptomatology resulted entirely from the preexisting chronic tendinitis or rotator cuff degeneration. The Board finds that Dr. DiCecca's opinion is flawed, because he stated erroneously that appellant's original, accepted work-related condition was preexisting degenerative, tendinitis which was only temporarily aggravated. This was contrary to the contemporaneous medical evidence which indicated that she had experienced a scapulo-cervical strain and chronic tendinitis in her right shoulder -- not an aggravation of a preexisting strain or tendinitis. Dr. Zito, the original treating physician, referred appellant to Dr. Mitchell, who stated in his August 14, 1989 report that appellant had sustained a strain of her levator scapular muscles due to repetitious use of her arm and an overuse dysfunction related to her employment. He noted in his July 30, 1991 report that appellant's May 1989 work injury was diagnosed as supraspinatus tendinitis and right shoulder strain and stated in reports dated December 11 and 30, 1991 and February 26, 1992 that appellant was disabled from work due to chronic supraspinatus tendinitis. In his July 1, 1992 report, Dr. Mitchell stated again that appellant was currently disabled due to her May 1989 work injury and submitted an April 16, 1992 report, which stated findings consistent with mild tendinitis or degenerative changes and tearing of the rotator cuff. Dr. Mitchell reiterated these findings and conclusions in reports dated May 27 and June 14, 1993. Dr. DiCecca, however, in his referee medical opinion, disregarded the medical evidence at the time of appellant's original injury and alleged recurrence and found that appellant's original, accepted work-related condition was preexisting degenerative, tendinitis which was only temporarily aggravated in May 1989.

On remand, the Office will refer appellant to a new impartial medical specialist and prepare a new statement of accepted facts which specifically indicates that appellant sustained a right shoulder strain in May 1989, as indicated by the Office's original acceptance, that she experienced chronic tendinitis resulting from her work injury and which contains contemporaneous medical evidence documenting these conditions; *i.e.*, the reports from Dr. Mitchell. The new referee specialist will be instructed to provide a well-rationalized opinion, to specifically determine the outstanding issue in the case, *i.e.*, whether appellant met her burden to establish that her alleged recurrence of disability as of June 1991 through March 1994 was caused or aggravated by her accepted May 13, 1989 employment injury and to clearly indicate the specific background upon which he based his opinion. After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Office of Workers' Compensation Programs' decision of December 19, 1998 is, therefore, set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
August 27, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member