U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL R. MIKINKA and DEPARTMENT OF VETERANS AFFAIRS, JOHN D. DINGELL MEDICAL CENTER, Detroit, MI

Docket No. 03-329; Submitted on the Record;
Issued April 1, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that she was totally disabled for work, and therefore entitled to receive continuation of pay, for the period July 20 to 27, 2001 related to an accepted July 20, 2001 right shoulder strain; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's July 18, 2002 request for a review of her claim on the merits.

The Office accepted that, on July 20, 2001, appellant then a 53-year-old part-time registered nurse, sustained a right shoulder strain when she slipped and fell on a wet floor while making a bed. Appellant claimed continuation of pay. She explained that, when she slipped, her "right arm hit and remained on the footboard [of the bed] as [she] fell to the floor." Appellant experienced extreme pain, diaphoresis and nausea and could not move her arm. "Pam[ela] Holman-Johnson, the [n]ursing [s]upervisor, took [appellant] to x-ray" by wheel chair. An x-ray technician rotated appellant's "right arm outward and backward," and appellant "felt the bone pop back into place," thus reducing the dislocation prior to x-rays being taken to substantiate its presence.

On July 20, 2001 appellant accepted a light-duty job offer with "no lifting, pulling, pushing greater than five pounds, performing various nursing duties.

In a July 27, 2001 slip, Dr. Kevin J. Sprague, an attending Board-certified orthopedic surgeon, prescribed two weeks of physical therapy.

In a July 30, 2001 letter, the employing establishment controverted continuation of pay as appellant had not returned to work and did not submit medical evidence that she was disabled for light-duty work.[1]

[1] In an August 6, 2001 letter, the Office advised appellant that the Office "may terminate [her] continuation of pay or compensation if [she refused] (without good cause) to accept work which [was] within [her] medical restrictions."

Appellant took sick leave through August 6, 2001. She returned to work in a limited-duty position on August 7 and 8, 2001 with scheduled days off from August 9 to 11, 2001.

On August 11, 2001 while at home, appellant sustained a dislocation of her right shoulder. Appellant explained that, while "sitting on the stairs, [she] raised [her] right arm above [her] head to get a hold of the handrail." Appellant was then taken to the emergency room and diagnosed with a dislocated right shoulder. Appellant asserted that the July 20, 2001 injury was a right shoulder dislocation and not a strain and that the August 11, 2001 dislocation was consequential to the initial dislocation.

Appellant submitted August 11, 2001 emergency room reports noting the July 20, 2001 right shoulder injury and diagnosing a right shoulder anterior dislocation which was successfully reduced.

In an August 13, 2001 slip, Dr. Sprague found "decreased sensation over the anterior aspect of the shoulder at the musculocutaneous nerve," with a "positive apprehension sign and relocation test." Dr. Sprague diagnosed a recurrent right shoulder dislocation and held appellant off work for two months.

Appellant used a combination of sick and annual leave from August 14 to November 28, 2001.

By decision dated September 6, 2001, the Office denied appellant's claim for continuation of pay. The Office found that, although appellant accepted a light-duty job offer on July 20, 2001, she had "not reported for work or provided … detailed medical information supporting [her] period of absence." The Office noted that the decision affected only appellant's entitlement to continuation of pay and not other compensation benefits.

Appellant disagreed with this decision and in a September 20, 2001 letter requested a hearing before a representative of the Office's Branch of Hearings and Review, held February 28, 2002. Appellant asserted that the Office erred in its September 6, 2001 decision by finding that she had not returned to work following the July 20, 2001 injury, as she returned to work in a light-duty position on August 7 and 8, 2001. She submitted additional evidence.

In a July 20, 2001 occupational health clinic note, a nurse whose signature is illegible stated that appellant "stretched her r[ight] shoulder after slipping on water this" morning, with x-rays negative for fracture and dislocation. No bruising or ecchymosis was noted. Appellant reported pain with active and passive movement of the right shoulder, pain and tenderness in the deltoid and supraspinatus with forward flexion and abduction and "numbness in the r[ight] deltoid area" with objective touch sensation intact. A diagnosis of "most likely strained muscles/tendon of shoulder" was noted. This note was not signed or reviewed by a physician.

In a July 26, 2001 employing establishment accident report, appellant's supervisor, Ms. Holman-Johnson, stated that, on July 20, 2001, appellant slipped on a wet floor, her right arm remained on the bed "and she felt it pop out of place."

In a July 27, 2001 report, Dr. Sprague provided a history of the July 20, 2001 slip and fall, noting that appellant "twist[ed] her right upper extremity." Appellant related continuous but

decreasing right upper extremity pain since the injury. Dr. Sprague obtained x-rays showing no fractures or dislocations, with the acromiohumeral space intact. Dr. Sprague diagnosed "[r]ight rotator cuff strain versus a tear." Dr. Sprague prescribed physical therapy and home exercise, and held appellant off work for 10 days.

In an August 6, 2001 report, Dr. Sprague released appellant to duty that day. Dr. Sprague stated that appellant was disabled for work from July 20 to August 6, 2001.

In an August 13, 2001 report, Dr. Sprague stated that on July 20, 2001, by history, appellant dislocated her right shoulder, with spontaneous recurrence on August 11, 2001. On examination, Dr. Sprague found "some decreased sensation over the anterior aspect of the shoulder at the musculocutaneous nerve," a positive apprehension sign and positive relocation test. He commented that appellant might require surgery to stabilize her shoulder.

In a September 10, 2001 report, Dr. Sprague noted that appellant was "status post four weeks from her second dislocation." On examination Dr. Sprague found a positive apprehension test. Dr. Sprague diagnosed "[r]ecurrent dislocation as a result of a work injury." Dr. Sprague held appellant off work for two months, commenting that, if the shoulder did "not stabilize, she may require a surgical procedure to repair the anterior labrum." Dr. Sprague prescribed four weeks of physical therapy. Dr. Sprague submitted progress notes through November 16, 2001.

In a September 19, 2001 letter, the employing establishment acknowledged that, following the July 20, 2001 right shoulder injury, appellant "returned to full duty on August 7, 2001."

Dr. Sprague released appellant to limited duty as of December 5, 2001, with "[n]o lifting over 10 pounds with 2 hands and no over-the-shoulder level work." He submitted progress notes through March 22, 2002 prescribing continued work restrictions.

Appellant returned to light-duty work on December 5, 2001. The injury date was noted as July 20, 2001 and the form indicates that appellant was placed on light duty due to the July 20, 2001 injury. The employing establishment granted light duty from December 5, 2001 through March 22, 2002 based on Dr. Sprague's recommendations.

In a February 4, 2002 statement, Dawn Knight, a registered nurse and coworker of appellant, stated that, on July 20, 2001, appellant "could not move her right arm" after she slipped and fell. February 2002 statements from coworkers Janice Wells and Delores Gocha who attended to appellant at the time of the July 20, 2001 injury, stating that appellant was screaming in pain and unable to walk.

At the hearing, appellant asserted that, on July 20, 2001, she sustained a right shoulder dislocation and not merely the accepted right shoulder strain. Appellant asserted that the first physician who treated her at employee health believed her arm was broken and thus ordered immediate x-rays prior to examination. Appellant described her severe distress, including nausea and faintness, such that she was laid down on the floor to prevent her from fainting. In the process of obtaining x-rays, an x-ray technician rotated appellant's arm outward and upward, and the shoulder slid back into place. Appellant noted that, immediately afterward, although she remained dizzy and in pain, a physician ordered her back to light duty. Appellant's supervisor,

Ms. Holman-Johnson, granted appellant immediate sick leave. Appellant was driven home and remained there until her appointment with Dr. Sprague on July 27, 2001. Dr. Sprague explained that, without x-ray proof of the dislocation, he diagnosed a sprain or strain.[2]

Following the hearing, appellant submitted progress notes from Dr. Sprague prescribing continued light duty through June 22, 2002, which was granted by the employing establishment.

By decision dated and finalized May 14, 2002, the Office hearing representative affirmed the September 6, 2001 decision insofar as it denied continuation of pay from July 21 to 27, 2001, but modified it to order continuation of pay from July 27 to August 6, 2001. The Office found that appellant submitted "evidence sufficient to support total disability from July 27 through August 6, 2001." However, the hearing representative found that appellant had not submitted sufficient medical evidence to establish that she was totally disabled for work from after the time of injury on July 20 through 26, 2001. The hearing representative noted that appellant's claim for an August 11, 2001 right shoulder dislocation had not yet been adjudicated and directed the Office to "develop the file and render a decision with regard to this injury."[3]

Appellant disagreed with this decision and in a July 18, 2002 letter requested reconsideration. She submitted additional evidence addressing the claimed total disability for work from July 20 to 26, 2001.

In a June 19, 2002 letter, Dr. Sprague stated that, on July 20, 2001, appellant sustained a dislocation of the right shoulder, spontaneously reduced in the process of obtaining an x-ray shortly after the injury. Dr. Sprague noted that, on a July 27, 2001 examination, he diagnosed a shoulder strain, which encompassed "capsular labral ligamentous and tendinous injuries." "On August 11, 2001 [appellant] was sitting on a stairway and reached up to grab a handrail and in doing so placed her arm above-shoulder level resulting in an acute dislocation of the right shoulder. This injury could not have occurred in a normal shoulder. It only occurred because she had previously dislocated the shoulder on July 20, 2001," resulting in "a torn anterior capsule and Bankart lesion." Dr. Sprague explained that an untreated shoulder dislocation had a 95 percent recurrence rate, as occurred in appellant's case. Dr. Sprague stated that the August 11, 2001 dislocation was "a consequential injury from the initial injury on July 20, 2001, at that time she sustained an anterior labral and capsular tear which has a probability approaching 95 percent of redislocating without treatment." Dr. Sprague noted that, although appellant had improved greatly with physical therapy, "she most likely has an underlying Bankart tear" and should continue "limited duty with no working above shoulder level."

In a July 30, 2002 letter, Dr. Sprague amended his June 19, 2002 letter, stating that appellant "was totally disabled from the time of injury on July 20 until 27, 2001 when [he]

[2] Following the hearing, the employing establishment submitted comments to the hearing transcript. In a March 21, 2002 letter, the employing establishment explained that it controverted appellant's claim for continuation of pay as she "accepted an alternate-duty assignment on July 20, 2001 but did not report for duty until August 7, 2001."

[3] In a May 23, 2002 letter, the Office advised appellant of the type of medical and factual evidence needed to establish her claim for a consequential injury.

evaluated her." Dr. Sprague stated that appellant could return "to work with no restrictions," but should "avoid at risk positions."

In an August 8, 2002 letter, Ms. Holman-Johnson, appellant's acting supervisor on July 20, 2001, stated that, on July 20, 2001, following the right shoulder injury, appellant "was nauseated, gagging and felt faint. Before the films of her right shoulder were taken, she was not able to move her right arm. After x-rays were completed she was able to move her right arm." Ms. Johnson recalled that, after the x-rays were taken, appellant "stated in the presence of Dr. Yellayi, [e]mployee [h]ealth [p]hysician, she had felt her arm (right shoulder) pop back into place when the x-ray technician positioned her arm for x-rays." Ms. Holman-Johnson stated that, at the time of the injury, she could not accommodate appellant on light duty as she was "solely right handed and was unable to perform light-duty assignments such as making beds, bathing patients, feeding patients, taking vital signs, raising her arm up to the computer keyboard (pain), picking up charts to check orders (pain) and writing (pain). Thus I granted her sick leave until she could see her doctor." Ms. Holman-Johnson noted that, on August 24, 2001, she informed Dr. Padiyar, an employee health physician, that appellant "was unable to move her right arm before x-rays were taken but could move her arm after x-rays were taken on July 20, 2001."

By decision dated September 9, 2002, the Office denied reconsideration on the grounds that the evidence that appellant submitted was "irrelevant and cumulative." The Office noted that the May 14, 2002 decision granted continuation of pay from July 27 through August 6, 2001, but denied it from July 20 to 26, 2001 on the grounds that appellant submitted insufficient medical evidence establishing total disability for those dates. The Office stated that the new reports from Dr. Sprague were "not relevant to the issue regarding the denial of [her] continuation of pay … and whether [she] was disabled from work from July 21 to 26, 2001. He only provides a statement that [she was] disabled but did n[o]t actually evaluate [her] until July 27, 2001."

Appellant filed her appeal with the Board on November 14, 2002.

The Board finds that appellant has not established that she was totally disabled for work from July 20 to 26, 2001.

In this case, the Office accepted that appellant sustained a right shoulder strain on July 20, 2001 and that this injury totally disabled her for work from July 27 to August 6, 2001, a period for which appellant provided medical documentation. Thus, appellant has met her preliminary burden of proof in establishing that she sustained a right shoulder injury on July 20, 2001 at the time, place and in the manner alleged. Appellant also submitted sufficient medical evidence to substantiate this injury.[4]

However, the Office found that appellant submitted insufficient medical evidence to establish disability from the July 20, 2001 date of injury through July 26, 2001. It is a well-established principle of compensation law that whether a particular injury causes an employee

[4] *John J. Carlone*, 41 ECAB 354 (1989).

disability for employment for any period is a medical question that must be resolved by competent medical evidence.[5]

The threshold difficulty with this case is a gap in the medical evidence from July 20 to 26, 2001. The July 20, 2001 occupational health note, the only medical record from the date of injury, was not signed or reviewed by a physician. Therefore, the note does not constitute medical evidence.[6] Also, there are no medical reports dated from July 21 to 26, 2001.

Dr. Sprague, an attending Board-certified orthopedic surgeon, did not examine appellant until July 27, 2001. In a July 27, 2001 report, Dr. Sprague noted the July 20, 2001 injury, diagnosed a right rotator cuff strain vs. tear and held appellant off work for 10 days prospectively. However, Dr. Sprague did not address whether appellant was disabled for work from July 20 to 26, 2001.

In an August 6, 2001 report, Dr. Sprague released appellant to light duty, noting that she was disabled for work from July 20 to August 6, 2001. While Dr. Sprague does support that appellant was disabled for work from July 20 to 26, 2001 due to the July 20, 2001 right shoulder injury, he did not explain why. Therefore, his opinion is of lessened value in establishing the claimed period of disability from July 20 to 26, 2001.[7]

The Board notes that the Office has not accepted a right rotator cuff tear or strain, or a right shoulder dislocation, only a right shoulder strain. Also, Dr. Sprague did not submit sufficient medical rationale to establish that the July 20, 2001 injury was in fact a right shoulder dislocation or rotator cuff tear and not merely a strain or sprain.

Consequently, appellant has not established that she was totally disabled for work from July 20 to 26, 2001 as she submitted insufficient rationalized medical evidence establishing the claimed period of disability.

The Board further finds that the Office abused its discretion by denying appellant's July 18, 2002 request for a merit review.

Under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation[9] which provides that a claimant may obtain review of the merits if his written

[5] *Donald E. Ewals*, 51 ECAB 428 (2000).

[6] *Vickey C. Randall*, 51 ECAB 357 (2000).

[7] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b) (1999).

application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[10]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[11]

The critical issue in the case at the time of the May 14, 2002 decision is whether appellant had established a total disability for work from July 20 to 26, 2001. The hearing representative found that appellant had submitted sufficient rationalized medical evidence to establish a total disability for work from July 27 to August 6, 2001. However, the hearing representative also found that appellant did not submit sufficient medical evidence to establish total disability for work from the time of the July 20, 2001 injury through July 26, 2001.

In support of her July 18, 2002 request for reconsideration of the May 14, 2002 decision, appellant submitted new, additional medical evidence directly addressing the critical issue of total disability for work from July 20 to 26, 2001.

In a June 19, 2002 report, Dr. Sprague explained the pathophysiologic mechanisms behind his objective findings in a July 27, 2001 examination which demonstrated that appellant sustained a right shoulder dislocation on July 20, 2001 and not merely the accepted right shoulder strain. Dr. Sprague provided detailed reasoning as to why appellant could not have spontaneously dislocated her right shoulder on August 11, 2001 without the previous dislocation having occurred on July 20, 2001. Dr. Sprague added to this opinion, in a July 30, 2002 letter, stating that the July 20, 2001 right shoulder injury rendered appellant "totally disabled from the time of injury on July 20 until 27, 2001."

The Board finds that Dr. Sprague's June 19 and July 30, 2002 reports are new, relevant evidence warranting a review of appellant's claim on the merits. These reports directly address the issue of whether or not appellant was disabled for work from July 20 to 26, 2001.

Appellant also submitted a detailed witness statement from Ms. Holman-Johnson, acting supervisor on July 20, 2001. Ms. Holman-Johnson stated that, as a result of the July 20, 2001 accident, appellant felt her right shoulder pop out of place. She described appellant's severe distress and that, when an x-ray technician positioned appellant's arm to obtain diagnostic films,

[10] 20 C.F.R. § 10.606(b).

[11] 20 C.F.R. § 10.608(b).

the shoulder popped "back into place." Ms. Holman-Johnson emphasized that appellant related her account of the right shoulder dislocation to Dr. Yellayi, an employing establishment physician, immediately after the x-rays were obtained. Ms. Holman-Johnson also observed that prior to the x-ray technician manipulating appellant's right arm, appellant could not move her arm, "but could move her arm after x-rays were taken…." Ms. Holman-Johnson also noted that appellant could not be accommodated with light duty as any of the modified assignments would involve the use of the injured right arm. Ms. Holman-Johnson explained that "[t]hus, [she] granted [appellant] sick leave until she could see her doctor."

While Ms. Holman-Johnson is a nurse and not a physician, her statement indicates that appellant was deemed medically unfit for light duty by the employing establishment from July 20 to 26, 2001. As appellant's supervisor, Ms. Holman-Johnson had the administrative authority, separate and apart from any medical expertise, to determine that appellant was medically unfit for duty. This finding is highly relevant to the critical issue of whether appellant was disabled for work from July 20 to 26, 2001.

As appellant submitted new, relevant evidence in support of her request for reconsideration and the Office has not yet considered this evidence on its merits, the case must be remanded for further development. On remand of the case, the Office shall conduct a thorough merit review of the new medical and factual evidence appellant submitted in support of her July 18, 2002 request for reconsideration. Following such review, and any other development the Office deems necessary, the Office shall issue a *de novo* decision in the case.

The decision of the Office of Workers' Compensation Programs dated September 9, 2002 is hereby set aside and the case is remanded for further development consistent with this decision and order. The decision of the Office dated and finalized May 14, 2002 is hereby affirmed.

Dated, Washington, DC
April 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member