

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD O'BRIEN and U.S. POSTAL SERVICE,
POST OFFICE, Boston, MA

*Docket No. 00-1665; Oral Argument Held June 7, 2001;
Issued November 21, 2001*

Appearances: *Thomas P. Clougherty, Esq.*, for appellant; *Thomas G. Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a herniated disc, or arthritis of his neck, back, or right shoulder causally related to his employment duties or accepted employment injuries; and (2) whether the aggravation of appellant's left acromioclavicular joint arthritis was temporary and ended by March 17, 1994.

On September 1, 1987 appellant, then a 30-year-old letter sorting machine clerk, filed a claim for an injury sustained on that date to his shoulder, hand and back by lifting a sack of mail. The Office of Workers' Compensation Programs accepted that appellant sustained a back strain.

On August 10, 1988 appellant filed a claim for an injury to his low back sustained on August 10, 1988 by bending and twisting. The Office accepted that appellant sustained an acute lumbosacral strain.

On November 20, 1992 appellant filed a claim for an injury to his lower and upper back sustained on November 14, 1992 when attempting to move a box. By decision dated January 26, 1993, the Office found that appellant had not established fact of injury with regard to this claim. By decision dated October 13, 1993, an Office hearing representative found that the medical evidence did not establish that appellant sustained an injury on November 14, 1992. By decision dated April 10, 1995, the Office found that the evidence submitted with appellant's request for reconsideration was not sufficient to warrant modification of its prior decisions.

On April 1, 1993 appellant filed a claim for an occupational disease in which he attributed post-traumatic degenerative osteoarthritis of his spine and shoulders to repetitive lifting in his employment and to his prior traumatic injuries. The Office accepted this claim for chronic strains of both shoulders and of the upper and lower back.

By decision dated April 19, 1996, the Office found: “The weight of the medical evidence does not support the expansion of the accepted condition to include arthritis and/or L4-5 disc herniation as work related and does not support the payment of wage-loss compensation commencing November 20, 1995 and continuing.”

At appellant’s request, a hearing was held before an Office hearing representative on June 25, 1996, at which appellant testified that his termination from employment by the employing establishment on August 28, 1995 was not due to his employment injuries but rather to his wife’s medical emergency and that his grievance of the termination was unsuccessful. By decision dated September 4, 1996, an Office hearing representative found that the evidence failed to demonstrate that appellant’s disability on and after November 20, 1995 was causally related to his employment duties or injuries. This Office hearing representative further found that the July 22, 1996 report appellant submitted from Dr. Frederic T. Huffnagle, a Board-certified orthopedic surgeon, was sufficient to require further development of the record. The Office hearing representative directed the Office to refer appellant, the case record and a statement of accepted facts to a Board-certified orthopedist “for resolution and determination with regard to whether the claimant has incurred a herniated lumbar disc at the L4-5 level and/or developed arthritis of his neck or back in any way causally related to the accepted employment incidents or factors of the claimant’s federal employment.”

On December 13, 1996 the Office referred appellant, copies of his medical records and a statement of accepted facts to Dr. S. Richard Prothero, a Board-certified orthopedic surgeon. After it obtained an original and two supplemental reports from Dr. Prothero, the Office determined that there was a conflict of medical opinion between Dr. Prothero and appellant’s attending physicians. To resolve this conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. John F. McConville, a Board-certified orthopedic surgeon. The Office obtained an original and a supplemental report from Dr. McConville, but was unsuccessful in obtaining a second supplemental report.

The Office thereafter referred appellant to Dr. Steven Silver, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion, but Dr. Silver did not examine appellant. By decision dated August 7, 1998, the Office suspended appellant’s entitlement to compensation for failure to establish good cause for refusing to be examined by Dr. Silver.

On November 24, 1998 the Office referred appellant, the case record and a statement of accepted facts to Dr. Kuhrt Wieneke, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. Dr. Wieneke submitted a report dated December 8, 1998, and in response to an Office request for clarification of this report, a supplemental report dated March 12, 1999.

By decision dated May 7, 1999, the Office found that appellant’s lumbar disc derangement and degenerative disease at L4-5 and L5-S1, his right shoulder arthritis, and his cervical arthritis were not causally related to his employment duties or his accepted employment

injuries. The Office further found that the temporary aggravation of appellant's left acromioclavicular joint arthritis resolved no later than March 17, 1994.¹

Appellant requested a hearing, which was held on October 28, 1999. By decision dated January 6, 2000 an Office hearing representative affirmed the Office's May 7, 1999 decision on a finding that the reports of Dr. Wieneke, as those of an impartial medical specialist resolving a conflict of medical opinion, constituted the weight of the medical opinion evidence. The Office hearing representative also found that the Office had no specific obligation to request clarification from appellant's attending physicians before referring appellant for a second opinion evaluation, that the Office properly referred appellant to Dr. Wieneke after it was unable to obtain a supplemental report from Dr. McConville, that there was no convincing evidence to support appellant's allegation that the Office had improper telephone contact with Dr. Wieneke, that there was no evidence to support an allegation that Dr. Wieneke regularly performed fitness-for-duty examinations for the employing establishment, and that the Office's statement of accepted facts and questions to Dr. Wieneke were appropriate.

The Board finds that the weight of the medical evidence establishes that the aggravation of appellant's left acromioclavicular joint arthritis was temporary and ended by March 17, 1994, and that appellant did not sustain a herniated disc, or arthritis of his back casually related to his employment duties or accepted employment injuries.

There was a conflict of medical opinion in this case between appellant's attending physicians, Dr. Jay Rosenfeld,² and Drs. Huffnagle and Prothero, to whom the Office referred appellant for a second opinion evaluation. In a report dated October 1, 1997, Dr. Rosenfeld diagnosed left shoulder instability with labral tear and stated that appellant did not have a history of shoulder problems prior to his employment at the employing establishment and that the nature of his work was consistent with his injuries. In a report dated July 22, 1996, Dr. Huffnagle stated that it was his opinion to a reasonable medical certainty that appellant's osteoarthritis of the back and his L4-5 disc herniation were causally related to his employment and his employment injuries. Dr. Huffnagle stated that the work appellant performed "over the course of time amounted to many thousands of hours of physical labor imposed upon a chronically weak back," that "consequent to [his] injuries and activities the muscles and ligaments in [appellant's] back were inadequate to meet the rigors of his employment, resulting in instability of the spine itself with resultant disc herniation," and that appellant "had not experienced any back pathology before his employment with the employing establishment and there is no known cause of his condition other than the work activities described above."

In a report dated January 9, 1997, Dr. Prothero stated that there were "no objective findings on my examination today with regards to the cervical spine or the shoulders to indicate any ongoing disability in either of these areas. Motion and strength in both these areas was clinically normal with no significant pathology noted with the exception of what appeared to be

¹ This decision superceded an Office decision dated May 6, 1999 which contained the same findings regarding appellant's lumbar and left shoulder conditions, but did not contain findings on appellant's right shoulder or cervical spine arthritis.

² Dr. Rosenfeld is Board-certified in physical medicine and rehabilitation.

chronic arthritic abnormalities of both acromioclavicular joints but without any evidence of limitation of function because of same.” Dr. Prothero stated that there was “definite evidence of arthritis in the shoulders,” that this arthritis was of the degenerative type, that the “arthritic conditions of the spine and shoulders is possible to have been related to some degree to his employment duties as a distribution clerk,” but because “no x-ray documentation of the x-ray changes in either area was obtained until many years following the first report of his symptomatology,” he could not “make a reasonable determination as to whether or not the arthritic conditions were or were not caused by his employment. It is certainly possible he would have developed arthritis regardless of his postal employment and indeed as stated above it is possible that he did develop arthritis prior to beginning his postal employment but there is no way that we can document this.” Dr. Prothero also stated that there was “equivocal evidence of the lumbar disc herniation,” that the computerized tomography (CT) scan on September 16, 1988 showed no evidence of a herniated disc but the July 1995 magnetic resonance imaging (MRI) scan did and that this MRI scan was “subsequent to the time that he discontinued working and it is certainly possible that a further injury occurred during that time resulting in the subsequent herniation, but there is no way that I can document this one way or the other.” In response to an Office request for an opinion whether appellant’s arthritic condition was materially worsened by his employment duties, Dr. Prothero, in an April 10, 1997 report, stated:

“I would state that in light of the fact that his x-ray evidence showed more significant osteoarthritis in the left acromioclavicular joint than in the right and since his symptoms relative to the shoulders were related to the left shoulder, it would be my opinion that at whatever point the examinee developed osteoarthritis of the acromioclavicular joints and it would be my opinion that he more likely developed osteoarthritis of those joints prior to beginning employment, nonetheless it would be my feeling that the osteoarthritis of the left acromioclavicular joint was materially worsened as a result of his employment. As to whether or not the work injuries of September 1, 1987 and August 8, 1988 materially contributed, I would say that in light of the fact that he registered symptoms relative to the shoulder in those episodes, that these injuries did materially worsen his condition relative to the shoulder.

“As to whether this was a temporary or permanent aggravation, it is my opinion that this was a temporary aggravation. His current work restrictions would be due to the naturally progressive nature of the disease process itself. Since he has not worked in so long, his current complaints would be considered related to his probable preexisting arthritis.”

In response to an Office request for an opinion when the employment-related aggravation of his arthritis ended, if it had, Dr. Prothero stated: “In light of the fact that the examinee stated ongoing symptoms relative to his shoulder as of the date of my examination on January 9, and in light of the fact that I found no objective evidence of any disability relative to the shoulder at that time, it would be my opinion that the date upon which the work-related aggravation ceased would be January 9, 1997, in that I had not had the opportunity to examine him prior to this time and it would be impossible for me to give a date prior to that time as having been determined by me.”

The reports of Dr. Prothero created a conflict of medical opinion with those of Drs. Huffnagle and Rosenfeld on the causal relation of appellant's arthritic condition.³ It was proper for the Office to refer appellant to Dr. Prothero for a second opinion evaluation. The opinions of Drs. Huffnagle and Rosenfeld were not sufficient to establish appellant's claim, as Dr. Rosenfeld's reports provided little rationale and Dr. Huffnagle's reports did not reflect an awareness that appellant performed only limited duty following his employment injuries. The Office's procedure manual does not require that the Office seek clarification from appellant's attending physicians before making a referral for a second opinion, but rather states that the attending physician is one of the sources that "may be asked to provide further medical rationale."⁴

To resolve the conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. Wieneke, a Board-certified orthopedic surgeon. In a report dated December 8, 1998, Dr. Wieneke, after setting forth appellant's history, complaints and findings on examination, concluded:

"The disc changes in the lumbosacral spine, at L4-5 and L5-S1 levels, are consistent with his age. These are not only frequently seen, but in this individual are asymptomatic in their entirety. In fact his physical examination of the low back and both legs is entirely within normal limits. There would therefore be no restrictions placed upon his activities.

"The positive MRI's of both shoulders are consistent with degenerative osteoarthritis in the AC [acromioclavicular] joints as described, and are symmetrical in appearance. The degenerative changes at the anterior glenoid rims likewise, are symmetrical or nearly so, in appearance. I find therefore that he sustained a left lumbar strain in September 1987, following which he was appropriately treated conservatively, and was out of work for less than one month. He suffered a second low back strain on approximately January 4, 1988, and again on approximately August 5, 1988. CT scanning in September 1988, and an MRI study of the lumbar spine on July 20, 1995 are consistent with degenerative disc disease, initially at the L4-5 level and subsequently at both L4-5 and L5-S1. The MRI study, however, is significantly more sensitive for degenerative disc disease *per se*, and there were elements in the diagnosis of these conditions, from 1988 through 1995. Moreover, his history clearly is consistent with a lumbosacral muscular ligamentous strain, which gradually but definitely resolved, with conservative treatment. There is no indication in the forwarded medical records, as to why he was out of work from 1988 through early October 1992.

"He sustained a work aggravation of his left shoulder osteoarthritis in early September 1987, although this is poorly documented. There is no indication that he injured his right shoulder at that time. The aggravation of his shoulder

³ In a report dated March 8, 1997, Dr. Huffnagle stated that appellant's "herniated disc which we diagnosed initially is now a moot point."

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.5(c) (June 1995).

sustained at work appears related to pushing and pulling heavy materials, with occasional overhead lifting. Since arthritis in the acromioclavicular joints in both shoulders is absolutely symmetrical in appearance, on the MRI's, I conclude that this is an underlying preexisting condition, which can certainly be subject to transient overload, as happened in this individual. His physical examination, as described in some detail above, is as of this date virtually within normal limits. Because of the presence of osteoarthritis in both acromioclavicular joints, as well as the degenerative changes in the anterior glenoid rims of both shoulders, I would limit his overhead lifting to 10 pounds on an occasional basis, and his lifting, pulling, pushing, carrying to medium duty or 40 pounds on an occasional basis, 20 pounds repetitively."

* * *

"There is no indication that the disc degenerations at L4-5 and L5-S1, apparent on two imaging studies, are related in any way to his work activities. I agree that [appellant] would have developed osteoarthritis in the AC joint, symmetrically, regardless of his time spent employed by the [employing establishment]."

In a supplemental report dated March 12, 1999, submitted in response to a January 22, 1999 Office request, Dr. Wieneke stated:

"My statement regarding aggravation at work of his left shoulder arthritis relates specifically to lifting a mail sack on September 1, 1987, when he complained of pain in the region of his left shoulder blade. There was however, underlying mild osteoarthritis involving both AC joints, most likely at that time and certainly with the passage of additional time. Moreover, a throwing motion as in throwing mail bags, would likely have produced a small aggravation as well, in that general time frame, although not specifically on September 1, 1987."

* * *

"The underlying AC joint arthritis was, in my opinion, subject to transient overload, during periods when he was lifting and/or throwing sacks of mail, at work. That overload clearly would not have been present when he was in physical therapy and when he was in fact, not working. Also, it is unlikely to have occurred while he was working a light[-]duty assignment (I should point out that light duty specifically includes lifting to 10 pounds repetitively and up to 20 pounds occasionally). It does not include lifting beyond 20 pounds.

"Finally, there is no indication either in the forwarded medical reports, on my clinical examination, or on the performed MRI's, that the small anterior glenoid labral tear in his left shoulder resulted from work injuries on September 1, 1987, or on August 5, 1988. Damaging the anterior labrum would require, at a minimum, a local mechanical instability or stress across the anterior joint. This in turn would have resulted in anterior shoulder pain, rather than the shoulder blade type pain he described on September 1, 1987."

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist is entitled to special weight if sufficiently well rationalized and based upon a proper factual review of the case.⁵ The reports of Dr. Wieneke satisfy these criteria and constitute the weight of the medical evidence.⁶ It was proper for the Office to refer appellant to Dr. Wieneke, as Dr. McConville, the physician initially selected as the impartial medical specialist, would not, despite the Office's request, provide medical rationale for his opinion on causal relation.⁷

Dr. Wieneke's reports contain sufficient rationale for the conclusions reached. He explained why the small tear in appellant's left shoulder glenoid labrum was not related to his employment, stating that a different mechanism of injury was needed and that pain in a different location would have resulted. Dr. Wieneke also explained why he considered the aggravation of appellant's left shoulder arthritis to be temporary, stating that the absolutely symmetrical appearance of his acromioclavicular joints on MRI's were consistent with degenerative osteoarthritis, which was preexisting, with the aggravation being due to transient overload. He attributed the osteoarthritis in appellant's right shoulder to degenerative changes, noted that the disc changes in appellant's lumbosacral spine were consistent with his age and concluded that appellant's history was "consistent with a lumbosacral muscular ligamentous strain, which gradually but definitely resolved...." Dr. Wieneke also concluded that the disc degenerations in appellant's lumbosacral spine were not in any way related to his work activities and that he would have developed the symmetrical osteoarthritis of his acromioclavicular joints regardless of his employment.

Dr. Wieneke's reports were based upon a proper factual background. The statement of accepted facts submitted to Dr. Wieneke by the Office contains a description of the mechanism of each injury accepted by the Office, the conditions accepted for each injury and for appellant's occupational disease claim, his prior medical history, including diagnostic testing and his employment history. Although the statement of accepted facts does not contain a history of the claim rejected by the Office for a right shoulder injury allegedly sustained on November 16, 1987, the absence of the history of this claimed condition does not invalidate Dr. Wieneke's conclusion that appellant "would have developed osteoarthritis in the AC joint, symmetrically, regardless of his time spent employed at the [employing establishment]." The section of the Office's procedure manual that states that one of the essential elements of a statement of accepted facts is the "condition(s) claimed or accepted"⁸ does not apply to the rejected claim for

⁵ *Irene M. Williams*, 47 ECAB 619 (1996); *Elmer K. Kroggel*, 47 ECAB 557 (1996); *Harold Weisman*, 39 ECAB 961 (1988).

⁶ The subsequently submitted report of Dr. Rosenfeld dated December 8, 1999, as that of a physician on one side of a resolved conflict of medical opinion, is insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion. *Dorothy Sidwell*, 41 ECAB 857 (1990).

⁷ The Office has a responsibility to secure a supplemental report from an impartial medical specialist to correct the defect in the original report. However, when the supplemental report is vague, speculative or lacks rationale, the Office must refer appellant to another impartial medical specialist for a rationalized medical opinion on the issue in question. *Terrance R. Stath*, 45 ECAB 412 (1994).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12(f) (June 1995).

a traumatic right shoulder injury allegedly sustained on November 16, 1987. Appellant exercised his appeal rights on the rejection of this claim, and cannot now readjudicate this claim as part of his occupational disease claim. The Office's statement of accepted facts does state that appellant filed a claim for an occupational disease claiming the repetitive nature of his job caused arthritis in his shoulders.

The Board finds that Dr. Wieneke's reports need not be excluded on the basis of the questions posed to this physician. Although the Office's questions pointed out appellant's extensive absences from work, this alone does not make the questions leading, as it does not suggest the answer to the question posed.⁹ The Board also finds that the evidence does not establish that the Office engaged in improper telephone communications with Dr. Wieneke. The only evidence of any Office telephone communications with Dr. Wieneke shows that the Office's medical management assistant called the doctor on February 23, 1999 to inquire when the Office might receive his supplemental report, and that an Office hearing representative called Dr. Wieneke's office to inquire whether Dr. Wieneke performed fitness-for-duty examinations for the employing establishment. As neither call addressed disputed issues to be resolved by the impartial medical specialist, these telephone communications were not improper.¹⁰

The evidence also does not establish that Dr. Wieneke performed fitness-for-duty examinations for the employing establishment.¹¹ Appellant's statements that Dr. Wieneke informed him that he performed examinations of injured postal employees does not indicate that these examinations were fitness-for-duty examinations. Nonetheless, an Office hearing representative contacted Dr. Wieneke's office, and was told in a telephone conversation that the postal employees Dr. Wieneke had as patients were not examined at the request of the employing establishment. This was confirmed by an October 24, 1999 fax from Dr. Wieneke's office, identified as such at the top of the reply.

The Board finds that the evidence fails to establish that appellant has arthritis of the neck that is causally related to his employment injuries or to factors of his employment. The only medical report addressing cervical spine arthritis is a March 17, 1993 report from Dr. Omer A. Oruc, and this report does not attribute this condition to appellant's employment injuries or factors. This condition was not one on which there was a conflict of medical opinion, but rather one on which appellant did not meet his burden of proof.¹²

⁹ Compare *Carl D. Johnson*, 46 ECAB 804 (1995) with *Stanlaw M. Lech*, 35 ECAB 857 (1984).

¹⁰ *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Aubrey Belnavis*, 37 ECAB 206 (1985).

¹¹ Physicians who perform fitness-for-duty examinations for the injured employee's employing establishment cannot serve as impartial medical specialists resolving conflicts of medical opinion. *George W. Coast*, 36 ECAB 600 (1985).

¹² Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment. As part of this burden he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation. *Froilan Negron Marrero*, 33 ECAB 796 (1982).

The decision of the Office of Workers' Compensation Programs dated January 6, 2000 is affirmed.

Dated, Washington, DC
November 21, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member