

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEVIN G. WILSON and U.S. POSTAL SERVICE,
POST OFFICE, Stamford, CT

*Docket No. 02-1677; Submitted on the Record;
Issued January 7, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained a recurrence of disability on May 3 and June 14, 2000 and June 7, 2001; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On September 7, 1999 appellant, then a 46-year-old electronic technician, filed a notice of traumatic injury alleging that he hurt his arm while in the performance of duty. The Office accepted the claim for a right elbow and forearm strain.¹ Appellant received compensation for wage loss while he underwent a course of physical therapy. He returned to limited duty on September 22, 1999 under restrictions that he not perform repetitive activities with his right arm. Appellant sustained a recurrence of disability on October 18, 1999 but did not miss any time from work.

The record includes physical therapy records dating from January to February 2000, which include a diagnosis of right lateral epicondylitis and left arm tendinitis.

In reports dated February 9 and 25, 2000, Dr. W. Tracy Schmidt, a Board-certified orthopedist, indicated that appellant suffered from lateral epicondylitis and needed to stop using his right arm for four to six weeks. Dr. Schmidt noted that appellant had twisted his elbow back in September while opening a stuck door at work.

Appellant submitted treatment notes from Dr. Melchias N. Mukendi, a general practitioner dating from February through June 14, 2000. He was seen for persistent right arm pain. On June 9, 2000 Dr. Mukendi noted appellant described his right elbow and arm pain to be worse due to lifting at work. On June 14, 2000 appellant described to Dr. Mukendi that his pain had not improved and remained unchanged.

¹ Appellant had a prior claim for an occupational disease that was accepted by the Office for the conditions of sprain/strain of the right shoulder and right shoulder tendinitis. The file number for that claim was 010364896.

Appellant subsequently filed a claim for a recurrence of disability beginning May 3, 2000. He stated that he had been repairing machines and vacuuming when he experienced right arm pain. Appellant did not claim any time off from work.²

The record includes treatment notes from Dr. Mukendi's office dating from February 22 to June 14, 2000. He treated appellant during that period for consistent complaints of arm pain. On May 3, 2000 Dr. Mukendi stated: "[appellant] entered today with arm pain. There is no change in the patients condition." Treatment consisted of "temperature gradient and application neurostim." Appellant was told to return in two days.

In a May 13, 2000 memorandum, the employing establishment indicated that appellant had been told to clock out that day at 8:00 a.m. and to go home. It was noted that appellant's supervisor thought he was being uncooperative regarding his work assignment as appellant insisted that he was unable to do any work with his right arm.

In a May 15, 2000 letter, the employing establishment stated: "[appellant] appears to be going back and forth with his claims for his right forearm and shoulder. When he is requested to perform certain duties or when he is requested to continue his duties without assistance, he files a recurrence."

In a report dated May 18, 2000, Dr. Mukendi advised that appellant should be put on light duty with "no use of the forearm due to repeated exacerbations." He also completed a Form CA-17 duty status report on that date.

On May 22, 2000 the Office authorized additional physical therapy.

On May 30, 2000 the employing establishment offered appellant a limited-duty position as a modified electronics technician, noting that he could perform the duties of the position with his left arm only. Appellant, however, rejected the job offer.

On June 7, 2000 Dr. Mukendi prepared a letter of medical necessity for neurological testing. He listed a diagnosis of lateral epicondylitis, spasm of muscles. Dr. Mukendi noted that appellant complained of pain in the right elbow and forearm with radiation to the fingers.

A sensory nerve conduction threshold test performed on June 7, 2000 showed a moderate hypoesthetic condition in the right thumb, a very mild hypoesthetic condition of the index finger of the right hand and only a slight abnormality with the ulnar nerve extending to the little finger.

On June 14, 2000 appellant filed another claim for a recurrence of disability. He stated on his CA-2a claim form that he "could have possibly caused this by walking around through the building, swinging my arm while walking." Appellant indicated that he stopped work on June 14, 2000.

² In a May 3, 2000 letter, appellant's supervisor stated that appellant had told him that he hurt his arm on that day "going to get parts for an OCR and turning pages on a book."

In a routing slip dated June 14, 2000, appellant wrote to his supervisor stating, "I was working with only my left hand and when I was nearly finished with my one OCR (#4) my right forearm began to hurt. I did nothing with my right hand."

In a CA-17 duty status report dated June 15, 2000, Dr. Mukendi stated that appellant could resume work effective June 15, 2000 with certain restrictions.

In a June 30, 2000 letter, the Office advised appellant of the factual and medical evidence required to establish his claim for compensation.³

In a report dated August 2, 2000, Dr. Mukendi noted that appellant had been under his care for lateral epicondylitis and a concomitant shoulder problem since April 20, 2000. He reported that neurological testing showed decreased function of the median nerve of the thumb and index finger, while function testing of the right hand showed a 30 percent decrease in strength of the right hand. Dr. Mukendi stated as follows:

"It is my opinion given the history of [appellant's] complaint and lack of stable progress in therapy, the nature of his occupation is the single most aggravating factor in this case. Effective and lasting therapeutic result depends on either dissisting (sic) from or significantly reducing the amount or type of work in which [appellant] is currently employed."

Appellant also filed a claim for traumatic injury on September 14, 2000. The Office accepted the claim for a right shoulder strain.⁴ Appellant remained on limited duty and his medical restrictions were changed to reflect that he could only perform a sedentary job sitting down with no use of his right arm.⁵

In a decision dated September 20, 2000, the Office denied appellant's claims for a recurrence of disability beginning May 4 and June 14, 2000.

On October 3, 2000 the Office received additional treatment notes from Dr. Mukendi for the period of June 14 to September 15, 2000.

An electromyography report dated November 6, 2000 showed severe right median nerve entrapment at the transverse carpal ligament of the right hand.

The employing establishment notified appellant on January 23, 2001 that there was no light duty available within his medical restrictions.

Appellant requested an oral hearing, which was held on February 21, 2001.

³ The Office references a claim for a recurrence of disability beginning in April 20, 2000; however, the Board does not find any documentation relevant to that alleged claim in the record.

⁴ The claim was assigned case number 01-0364896 and was eventually doubled with the instant claim under case number, No. 01368052.

⁵ The employing establishment offered and appellant accepted a modified position effective September 14, 2000.

In a decision dated May 21, 2001, an Office hearing representative affirmed the Office's September 20, 2000 decision.

Appellant requested reconsideration and submitted additional evidence.

In a decision dated August 14, 2001, the Office denied modification of its May 21, 2001 decision.

On October 13, 2001 appellant requested an oral hearing.

In a December 18, 2001 decision, the Office denied appellant's request for a hearing on the grounds that he had already received one hearing and since he had previously requested reconsideration was not as a matter of right entitled to another hearing.

On December 25, 2001 appellant filed a claim for a recurrence of disability beginning June 6, 2001.

In support of that claim, appellant submitted progress notes dated March 29, April 6 and April 19, 2001 from Dr. Scott Wolf; physical therapy notes from April 18 to August 9, 2001; and an October 29, 2001 medical note from Dr. David B. Brown, a Board-certified orthopedist.

By letter dated January 8, 2002, appellant also filed a request for reconsideration of the Office's August 14, 2001 decision.

On January 14, 2002 appellant wrote to the Office stating that he wanted an oral hearing.

In support of his reconsideration request, appellant submitted an unsigned physician's note from Riverview Hospital dated November 1, 2000; two light-duty request forms signed by Dr. Brown on April 8 and May 3, 2002; and a May 15, 2002 medical note signed by Dr. Hamms, who reported on that date that appellant was suffering from bilateral wrist and arm pain.

In a report dated February 7, 2002, Dr. Brown noted that appellant had returned complaining of residual right elbow and bilateral wrist soreness. He related that appellant had first been treated in July 2001 for de Quervain's tenosynovitis of the right thumb. Dr. Brown stated that appellant returned on September 21, 2001 complaining of right lateral elbow pain and was given a series of cortisone injections and a course of physical therapy without improvement. Dr. Brown advised that appellant had ulnar right elbow extensor tendon release surgery on October 23, 2001. Physical and objective findings were discussed. The diagnosis was listed as (1) status post lateral epicondyle release right elbow; (2) status-post right carpal tunnel release; and (3) bilateral wrist tendinitis. Dr. Brown opined that appellant's complaints of wrist and right forearm soreness were undoubtedly related to his many years of work for the employing establishment. He concluded that appellant was capable of performing only light duty with no repetitive use of his arms or hands.

On March 21, 2002 the Office denied appellant's request for an oral hearing.

In a decision dated May 25, 2002, the Office denied compensation on the grounds that the evidence was insufficient to establish that appellant sustained a recurrence of disability on or after June 6, 2001.

The Office also issued a second decision dated May 25, 2002, wherein the Office denied modification of its prior decisions dated September 20, 2000 and May 21, 2001.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁶

In this case, there is insufficient medical evidence addressing whether appellant sustained a recurrence of disability on any of the dates alleged. Treatment notes available during May through June 2000 do not show a change in the nature or extent of appellant's light-duty requirements such that he was unable to perform his job. Indeed, it does not appear that appellant stopped work on either May 3 or June 14, 2000. His treating physician reported no change in the status of his arm condition and appellant's limited-duty restrictions remained the same.

The Office properly found that the November 1, 2001 physician's note gave no history of injury and failed to mention any prior recurrences of disability. Similarly, Dr. Brown's February 7, 2002 report does not address whether or not appellant sustained a recurrence of disability on May 3 or June 14, 2000. Treatment notes dated March 29 and April 19, 2001 do not mention a recurrence of disability and specifically predate the June 7, 2001 claim. Accordingly, the Board concludes that appellant failed to carry his burden of proving that he sustained a recurrence of disability on May 3 and June 14, 2000 or June 7, 2001.

Additionally, the Board finds that the Office properly denied appellant's multiple requests for a hearing following the Office's August 14, 2001 decision denying modification.

Section 8124(b) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.⁷ Office regulations provided that a claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁸

⁶ *Gus N. Rodes*, 46 ECAB 518 (1995).

⁷ *See* 5 U.S.C. § 8124(b).

⁸ 20 C.F.R. § 10.616(a) (2002)

In this case, the Office had already granted appellant's oral hearing request with respect to the September 20, 2000 decision and an Office hearing representative issued a decision denying appellant's multiple claims for a recurrence of disability on May 3 and June 14, 2000. The Office hearing representative's decision was dated May 21, 2001. The Office also denied modification of its decisions pursuant to appellant's request for reconsideration. The Office's August 14, 2001 decision denying modification specifically instructed appellant that he could either file another request for reconsideration or file an appeal with the Board. Appellant was not advised that he could request another oral hearing because he had already received a hearing with respect to the Office's September 20, 2000 decision. The Board finds that the Office properly exercised its discretion in denying appellant's hearing requests.

The decisions of the Office of Workers' Compensation Programs dated March 21 and May 25, 2002 are hereby affirmed.

Dated, Washington, DC
January 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member