

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL G. PEREA and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Ogden, UT

*Docket No. 99-1911; Submitted on the Record;  
Issued June 19, 2001*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated medical benefits for appellant's right shoulder condition subsequent to April 1, 1991.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's medical compensation benefits for his right shoulder condition subsequent to April 1, 1991.

On October 25, 1989 appellant, then 27-year-old seasonal tax examiner, filed a traumatic injury claim (Form CA-1), alleging that he injured his back, shoulders and legs when his left foot got caught on an electrical cord and he fell forward hitting his right hand and elbow on a desk and twisting his body at the same time. The Office accepted the claim for low back strain and herniated nucleus pulposus (HNP) L4-5 with surgery. Appellant worked light duty intermittently, stopped work on January 27, 1991 and was placed on the automatic rolls for temporary total disability by letter dated August 22, 1991.

On December 8, 1993 appellant filed a recurrence claim regarding his right shoulder.

In a December 3, 1993 report, Dr. Grace M. O'Brien, an attending Board-certified family practitioner, noted that appellant had complained of right shoulder, arm and upper back pain as well as lower back pain at the time of the October 25, 1989 employment injury. Dr. O'Brien indicated that in October 1993 appellant was seen for his "continuing complaints of upper thoracic and shoulder pain" and that "at this point, we have to consider that, yes indeed the neck and shoulder pain have been present for quite some time, dating back to perhaps the original injury in 1989."

In a July 20, 1994 report, Dr. Otmar W. Albrand, an attending Board-certified neurological surgeon, concluded that due to appellant's "accident he has experienced a great deal of shoulder and arm pain," which the physician determined was related to appellant's accepted employment injury.

In a February 21, 1995 report, Dr. Corey D. Anden, based upon a physical examination and an electromyographic (EMG) examination, opined that due to his accepted October 25, 1989 employment injury appellant sustained lumbosacral musculoligamentous strain, probable occurrence of HNP at L4-5, possible right shoulder strain, post-traumatic myofascial pain syndrome symptomatology with a trigger point in the right upper trapezius musculature.

By decision dated August 3, 1995, the Office found the medical evidence insufficient to establish that appellant's neck, right arm, right shoulder, upper back and feed conditions were causally related to his accepted October 25, 1989 employment injury.

In an August 3, 1995 report, Dr. O'Brien concluded that appellant had "physical disabilities from his injury, including his back and shoulder." He noted that, appellant stated that his right shoulder and arm pain have been present since his accepted employment injury, but that he focused on his back pain at the time since it was more severe.

In a letter dated August 25, 1995, appellant requested an oral hearing, which was held on October 22, 1996.

In a September 21, 1995 report by Dr. Bradley R. Melville, an attending Board-certified physiatrist, noted the history of appellant's employment injury and diagnosed rotator cuff tendinitis and impingement syndrome, failed back syndrome, congenital stenosis, general anxiety disorder and history of hypertension.

In a report dated October 24, 1996, Dr. Melville noted that appellant reported injuring his arm on October 25, 1989 when he fell and indicated that appellant's symptoms "in his shoulder certainly are consistent with an injury he may have received" on that date. Furthermore, he stated that such an injury "may result in chronic shoulder discomfort for many years."

By decision dated January 31, 1997, the hearing representative set aside the August 3, 1995 Office decision and remanded the case for further development regarding the issue of whether appellant's right shoulder condition was due to his accepted employment injury.

In a report dated May 7, 1997, Dr. David E. Curtis, a second opinion Board-certified orthopedic surgeon, opined that appellant did suffer a sprain in his right shoulder due to his accepted employment injury, but concluded that any "residuals of the shoulder sprain should have ceased with 6 to 9 months following the injury. Furthermore, he concluded that appellant's current shoulder problems were unrelated to his accepted employment injury. In support of this conclusion, he noted:

"[Appellant's] shoulder conditions is primarily muscular involving the right shoulder girdle and base of the neck. The records reflect a condition of shoulder impingement. I do not believe that [his] current shoulder problems are related to the October 25, 1989 injury. This was a low level energy injury and [appellant] did not make significant complaint about his right shoulder despite having frequent physician contact for several years following the injury. He does have according to one MRI interpretation bony predisposition, that could lead to problems with shoulder impingement."

In a September 5, 1997 decision, the Office denied appellant's claim that his right shoulder condition was causally related to his accepted employment injury.

Appellant requested a hearing in an undated letter received by the Office on September 26, 1997. A hearing was held on April 21, 1998 at which appellant was allowed to testify and submit evidence.

In a decision dated May 28, 1998, the hearing representative accepted that appellant's right shoulder condition was caused by his accepted employment injury, but found that all residuals had ceased by April 1991.

The Board finds that the Office failed to meet its burden of terminating appellant's medical benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>3</sup>

The Board finds, however, that there currently is a conflict in the medical evidence between Dr. Curtis, a second opinion physician and Drs. Albrand, Anden, Melville and O'Brien, appellant's treating physicians, as to whether appellant has any residuals due to his shoulder injury requiring further medical treatment. Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>4</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>5</sup>

It is the Office's burden to establish that employment-related disability or residuals have ceased before it may terminate benefits. In order to meet this burden, there must be probative medical evidence that the disability has ceased or is no longer causally related to appellant's employment injury. The Board finds that there is a conflict in the medical evidence between the opinions of, Drs. Albrand, Anden, Melville and O'Brien and Dr. Curtis, the Office second

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<sup>1</sup> *Mohamed Yunis*, 42 ECAB 325 (1991).

<sup>2</sup> *Id.*

<sup>3</sup> *Frederick Justiniano*, 45 ECAB 491 (1994); *see Marlene G. Owens*, 39 ECAB 1320 (1988); *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>4</sup> 5 U.S.C. § 8123(a).

<sup>5</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

opinion physician, regarding whether appellant had any residual disability due to his accepted shoulder injury after April 1, 1991. Appellant's treating physicians, Drs. Albrand, Anden, Melville and O'Brien, all opined that appellant continued to have residuals from his shoulder injury while the second opinion physician, Dr. Curtis, determined that appellant's shoulder injury should have resolved within six to nine months of his October 25, 1989 employment injury.

Section 8123(a) of the Federal Employees' Compensation Act,<sup>6</sup> provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination."<sup>7</sup> Such a conflict exists in this case. Inasmuch as the opinions of Drs. Albrand, Anden, Melville and O'Brien and Dr. Curtis are in direct conflict on the issue of whether or not appellant had injury residuals subsequent to April 1, 1991, the record contains no medical opinion which constitutes the weight of the medical evidence and the Office improperly terminated appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated May 28, 1998 is hereby reversed.

Dated, Washington, DC  
June 19, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>7</sup> 5 U.S.C. § 8123.