

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AFIOGA W. YARBROUGH and DEPARTMENT OF VETERANS AFFAIRS,
ROSEBURG VETERANS HOSPITAL, Roseburg, OR

*Docket No. 00-2271; Submitted on the Record;
Issued October 16, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) Whether appellant has established that she sustained a left shoulder condition, causally related to October 6 and 10, 1995 employment incidents; (2) if so, whether appellant's left shoulder surgery and resulting disability on and after October 13, 1997 is causally related to her employment; and (3) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On November 15, 1995 the Office accepted that on October 6 and 10, 1995 appellant, then a 50-year-old food service worker, sustained a cervical subluxation at C1-2 and a lumbar subluxation at L4-5, when she pulled a fallen yogurt machine off a coworker and when she prevented a food cart on a slope from hitting a patient. The Office approved surgery for an L4-5 disc herniation.¹ At the time of her claim, appellant also alleged injury to her neck, upper and lower back and shoulders. She was placed on the automatic rolls for receipt of compensation due to her back injury.

By report dated January 22, 1996, Dr. Mark L. Webb, a chiropractor, noted appellant's history, explained her results upon physical examination and diagnosed ongoing neck and lower pain since October 14, 1995. Dr. Webb also noted that, when examined on January 5, 1996, appellant had upper cervical pain with accompanying left shoulder irritation. Surgery was discussed and chiropractic adjustments were given.

In a team report dated February 6, 1996, Dr. Allan R. Wilson, an orthopedic surgeon, and Dr. F. Clifford Roberson, a Board-certified neurologist, reviewed appellant's factual and medical history, with injuries on October 6 and 10, 1995 and noted that appellant currently complained of lower abdominal pain, lower back pain, and some pain along the posterior aspect of her left

¹ Appellant sought initial treatment with a chiropractor, Dr. James A. Leone, who provided spinal diagnoses only. Progress notes dated October 18 and 25, 1995 reported that appellant also complained of left shoulder and cervical tenderness/soreness. A November 6, 1995 orthopedic evaluation by Dr. Kevin P. Schoenfelder, a Board-certified orthopedic surgeon, noted that appellant was complaining of some mild shoulder pain and right upper extremity problems in addition to her complaints of back pain and left lower extremity problems.

shoulder. Upon examination the physicians found generalized give-way weakness in appellant's neck and shoulder area, more so than in the lower back and indicated that appellant broke down, reported pain and hyperventilated. The physicians noted that appellant reported diffuse tenderness about the shoulder without localized pain with left acromioclavicular crepitus. They opined that there appeared to be some functional overlay with minor maneuvers producing subjectively a great deal of discomfort, sighing and grimacing. Drs. Wilson and Roberson diagnosed cervical, lumbar and left shoulder strains related to the accidents of October 1995, and spinal stenosis from L3 to her sacrum which was preexisting. They did not recommend surgery, but noted that appellant's neck and shoulder pain was preventing her from working, and that the left shoulder pain exceeded that of her lower back. However, Drs. Wilson and Roberson also opined that "nothing on physical examination today ... would totally disable [appellant] from return to work."

On February 27, 1996 the Office asked Drs. Roberson and Wilson, to address whether the cervical, lumbar and left shoulder strains were still causing disability.

In a March 11, 1996 addendum report, Dr. Wilson opined that appellant's generalized giveaway weakness was a functional weakness and was not based on musculoskeletal or neurologic pathology that, when previously examined, Dr. Roberson had noted some functional overlay in the form of positive Waddell criteria and that these nonorganic findings had no musculoskeletal or neurologic pathology that was producing them. He concluded that appellant had no objective findings on the examination of February 6, 1996 that would result in any musculoskeletal impairment, and no findings to suggest limitations in appellant's ability to do work other than the nonorganic pain behavior, and he recommended physical therapy and a physical capacities assessment.

However, Dr. Schoenfelder, a Board-certified orthopedic surgeon, noted on March 27, 1996 that appellant had severe spinal stenosis at L3-4 by computerized tomography (CT) scan, as well as a left disc herniation at L4-5 which was blocking the foramina and hitting the nerve, and he recommended a decompression laminectomy from L4 to S1.

The Office determined that a second opinion was needed.

By report dated May 21, 1996, Drs. Roberson and Wilson provided cervical and lumbar diagnoses, but indicated no objective findings concerning appellant's left shoulder at that time, and opined that she needed no further cervical treatment.

By decision dated April 23, 1996, the Office terminated appellant's compensation finding that the weight of the medical evidence established that she had no further disability for work or injury residuals requiring further treatment after April 23, 1996, causally related to her accepted employment injuries. Appellant thereafter returned to work on regular duty.

By letter dated May 22, 1996, appellant, through her representative, requested an oral hearing.

In support appellant submitted a report from Dr. Schoenfelder who saw appellant on June 26, 1996 and diagnosed left acromioclavicular (AC) joint arthritis which had worsened as appellant had returned to work. He noted that three injections had given appellant some relief for a short period of time.

By decision dated December 23, 1996, the hearing representative reversed the Office's April 23, 1996 decision finding that the report from Drs. Wilson and Roberson was in agreement with appellant's physician and established that appellant had objective findings causally related to her October 10, 1995 employment injury.

On February 20, 1997 Dr. Steven M. Teeny, a Board-certified orthopedic surgeon, submitted a February 12, 1997 report which noted that he first saw appellant on June 5, 1996 for a problem regarding her left shoulder. Dr. Teeny stated as history that on October 10, 1995 an ice machine fell on a coworker and appellant had to lift it off and that she injured her low back, her cervical region, and her left shoulder. He noted that initial treatment was provided by a chiropractor who focused on appellant's back and neck problems, and that in her initial accident report she claimed that she had pain in her shoulders dated October 14, 1995. Dr. Teeny noted that appellant had had "consistent complaints of left shoulder pain since first being seen by [him] on June 5, 1996." He continued: "Assuming her history is correct and that she has had consistent symptoms in her left shoulder since the time of her injury and none prior to that time and corroborated by the initial accident report, as well as a bit by the reports by the chiropractor, I would assume, on a more probable than not basis, that her continued left shoulder symptoms are related causally to the accident she suffered in October 1995."

Dr. Teeny also submitted medical treatment notes beginning on June 5, 1996. On that date he noted appellant's history of injury, reported that upon examination she had left AC joint tenderness, and diagnosed "Left AC joint inflammation and arthritis." Subsequent visits on a monthly basis repeated the same diagnosis, noted that the subacromial space was injected with steroids and an anesthetic, with a temporary response and indicated that appellant was scheduled for a left distal clavicle excision.

By report dated April 17, 1997, Dr. Gregory A. Popich, a Board-certified orthopedic surgeon, noted as history that appellant injured her low back, neck and left shoulder while attempting to pull a yogurt machine off a coworker, that, since that time she has continued to experience upper back, neck and shoulder discomfort, and that appellant had been diagnosed by Dr. Teeny as having ongoing rotator cuff tendinitis, for which he had injected her shoulder on two occasions. Dr. Popich examined appellant, noted tenderness over the posterior aspect of the acromion and posterior shoulder and a painful arc in both abduction and elevation beginning at about 95 degrees and noted light crepitus with left shoulder rotation movements and with restriction of internal rotation. He diagnosed "probable rotator cuff tendinitis versus partial thickness rotator cuff tear," and recommended that a left shoulder arthrogram be performed.

On April 28, 1997 appellant filed a claim for recurrence of disability commencing on the date of original injury. Appellant alleged that the employing establishment did not provide her with light duty and that every time she returned to regular duty her back and shoulder worsened.

On May 20, 1997 the Office advised appellant that it was referring her for a second opinion as to whether surgery was indicated. On June 3, 1997 the Office referred appellant, a statement of accepted facts and the relevant case record, to Dr. Richard G. McCollum, a Board-certified neurologist.

A June 23, 1997 report from Dr. Gregory E. Arnette, an internist and associate of Dr. Teeny, noted appellant's history and physical examination results, diagnosed chronic low

back pain with atypical leg pain and left shoulder pain, and opined that appellant was well into a significant chronic pain syndrome and needed steroids.

By report dated June 25, 1997, Dr. McCollum reviewed appellant's factual and medical history, noted that x-rays revealed mild degenerative changes at the AC joint which he opined "probably preexisted the injury of October 10, 1995," and opined that surgery on the left shoulder was not indicated at that time, that appellant's symptoms were localized and that the condition of the AC joint was not part of her injury. He opined that appellant could work eight hours per day with no repetitive bending or kneeling, and with a 35-pound lifting limit and he indicated that activity limitations were the same for appellant's work injury as they were for her preexisting conditions.

By report dated July 22, 1997, Dr. Teeny noted that appellant's symptoms appeared to be atypical, appeared to be related most specifically to the left AC joint and appeared to respond to steroid/anesthetic injections for short periods. He opined that appellant was fixed and stable, but further evaluation and treatment were recommended.

On August 14, 1997 an Office medical adviser reviewed the record and agreed with Dr. McCollum that appellant's left shoulder problem was not related to her employment injury or to her employment in general. He further opined that appellant did not have findings that would be helped by further treatment at that time.

By decision dated August 19, 1997, the Office rejected appellant's claim finding that appellant's alleged recurrence of disability regarding her left shoulder was not causally related to her October 10, 1995 injuries. The Office found that appellant did not seek treatment for her left shoulder until more than six months after the original injury, that the case record contained no objective evidence of appellant sustaining a left shoulder injury, as the left shoulder changes were mildly degenerative and that Dr. Teeny did not provide any medical rationale to support his assertion that appellant's left shoulder tendinitis was causally related to her October 10, 1995 injury/incident.

By letter dated September 23, 1997, appellant, through her representative, requested reconsideration of the August 19, 1997 decision and in support submitted a November 6, 1995 orthopedic evaluation by Dr. Schoenfelder which noted that appellant complained that date of back pain, lower extremity pain, and "some mild shoulder pain." He also noted that appellant complained of right upper extremity problems, but indicated that her low back and left lower extremity problems were primary. Dr. Schoenfelder provided spinal diagnoses, referred appellant for further testing and opined that she was disabled from work at that time.

By decision dated October 8, 1997, the Office declined to reopen appellant's case for a further review on its merits under 5 U.S.C. § 8128(a), finding that the evidence submitted was duplicative and therefore not sufficient to warrant a reopening of the case.

Appellant underwent surgery on her left shoulder on October 13, 1997 and then requested reimbursement by the Office and payment of wage loss. She submitted two unsigned September 1997 medical treatment progress notes which noted that she continued to have left shoulder pain. Mild degenerative changes of the rotator cuff were diagnosed by magnetic resonance imaging scan and it was noted that this could not exclude some subacromial subdeltoid bursitis.

By decision dated November 13, 1997, the Office rejected appellant's claim finding that the evidence submitted was not sufficient to support disability for work because no left shoulder condition related to the October 10, 1995 work injury had been accepted.

By letter dated May 19, 1998, appellant requested reconsideration of the August 19, 1997 decision. She claimed that she had been treated for left shoulder pain since 1995. Appellant resubmitted a duplicate copy of the February 6, 1996 initial report from Drs. Wilson and Roberson, which noted left shoulder pain and weakness and diagnosed left shoulder strain. An additional copy of Dr. Webb's January 22, 1996 chiropractic report which noted cervical pain with accompanying left shoulder irritation was additionally submitted.

Appellant also submitted a January 5, 1996 chiropractic treatment note from Dr. James A. Leone, a chiropractor, who diagnosed a cervical subluxation and noted that appellant had "Palpable tightness/spasm of left paraspinal muscles. Subluxation of thoracic area. Left shoulder." Several 1995 physical therapy treatment notes were also submitted which noted that appellant complained of shoulder tenderness.

By decision dated September 10, 1998, the Office denied appellant's request for further review of her case on its merits under 5 U.S.C. § 8128(a) finding that the evidence submitted in support of her request was repetitious and therefore not sufficient to warrant reopening her case for further merit review.

The Board finds that this case is not in posture for decision on the issues of whether appellant has established that she sustained a left shoulder condition causally related to either of her accepted work incidents, and, if so, whether she was disabled for the period on or after the October 13, 1997 surgery.

In this case, the Office accepted that appellant experienced the employment incidents on October 6 and 10, 1995 at the time, place and in the manner alleged. Appellant alleged on her initial claim form that in arresting a run-away cart and in pulling the yogurt machine off her coworker she sustained injuries to her neck, upper and lower back, and shoulders. She initially sought chiropractic treatment with Dr. Leone, and although only subluxations of C1-2 and L4-5 were accepted, the medical evidence of record is conflicting as to the extent of her October 10, 1995 incident-related injuries.

Relatively contemporaneous chiropractic clinic progress notes dated October 18 and 25, 1995 indicate that appellant was, at that time, complaining of left shoulder pain as well as cervical soreness. Dr. Webb's report dated January 22, 1996 included a notation of appellant's subjective complaints of left shoulder irritation as well as her lower back problems. The February 6, 1996 joint report from Drs. Wilson and Roberson also noted that appellant was experiencing some pain along the posterior aspect of her left shoulder. Objective evidence of left acromioclavicular crepitus on circumduction was also found. They diagnosed cervical, lumbar and left shoulder strains related to the accidents of October 1995 and opined that appellant's neck and shoulder pain were significantly limiting and prevented her from working.

On June 26, 1996 Dr. Schoenfelder diagnosed left AC joint arthritis which had worsened as appellant returned to work.

Dr. Teeny, in a February 12, 1997 report, noted that on June 5, 1996 he saw appellant for a problem regarding her left shoulder, that in her initial October 14, 1995 accident report she had

complained of pain in her shoulders, and that she had had consistent complaints of left shoulder pain since he first saw her. Dr. Teeny opined that, assuming that appellant's history was correct, she had had consistent left shoulder symptoms since the time of injury and had had no such complaints prior to that time, that her initial accident report corroborated the shoulder injury, and that therefore he would assume on a more probable than not basis that her continued left shoulder symptoms were causally related to the October 1995 accidents. He further submitted medical treatment notes from June 5, 1996 and continuing which reported that upon examination appellant had AC joint tenderness and he diagnosed AC joint inflammation and arthritis.

On April 17, 1997 Dr. Popich also noted as history that appellant injured her low back, neck and left shoulder in the October 1995 incidents, noted continuing back, neck and shoulder discomfort, and noted appellant's diagnosis of ongoing rotator cuff tendinitis. He further found crepitus with left shoulder rotation and restricted internal rotation and diagnosed probable rotator cuff tendinitis versus a partial thickness rotator cuff tear. Further diagnostics were recommended.

On June 23, 1997 Dr. Arnette diagnosed appellant with chronic low back pain with atypical leg pain and left shoulder pain.

On July 22, 1997 Dr. Teeny opined that appellant's symptoms appeared to be related most specifically to her left AC joint and noted that they responded to steroid injections.

On June 25, 1997 Dr. McCollum opined that appellant's degenerative left shoulder changes "probably preexisted the injury of October 10, 1995" and opined that surgery was not necessary.² He opined that the condition of appellant's AC joint was not a part of her injury. Dr. McCollum opined that appellant could work full time with certain activity restrictions. On August 14, 1997 an Office medical adviser agreed with Dr. McCollum that appellant's left shoulder problem was not employment related and that she would not be helped by further treatment.

On August 19, 1997 the Office rejected appellant's recurrence and left shoulder injury claim finding that the shoulder injury was not related to the October 1995 incidents. It further found that appellant had not sought medical treatment for her left shoulder until more than six months after the original injuries, despite mention of her shoulder pain in the reports of Dr. Webb, and in the February 6, 1996 report of Drs. Wilson and Roberson wherein they found left acromioclavicular crepitus and diagnosed left shoulder strain related to the accidents of October 1995.

Appellant has also submitted multiple physical therapy notes identifying complaints of left shoulder pain and lost motion.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the

² The Board notes that Dr. McCollum's opinion was couched in speculative terms about what "probably" existed. See *Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

In this case, the Board finds that there exists a conflict in medical opinion evidence between the reports of appellant’s attending physicians who support that appellant sustained a left shoulder injury and Dr. McCollum and the Office medical adviser, who found no left shoulder injury causally related to the accepted work injuries.

Therefore, the case will be remanded to the Office for referral to an appropriate medical specialist to resolve the medical conflict, and for a rationalized medical opinion on whether or not appellant sustained a left shoulder injury on October 10, 1995, causally related to factors of her federal employment. Should it be found that such an injury was sustained, then the issue of whether appellant was disabled for the period beginning with her left shoulder surgery on October 13, 1997 and continuing should also be addressed.

As the disposition of the case results in a remand to the Office for further development, the issue of whether the Office abused its discretion by refusing to reopen appellant’s claim for a further review on its merits becomes moot.

Consequently, the decisions of the Office of Workers’ Compensation Programs dated September 10, 1998 and November 13 and October 8, 1997 are hereby set aside and the case is remanded to the Office for further development in accordance with this decision and order of the Board.

Dated, Washington, DC
October 16, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member