

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE ORTIZ and U.S. POSTAL SERVICE,
POST OFFICE, Corpus Christi, TX

*Docket No. 00-1310; Submitted on the Record;
Issued May 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained a recurrence of disability commencing May 27, 1999, causally related to his March 1, 1999 lumbosacral strain or April 13, 1992 right shoulder bursitis; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

On April 12, 1999 the Office accepted that appellant, then a 40-year-old distribution clerk, sustained lumbosacral strain in the performance of his duties on March 1, 1999. It subsequently accepted that he also sustained aggravation of his right shoulder bursitis in the performance of his duties.¹ Appellant stopped work on March 1, 1999 and was released to full duty on May 7, 1999, but he actually returned to light duty.

A medical progress note from Dr. Mark A. Dodson, a Board-certified family practitioner, dated May 7, 1999 reported that appellant felt like he could perform full duties, that he had no right shoulder tenderness and that he had full range of right shoulder motion. Appellant worked for approximately three weeks in a limited-duty capacity and then filed a claim for recurrence of disability due to right shoulder pain commencing May 27, 1999.

In support of his recurrence claim, appellant submitted a medical progress note from Dr. Dodson dated May 28, 1999, which indicated that appellant was seen with right shoulder pain as a recurrence of his problem in 1992. Dr. Dodson noted a reduced range of right shoulder abduction to 140 degrees and tenderness over the posterior aspect of the right shoulder.

A report from Dr. Dodson dated June 22, 1999 indicated that appellant was disabled from his regular duties due to chronic back and right shoulder pain.

¹ On September 10, 1992 the Office accepted that appellant sustained bursitis of the right shoulder under claim No. 16-0206020. This claim was later combined with claim No. 16-0330173 under the latter docket number. Appellant filed a recurrence claim under the first claim number on May 14, 1999.

On June 23, 1999 the Office accepted that appellant had sustained a “consequential injury,” aggravation of right shoulder bursitis. The date of injury was noted as March 1, 1999.

By report dated June 29, 1999, Dr. Charles W. Breckenridge, a Board-certified orthopedic surgeon, who diagnosed right shoulder impingement syndrome with internal derangement of the acromioclavicular (AC) joint and chronic rotator cuff tendinitis. On a Form CA-17 duty status report that date Dr. Breckenridge indicated that appellant could not perform any activities of his work requirements.

By Form CA-7 appellant claimed compensation for total disability commencing June 7, 1999.

On a duty form dated July 19, 1999 Dr. Breckenridge indicated by checkmark that appellant could not return to work.

A July 22, 1999 radiology report of a magnetic resonance imaging (MRI) scan revealed findings of “mild edema associated with the distal supraspinatus, likely representing an acute tendinitis.”

By letter dated July 26, 1999, the Office noted that appellant claimed compensation for total disability from June 7, 1999 and continuing and it advised him that medical evidence supporting total disability was required.

On a Form CA-17 duty status report dated July 29, 1999 Dr. Breckenridge again indicated that appellant could not perform any activities of his work requirements. In an accompanying narrative report that date Dr. Breckenridge reported positive physical examination results, including a positive impingement sign, a positive cross arm adduction test, weakness on rotator cuff strength testing and tenderness over the AC joint and the biceps tendon and he diagnosed right shoulder rotator cuff tendinitis with internal derangement of the AC joint creating impingement and chronic right shoulder impingement syndrome. Arthroscopic surgery was recommended.

By report dated August 9, 1999, Dr. Dodson, a Board-certified family practitioner, noted: “I saw [appellant] in my office on May 28, 1999 and ... put him off of work for one to two months due to back and shoulder pain. [Appellant] was unable to do any lifting, stooping, bending or climbing.”

By decision dated August 10, 1999, the Office denied appellant’s claim for compensation for total disability beginning May 27, 1999 finding that the medical evidence of record did not demonstrate an objective change in his condition commencing May 27, 1999.

On August 17, 1999 the Office received a July 30, 1999 statement from appellant indicating that he stopped work on May 27, 1999 because he was experiencing excruciating pain in his right shoulder.

On September 2, 1999 appellant underwent a “right shoulder arthroscopy with synovectomy debridement, debridement of the anterior labrum, status post subacromial decompression [and] distal clavicular excision.” His postoperative diagnoses were noted as

“right shoulder glenohumeral joint synovitis with anterior labral fraying, synovitis [of the] rotator cuff and partial thickness rotator cuff tear, internal derangement [of the] [AC] joint creating impingement [and] impingement syndrome [of the] right shoulder.”

On a September 21, 1999 Form CA-17 Dr. Breckenridge indicated that appellant was disabled due to impingement syndrome with internal derangement.

By report dated September 27, 1999, Dr. Dodson addressed the denial of appellant’s recurrence claim on the basis that no objective right shoulder changes were noted and he indicated that physical examination on May 7, 1999 revealed no tenderness over the right shoulder and full range of motion with abduction to 180 degrees, but that examination on May 28, 1999 revealed tenderness over the posterior aspect of the right shoulder and a reduced range of right shoulder motion with abduction limited to 140 degrees. Dr. Dodson opined that these were objective findings showing deterioration in the function of appellant’s right shoulder.

By letter dated October 4, 1999, appellant requested an oral hearing and he indicated that on August 20, 1999 he had originally requested an oral argument but had sent the request to the incorrect address, the Dallas branch of the Office, instead of the Branch of Hearings and Review in Washington, D.C. Attached to the October 4, 1999 letter was a letter dated August 20, 1999 addressed to the Dallas Office and requesting an oral hearing in his area. Both of these letters were date stamped as received on October 8, 1999.²

By Form CA-17 dated October 14, 1999, Dr. Breckenridge indicated that appellant remained totally disabled, but noted that he could return to light duty on November 1, 1999. An accompanying narrative indicated that appellant continued to improve with right arm forward elevation to 150 degrees, external rotation to 45 degrees and internal rotation to the L2 level. Dr. Breckenridge opined that appellant’s rotator cuff was functional, that he required further physical therapy and that he could return to modified light duty with no overhead activity, no repetitive activity and no sorting with the right upper extremity.

By decision dated November 3, 1999, the Branch of Hearings and Review denied appellant’s request for an oral hearing finding that it was untimely requested and that the issue could equally well be addressed by requesting reconsideration by the Office and submitting new and relevant evidence.

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

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty.³ As part of his burden, the employee must show a change in the nature and extent

² However, the mailing envelope for the August 20, 1999 request was not retained for the record.

³ *Terry R. Hedman*, 38 ECAB 222, 227 (1986) (In the instant case, although appellant was cleared to return to regular duty, the record supports that he actually returned to light duty).

of the injury-related conditions or a change in the nature and extent of the light-duty requirements.⁴

In this case, appellant's examination on May 7, 1999 by Dr. Dodson revealed full range of right shoulder motion with abduction to 180 degrees and without tenderness. He was cleared to return to duty. However, an examination on May 28, 1999, the day after appellant stopped work, revealed a decreased range of right shoulder motion with abduction to only 140 degrees and with the subjective addition of right shoulder tenderness. The loss in degrees of abduction in the right upper extremity is objective evidence of a change in the nature or extent of his injury-related condition. Therefore, under the *Hedman* test, appellant has presented threshold evidence supportive of his recurrence of disability claim.⁵

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁶ This holds true in recurrence claims as well as in initial traumatic and occupational claims. In the instant case, although none of appellant's treating physicians' reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained a recurrence of total disability on or around May 27, 1999, causally related to his March 1, 1999 accepted employment injuries, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship, that is sufficient to require further development of the case record by the Office.⁷ Additionally, there is no opposing medical evidence in the record.

Therefore, the case will be remanded to the Office for the preparation of a statement of accepted facts and specific questions to be addressed, to be followed by a referral to an appropriate specialist for a rationalized opinion as to whether appellant sustained a disabling recurrence of disability on or around May 27, 1999, causally related to his accepted lumbosacral strain or right shoulder bursitis injuries.

The issue of whether the Office abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124 (b)(1) is rendered moot.

⁴ *Id.*

⁵ *Id.*

⁶ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁷ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

The decision of the Office of Workers' Compensation Programs dated August 10, 1999 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board; the decision dated November 3, 1999 is moot.

Dated, Washington, DC
May 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member