

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DENNIS C. MARTY and U.S. POSTAL SERVICE,  
POST OFFICE, Grand Junction, CO

*Docket No. 00-681; Submitted on the Record;  
Issued February 7, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant has established a right rotator cuff tear as causally related to an October 14, 1995 employment injury.

The Office of Workers' Compensation Programs has accepted that appellant sustained a right shoulder contusion, left knee contusion, hamstring pull, and right hip bursitis in the performance of duty on October 14, 1995. Appellant returned to a light-duty position; on September 6, 1996 he underwent surgery to repair a torn rotator cuff in the right shoulder. In a claim for compensation (Form CA-7) dated December 4, 1996, appellant claimed compensation commencing November 12, 1996.

By decision dated October 24, 1997, the Office denied appellant's claim for compensation, finding that the weight of the evidence was represented by Dr. Louis H. Winkler, a Board-certified orthopedic surgeon selected as an impartial medical specialist pursuant to 5 U.S.C. § 8123(a). In a decision dated August 18, 1998, an Office hearing representative affirmed the prior decision. In a decision dated December 7, 1998, the Office denied modification of the prior decisions. By decision dated October 14, 1999, the Office again denied modification of its prior decisions.

The Board has reviewed the record and finds that the case is not in posture for decision.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>1</sup> In this case the Office declared a conflict in the medical evidence between an attending physician, Dr. David P. Fisher, an orthopedic surgeon, and Dr. W.H. Keener, an orthopedic surgeon serving as a second opinion physician. Dr. Fisher opined in an August 26,

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<sup>1</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

1996 report that appellant sustained a rotator cuff tear when he fell and caught himself with his right arm in the performance of duty on October 14, 1995. The Board finds, however, that the reports of Dr. Keener, the second opinion physician, are not sufficient to create a conflict. In a September 21, 1996 report, Dr. Keener opined that appellant did not sustain a large rotator cuff tear on October 14, 1995, noting a physical examination on October 19, 1995 showing excellent range of motion in the shoulder and the lack of reports revealing shoulder complaints.

In a supplemental report dated April 17, 1997, however, Dr. Keener appeared to offer a different opinion. He explained that he did not feel it was possible that appellant sustained a “large” rotator cuff tear,<sup>2</sup> but he then indicated that Dr. Fisher had submitted a November 7, 1996 report stating that appellant probably did discuss his shoulder following the employment injury, although it had not been recorded in treatment notes. Dr. Keener stated, “it is medically possible” that a small tear of the rotator cuff could have occurred on October 14, 1995, then worsened and tore completely sometime before the magnetic resonance imaging study of July 31, 1996. Dr. Keener concluded that, assuming that Dr. Fisher neglected to record continuing shoulder problems, “there would be a relationship” between the employment incident and the subsequent surgery on September 6, 1996, “in other words the rotator cuff injury could have gradually worsened to an eventual complete tear.”

The Office did not seek clarification from Dr. Keener or request additional information from Dr. Fisher regarding unrecorded shoulder complaints. The reports of Dr. Keener, taken together, provide a speculative opinion on causal relationship. To the extent that Dr. Keener offers a final opinion, it would appear to support a causal relationship between a rotator cuff tear and the employment injury. It does not constitute a probative medical opinion that is in conflict with Dr. Fisher on the issue of causal relationship.

Accordingly, the referral to Dr. Winkler is not as an impartial medical specialist whose report may be entitled to special weight,<sup>3</sup> but as a referral physician.<sup>4</sup> In a report dated June 20, 1997, Dr. Winkler provided a history and results on examination. Dr. Winkler opined that there was no causal relationship between the October 14, 1995 injury and the torn rotator cuff. Dr. Winkler indicated that he believed the tear occurred in the late spring of 1996, when appellant reported acute pain in his shoulder.

The Board finds that the record now is in conflict on the issue of whether appellant sustained a rotator cuff tear, with surgery in September 1996 and subsequent disability for work, causally related to the October 14, 1995 employment injury. Under section 8123(a), the Office should secure an opinion from an impartial medical specialist that resolves the issues in question. After such further development as the Office deems necessary, it should issue an appropriate decision.

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<sup>2</sup> A radiology report dated July 31, 1996 reported a large rotator cuff tear.

<sup>3</sup> When a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

<sup>4</sup> See *Leanne E. Maynard*, 43 ECAB 482 (1992).

The decisions of the Office of Workers' Compensation Programs dated October 14, 1999 and December 7, 1998 are set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
February 7, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member