

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN J. GAN and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, MO

*Docket No. 02-2212; Submitted on the Record;
Issued June 6, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs discharged its burden of proof to terminate appellant's compensation benefits effective September 22, 2000; and (2) whether appellant has established that he has any continuing disability causally related to his accepted employment injuries after September 22, 2000.

On September 10, 1997 appellant, then a 34-year-old letter carrier, filed a claim for traumatic injury alleging that on September 9, 1997 he slipped injuring his right arm from the elbow area up. On November 13, 1997 the Office accepted that he sustained employment-related right shoulder strain.¹

Appellant's treating physician, Dr. Jeffrey Mutchler, an osteopath, in a report dated November 5, 1997, released appellant to return to work with a 30-pound weight limitation, no heavy lifting, pulling, pushing or overhead lifting.

On December 15, 1997 the Office then referred appellant for a second opinion examination with Dr. Ted Lennard, Board-certified in physical medicine and rehabilitation, to determine the extent and degree of any disability remaining as a result of the accepted injury.

In a report dated December 22, 1997, Dr. Lennard stated that appellant had probable soft tissue pain of the right posterior shoulder. He indicated that he saw no reason to keep appellant from performing full work activities. Dr. Lennard stated that appellant should avoid lifting greater than 20 pounds with the right arm until the magnetic resonance imaging (MRI) scan was complete.

¹ The record reflects that appellant was a temporary casual employee whose appointment ended on September 24, 1997. Appellant stopped working on September 23, 1997.

In a January 20, 1998 MRI scan of the right scapula, Dr. Bruce Hedgepath, a physician of unknown specialty, noted that there was no evidence of a rotator cuff tear and opined that appellant had a negative scapula. The MRI scan of the cervical spine of the same date, revealed minimal degenerative changes at the C5-6 level with a small uncinat spur appearing at present on the right. The study was otherwise within normal limits. The MRI scan of the thoracic spine showed a negative study.

In a February 3, 1998 report, Dr. Lennard reviewed the MRI results, noting they were essentially normal. He indicated that appellant remained focused on his pain complaints and lack of improvement, including that he complained of “jiggling” in the area of the scapular spine and that his scapula was “sticking out.” Dr. Lennard indicated that appellant’s activities were upgraded to full duty.

In a February 16, 1998 report, Dr. Lennard noted that the electromyogram (EMG) study of February 16, 1998 showed that his right upper extremity was normal.

In a March 2, 1998 report, Dr. Lennard indicated that appellant was at maximum medical improvement and was capable of working a full range of duties as a letter carrier.

By decision dated March 18, 1998, the Office found that the weight of the medical evidence established that appellant was able to perform the duties of his position as a letter carrier but that he remained entitled to medical benefits due to residuals of the accepted injury.

By letter dated April 14, 1998, appellant requested a hearing, which was held on June 30, 1999.²

By decision dated October 14, 1999, the Office hearing representative remanded the case for referral of appellant for an impartial medical examination due to a conflict in the medical evidence.

On May 9, 2000 appellant was referred to Dr. Richard Lehman, a Board-certified orthopedic surgeon, to provide an impartial medical examination.³

In a report dated June 1, 2000, Dr. Lehman noted appellant’s history of injury and treatment. He included appellant’s list of complaints, which was comprised of aching in his right scapular area to chilling in his back and noted that appellant felt that something in his back was in the wrong place. Dr. Lehman described his findings on physical examination, including that appellant had full range of motion of his shoulder with minor clicking in his shoulder. He stated appellant’s scapula was appropriately positioned and there was no motor mechanical deficit. Dr. Lehman found appellant to be neurologically intact and his functional mechanics

² At that time, appellant submitted a medical report from Dr. Edward Eyeran, Board-certified in psychiatry and neurology, dated November 25, 1998 and a second report dated June 24, 1999, concluding that the medical evidence showed that appellant had sustained a denervation of the serratus anterior which was causing pain behind the scapula and weakness in the right arm. He opined that appellant could not lift over 20 pounds.

³ The record reflects that appellant was originally sent to Dr. Michael Clark, a Board-certified orthopedic surgeon; however, he failed to provide a supplemental report and his opinion was not utilized.

were normal. He found that appellant's shoulder was stable with full extension and full flexion of his shoulder and no mechanical loss of his shoulder. Further, Dr. Lehman indicated that appellant had normal rotator cuff function, normal rotator cuff extension and normal mechanical strength. He opined that he felt that there was absolutely nothing wrong with appellant's scapula or his shoulder. Dr. Lehman noted that the x-rays showed spurring of the acromioclavicular (AC) joint and spurring at the anterior inferior aspect of the acromion which was preexisting and they also showed some straightening of the cervical spine, which was also preexisting. Further, he indicated that he had reviewed the medical records from Dr. Eyerman, wherein he mentioned that appellant had problems to the nerve but explained that he did not give the name of the nerve. Dr. Lehman also indicated that Dr. Eyerman's report talked about loss based on his EMG nerve conduction velocity test but he does not mention the names of the nerves tested. He recommended that appellant undergo an EMG nerve conduction velocity test. Dr. Lehman again stated that he could basically find nothing wrong with appellant's shoulder although he did note minor swelling in his posterior scapula and preexisting arthritis at the AC joint and anterior inferior acromion. Further, he indicated that appellant had some preexisting impingement syndrome and minor popping in the shoulder and explained that this was normal in a patient of this age. Dr. Lehman opined that appellant's right shoulder strain was resolved and that he could find nothing objective on his examination. He concluded that appellant had a zero percent permanent disability and there was absolutely nothing wrong with appellant's shoulder. Finally, Dr. Lehman indicated that appellant could work without restrictions as appellant had a resolved strain of his shoulder.

In an August 16, 2000 report, Dr. Dan Phillips, a Board-certified psychiatrist and neurologist, stated that the bilateral median motor terminal latencies and response voltages fell well within the range of normal.

In an August 29, 2000 report, Dr. Lehman reviewed the August 16, 2002 report of Dr. Phillips and opined that "there is nothing wrong with this gentleman." He added that appellant could work without restrictions and was at maximum medical improvement. Dr. Lehman also stated that there was no evidence of cervical radiculopathy, brachial plexopathy or distal entrapment neuropathy.

By decision dated September 22, 2000, the Office found that the evidence of file failed to establish that appellant suffered from continuing disability from the accepted injury of September 9, 1997 and appellant was capable of returning to his date-of-injury position as a letter carrier with no restrictions.

By letter dated October 18, 2000, appellant requested a hearing, which was held May 30, 2001.⁴

On June 26, 2001 appellant provided a letter and duplicate of Dr. Griffiths' report along with three photographs of his right scapula, with annotations.

⁴ At the hearing, appellant provided a May 25, 2001 medical report from Dr. Harry Griffiths, a Board-certified diagnostic radiologist. Along with this report, appellant entered a copy of Dr. Griffiths' curriculum vitae. Appellant also entered an exhibit listing his many symptoms.

In a report dated May 25, 2001, Dr. Griffiths indicated that, although the scapula was read as normal, there was a high signal in the serratus anterior muscle as well as the blade of the scapula itself. He opined that the remaining scapular muscles and the shoulder joint appeared to be normal at the same time the cervical MRI scan was performed. Further, Dr. Griffiths noted that appellant had an exaggerated lordosis and there was some high signal in C2 probably caused by a hemangioma. However, he opined that the discs and vertebral bodies signal are otherwise normal. Further, Dr. Griffiths found the thoracic spine appeared to be essentially normal and the x-rays of both scapulae appeared to be normal with the scapulae being symmetrical. He reviewed films of the right scapula and right shoulder done on June 10, 2000 and noted that they showed that the scapula was winging and that there were degenerative changes appearing in the AC joint with large spurs on the acromion and adjacent to the joint. Dr. Griffiths opined that this was presumably because of the rotation of the scapula from its normal position. He also stated that it was obvious that appellant's scapula was winging and rotated. Dr. Griffiths opined that this was the classical finding in a denervation or muscle damage to the serratus anterior muscle which was confirmed by the MRI scan appearance as well as the changes in the right AC joint.

The record reflects that appellant provided additional comments and corrections regarding the hearing and his various medical examinations.

By decision dated August 31, 2001, the Office denied modification of its September 22, 2000 merit decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁸

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence

⁵ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ *Id.*

⁷ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁸ *Id.*

that she had an employment-related disability, which continued after termination of compensation benefits.⁹

In this case, the Office accepted that appellant sustained employment-related right shoulder strain and paid appropriate benefits.

Appellant's physicians, Drs. Mutchler and Eyerman, reported that appellant had continuing disability, while Dr. Lennard, the physician to whom appellant was referred for a second opinion examination, indicated that appellant could return to full duty. Based on this conflict in medical opinion, as to whether appellant continued to have residuals of his accepted employment injuries, the Office referred appellant to Dr. Lehman, for an impartial examination.¹⁰

Section 8123(a) of the Act,¹¹ provides: "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In this case, in accordance with the Act, the Office referred appellant for an impartial medical evaluation by Dr. Lehman.

In the instant case, Dr. Lehman, in his role as an impartial medical specialist, has provided an opinion based on a proper factual and medical background and has supported his opinion with medical rationale. In his June 1, 2000 report, he noted appellant's history of injury and treatment and described his findings on physical examination, including that appellant had full range of motion of his shoulder with minor clicking in his shoulder, that it was in the proper position and had no motor or mechanical deficit. Dr. Lehman found appellant to be neurologically intact and his functional mechanics were normal. He opined that he felt that there was absolutely nothing wrong with appellant's scapula or his shoulder. Dr. Lehman explained that the x-rays showed preexisting spurring of the AC joint and spurring at the anterior inferior aspect of the acromion. He also noted appellant's preexisting impingement syndrome and minor popping in the shoulder and explained that this was normal in a patient of this age. Dr. Lehman opined that appellant's right shoulder strain was resolved and there were no objective findings on examination. He concluded that appellant had a zero percent permanent disability with a resolved strain of the shoulder and he could work without restrictions. Dr. Lehman repeated this assessment and concluded that appellant was at maximum medical improvement in a supplemental report dated August 29, 2000.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper

⁹ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹⁰ 5 U.S.C. § 8123(a) of the Federal Employees' Compensation Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes*, 43 ECAB 510 (1992).

¹¹ 5 U.S.C. §§ 8101-8193, § 8123(a).

factual background, must be given special weight.¹² As Dr. Lehman's report was based on a proper factual background and based on objective physical findings in support of his conclusion that appellant was no longer disabled and had no residuals of his accepted employment injury, his report is entitled to the weight of the medical evidence and the Office properly relied on this report in determining that appellant was no longer entitled to compensation, effective September 22, 2000.

The medical evidence therefore establishes that appellant's disability causally related to his accepted claim for right shoulder strain, had ceased and the Office properly terminated his compensation effective September 22, 2000. The burden of proof, thereafter, shifts to appellant.

The Board further finds that the issue of whether appellant has any continuing disability or residuals after September 22, 2000 the date the Office terminated his compensation, is not in posture for decision due to a conflict in the medical evidence between Drs. Griffiths and Lehman.

Subsequent to the September 22, 2000 decision terminating appellant's compensation, appellant submitted a May 25, 2001 report from Dr. Griffiths.

In his report, Dr. Griffiths noted that, although the scapula was read as normal, there was a high signal in the serratus anterior muscle as well as the blade of the scapula itself. He noted that appellant had an exaggerated lordosis and there was some high signal in C2 probably caused by a hemangioma. Dr. Griffiths reviewed films of the right scapula and right shoulder performed on June 10, 2000 and noted that they showed that the scapula was winging and that there were degenerative changes. He explained that this was because of the rotation of the scapula from its normal position and it was obvious that appellant's scapula was winging and rotated. Further, Dr. Griffiths explained that this was the classical finding in a denervation or muscle damage to the serratus anterior muscle which was confirmed by the MRI appearance as well as the changes in the right AC joint.

As noted above, Dr. Lehman, the impartial medical examiner, indicated there was absolutely nothing wrong with appellant's shoulder and his condition had resolved. He also stated there was no evidence of cervical radiculopathy, brachial plexopathy or distal entrapment neuropathy and that appellant was at maximum medical improvement. In this case, the Board finds that a conflict in medical opinion exists between the opinions of Drs. Griffiths and Lehman. The Board finds that, since Dr. Griffiths' report contains a sufficiently well-rationalized medical opinion that appellant still suffers from residuals, the report creates a conflict with the opinion of Dr. Lehman.

On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation pursuant to section

¹² *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

8123(a).¹³ After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The August 31, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed with respect to the issue of termination. On the issue of continuing disability, the decision is set aside and remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
June 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹³ 5 USC § 8123(a).