U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES WILLIAM LICK and TENNESSEE VALLEY AUTHORITY, CUMBERLAND CITY OPERATIONS, POWER GROUP, Cumberland, TN

Docket No. 03-154; Submitted on the Record;
Issued March 11, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained a right shoulder strain, right rotator cuff tear, bursitis and tendinitis of the right shoulder in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's January 21, 2002 request for an oral hearing on the grounds that it was untimely.

On April 27, 2001 appellant, then a 54-year-old assistant unit operator, alleged that he strained his right shoulder on March 26, 2001 while opening the door on a pyrite hopper and dislocated his right shoulder on April 25, 2001.[1]

On April 27, 2001 appellant also claimed an April 25, 2001 recurrence of disability related to the March 26, 2001 right shoulder strain. He was on restricted duty at the time of the alleged recurrence of disability. In a May 3, 2001 note, the employing establishment controverted appellant's claim.

In an April 26, 2001 report, Dr. Paul S. Cha, an attending Board-certified internist specializing in hematology and oncology, noted treating appellant for a dislocated right shoulder sustained within the previous 24 hours. He recommended that appellant not elevate his right hand above his shoulder, pull or push more than 15 pounds. Dr. Cha and his associate, Dr. Howell, submitted light-duty restrictions from March 26 to April 27, 2001 against working above the shoulder, pulling, pushing and heavy lifting.

By decision dated June 14, 2001, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that, while the evidence submitted

[1] In a May 10, 2001 letter, the Office advised appellant of the type of additional medical and factual evidence needed to establish his claim, including a report from his attending physician providing a medical explanation as to how and why the alleged work incidents caused the claimed right shoulder strain and dislocation. She did not submit additional evidence prior to issuance of the June 14, 2001 decision.

established that the March 26, 2001 incident occurred as alleged, there was insufficient evidence to establish that an injury resulted from that incident.

Appellant disagreed with this decision and, in a January 21, 2002 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review. He submitted copies of nurse's notes, and a June 8, 2001 note from Dr. Cha, stating that appellant had a right shoulder dislocation, and restricting him from lifting, pulling or pushing over 15 pounds and no lifting above shoulder level on the right.[2]

By decision dated March 25, 2002, the Office denied appellant's request for an oral hearing as untimely, as it was made more than 30 days following the June 14, 2001 decision. The Office exercised its discretion and further denied appellant's hearing request on the grounds that the issue in the case could be addressed equally well through the submission of new, relevant evidence accompanying a valid request for reconsideration.

Appellant disagreed with this decision and, in a May 2, 2002 letter, requested reconsideration. He submitted additional evidence.

Dr. Cha and Dr. John L. Stanton, an attending Board-certified orthopedic surgeon, provided light-duty job restrictions from May 7, 2001 to May 7, 2002, with no lifting, pulling or pushing more than 15 pounds or working overhead with the right arm. Dr. Cha also submitted chart notes from April 26 to October 31, 2001 regarding treatment of the right shoulder. These reports do not address causal relationship.

In a March 26, 2001 occupational health nurse note, appellant related pulling open a pyrite hamper door and feeling a twinge in his right shoulder, with subsequent discomfort when trying to raise his right arm. He received periodic treatment in the occupational health clinic through January 7, 2002. However, these notes were not signed or reviewed by a physician.

In a March 26, 2001 employing establishment accident report, appellant stated that he injured his right shoulder when he pulled open the door of a pyrite hopper and two hours later could not lift his arm above shoulder height.

November 12, 2001 x-rays of the right shoulder showed some lateral spurring of the acromion, "as well as a large hooked acromion anteriorly.

In a January 2002 letter, Dr. Cha stated that appellant "had an injury at work on March 26, 2001," with no subsequent injury. He noted treating appellant on April 26, 2001 for dislocation of the right shoulder. When appellant's pain symptoms persisted through December 2001, Dr. Stanton performed a rotator cuff repair on December 13, 2001. Dr. Cha opined that appellant sustained "a rotator cuff tear on March 26, 2001."

[2] On February 1, 2002 appellant filed a claim for a recurrence of disability commencing April 25, 2001 related to the March 26, 2001 right shoulder injury. He noted that he stopped work on December 13, 2001 and had not returned. The employing establishment controverted appellant's claim. The employing establishment also asserted that appellant may have dislocated his shoulder due to nonoccupational causes, such as working around his home from February 11 to 24, 2001, and lifting weights at a local gym following his return to work on April 3, 2001. There is no final decision of record regarding this claim.

In a January 10, 2002 letter, Dr. Stanton noted that, while appellant was turning a large valve at work in April 2001, "he strained his right shoulder … and was felt to have impingement and bursitis." When rest and medication failed to improve appellant's symptoms, x-rays were obtained which "showed a large hooked acromion anteriorly." He underwent surgery on December 13, 2001, revealing "a large tear of the rotator cuff in addition to the impingement and bursitis. The rotator cuff was repaired, the bone was resected and an acromioplasty with removal of the inflamed bursa was accomplished." Appellant developed a postoperative inflammatory response with wound drainage, requiring reopening the incision several times for irrigation. A second surgery was scheduled for January 11, 2002 to close the muscle and skin on the right shoulder, but repair of the rotator cuff was no longer possible. Dr. Stanton opined that, while appellant's pain and range of motion would eventually improve, he would have permanent weakness in the right shoulder. He noted that appellant would not be able to return to his date-of-injury job for many months.[3]

In a February 5, 2002 note, Dr. Stanton released appellant to light duty as of February 25, 2002, with no pushing, pulling or lifting more than 15 pounds, "no right arm or hand above shoulder," and working no more than 12 hours per day 4 days per week for 4 weeks.

In an April 26, 2002 letter, Dr. Stanton noted that, due to the postsurgical inflammatory response, appellant "never did have healing of that rotator cuff tendon in th[e] right shoulder; therefore, at the present time, while his pain is minimal, his motion is limited to about 90 degrees of forward elevation, full internal rotation and 10 degrees external rotation." He opined that appellant had reached an "end result" and did not require further treatment.[4]

By decision dated June 18, 2002, the Office modified the June 14, 2001 decision, finding that appellant had established fact of injury. However, the Office still denied appellant's claim on the grounds that causal relationship was not established.

Appellant filed his appeal with the Board on October 24, 2002.

Regarding the first issue, the Board finds that appellant has not established that his right shoulder condition is due to the March 26, 2001 incident.

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must

[3] In a February 1, 2002 note, Dr. Stanton prescribed physical therapy for two to three weeks.

[4] Although Dr. Stanton provided a detailed description of appellant's loss or range of right upper extremity motion and noted that appellant had reached maximum medical improvement, he did not provide a percentage of permanent impairment according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The Board notes that there is no schedule award claim of record for permanent impairment of the right upper extremity related to the accepted March 26, 2001 incident or other work factors.

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

submit sufficient evidence to establish that the employment incident caused a personal injury.[6] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[7]

The Board finds that appellant has submitted evidence alleging that he sustained an unspecified right shoulder injury in the performance of duty on March 26, 2001. The March 26, 2001 accident report and nurse's note indicate that the March 26, 2001 incident occurred as alleged and that appellant sought medical treatment for right shoulder pain, weakness and limited range of motion.

Appellant submitted medical records showing treatment for right shoulder difficulties from March 26, 2001 onward. Dr. Cha and Dr. Stanton both mention the March 26, 2001 incident. In his January 2002 report, Dr. Cha opined that appellant sustained "a rotator cuff tear on March 26, 2001." In his January 10, 2002 letter, Dr. Stanton stated that appellant strained his shoulder while turning a large valve at work, precipitating an acromion tear requiring surgical repair on December 13, 2001. However, Dr. Cha's and Dr. Stanton's reports are not sufficiently rationalized to establish the nature and extent of a right shoulder injury. Specifically, appellant has not established that the April 25, 2001 right shoulder dislocation, as well as the rotator cuff tear, bursitis and tendinitis, was related to the March 26, 2001 incident. He did not submit medical evidence from his attending physicians explaining how and why the March 26, 2001 incident would damage the rotator cuff, thus weakening the right shoulder, cause tendinitis and bursitis, and lead to the April 25, 2001 dislocation, December 13, 2001 rotator cuff repair and subsequent postsurgical complications. Without such medical rationale, Dr. Cha's and Dr. Stanton's reports are insufficient to establish that the dislocation or the rotator cuff tear were related to the March 26, 2001 incident.[8]

Regarding the second issue, the Board finds that the Office properly denied appellant's January 21, 2002 request for an oral hearing.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] The Office's procedures, requiring the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[10]

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[6] *Id.*

[7] *See Carlone*, *supra* note 5.

[8] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[9] 5 U.S.C. § 8124(b)(1).

[10] *Henry Moreno*, 39 ECAB 475 (1988).

In this case, appellant filed his request for an oral hearing on January 21, 2002, more than 30 days after issuance of the Office's June 14, 2001 decision. The Office's March 25, 2002 decision was therefore, correct in finding that appellant's hearing request was untimely filed. The Office then properly exercised its discretion by conducting a limited review of appellant's request and the appended evidence and determined that the issue could be addressed equally well through the submission of a valid request for reconsideration. The March 25, 2002 decision denying appellant's January 21, 2002 request for a hearing is, therefore, proper under the law and facts of this case.

The decisions of the Office of Workers' Compensation Programs dated June 18 and March 25, 2002 decision are hereby affirmed, as modified.

Dated, Washington, DC
March 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member