

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. WEDEL and U.S. POSTAL SERVICE,
POST OFFICE, Wichita, KS

*Docket No. 02-2085; Oral Argument Held October 7, 2003;
Issued October 29, 2003*

Appearances: *Beth Regier Foerster, Esq.*, for appellant; *Thomas G. Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant's disability and the need for medical treatment related to his October 17, 1992 employment injury ended by January 17, 1993.

This case has been before the Board on a prior appeal. By decision dated March 10, 1998, the Board found that none of the medical reports of record contained sufficient medical rationale to discharge appellant's burden of proving that his left shoulder and clavicular conditions were causally related to his October 17, 1992 employment injury. The Board noted; however, that these reports did raise an uncontroverted inference of causal relationship, sufficient to require further development of the case record by the Office of Workers' Compensation Programs. The Board remanded the case for referral of appellant, a statement of accepted facts and the medical evidence of record to an appropriate medical specialist for an examination and a rationalized opinion on the relationship between appellant's diagnosed condition and his October 17, 1992 employment injury.¹

On May 19, 1998 the Office referred appellant, a statement of accepted facts, a position description for the position of rural carrier that appellant held when injured and the medical evidence of record to Dr. Anthony G.A. Pollock, a Board-certified orthopedic surgeon, for an opinion on appellant's condition and its relationship to his October 17, 1992 employment injury.

¹ Docket No. 95-2789 (issued October 17, 1992). The facts of the case as set forth in the March 10, 1998 decision are hereby incorporated by reference.

In a report dated December 1, 1998, Dr. Pollock set forth a history of appellant's employment injury and the treatment received. He described his findings on physical examination and x-rays. Dr. Pollock concluded:

"I have reviewed the records made available to me and I believe that [appellant] has no significant orthopedic abnormality that would preclude his ability to work, though on a long-term basis, certainly he would have sustained a significant strain of his shoulder girdle and neck with a result of this kind of accident and obviously sustained a contusion to his head, sufficient to break his nose. These symptoms would have been expected to resolve within at least two, perhaps three months at most, in my opinion. The diagnosis of fibromyalgia, I believe is certainly a possibility, though he does not fit the full criteria as explained by Dr. Wolfe, whose opinion I respect and to whom I would defer concerning any discussion of fibromyalgia, as this is not my field. [Appellant] does have some mild degenerative changes of the cervical spine which are certainly not sufficient to preclude him working, but certainly would cause ongoing discomfort in his neck aggravated by overuse of injury.

"In answer to your questions, I believe that [appellant] had a significant strain of his shoulder girdle and neck as a result of his accident. I think his prognosis would have expected to have been good. The only objective findings that I have currently are some areas of tenderness in [appellant's] shoulder girdle and a decreased rotation of the cervical spine to the right side. There are multiple subjective complaints of pain diffusely around the shoulder girdle, pain with motion of his neck to this right side, but there are no indications of foraminal closure signs. The borrowed x-rays showed degenerative changes in the cervical spine to a moderate degree, but not prohibitive of activity or work. He does have some underlying degenerative disease currently, but I do not have the 1993 films available and there seems to be some discrepancy about whether or not he did have degenerative disease in his cervical spine to any extent to that time. I believe it was probably mild. I cannot explain all [of] [appellant's] current complaints of pain based purely on this accident.

"I believe there was a relationship of his pain and discomfort as a result of [appellant's] motor vehicle accident, but I would have expected these to have resolved to a significant degree, if not completely by this time. He did not complain to me of any clavicular problems. In review of [appellant's] symptoms, I believe he should have been capable of working probably within three months of his injury at his regular employment."

By decision dated December 3, 1998, the Office accepted the additional condition of strain of the left shoulder girdle and neck,² but found that appellant was not entitled to medical benefits or compensation for disability after January 17, 1993 "for the reason that the weight of

² The Office previously had accepted only lacerations of the nose and internal injury to the septum as related to the October 17, 1992 employment injury.

medical evidence as provided by Dr. Pollack establishes your injuries resolved no later than [three] months from date of injury or by January 17, 1993.”

By letter dated December 29, 1998, appellant requested an oral hearing. By decision dated December 2, 1999, an Office hearing representative found that the case was not in posture for decision and remanded the case for a supplemental report from Dr. Pollock “discussing how he arrived at his conclusion that[,] [appellant’s] condition had resolved within three months of the motor vehicle accident.”

By letter dated December 27, 1999, the Office requested a supplemental opinion from Dr. Pollock to address how the left shoulder strain and cervical strain had resolved within three months from the date of injury on October 17, 1992. In a report dated January 18, 2000, Dr. Pollock stated:

“When I saw [appellant] on October 7, 1998, six years after his injury, I could find no reason to explain his continued complaints of pain and, in view of these findings, I would have expected his symptoms to have resolved in approximately three months from his injury. To put an exact date on this, of course, is absurd. He did have some degenerative disease in his cervical spine, certainly and his physical examination was really unremarkable and so I could find no objective reason for his continued complaints of pain and, therefore, thought they would resolve in a normal course of time, as is normally found to be the case.

“I cannot comment on whether his continued symptoms are related to fibromyalgia and I would defer this question to Dr. Wolfe. I do not doubt that [appellant] sustained a significant strain of his neck and shoulder, but nothing that I could see would explain his symptoms lasting anything like six years.”

By decision dated March 17, 2000, the Office found that Dr. Pollock provided sufficient rationale to support his findings and that appellant was not entitled to medical benefits or compensation for disability after January 17, 1993.

By letter dated March 16, 2001, appellant requested reconsideration and submitted notes from a chiropractic clinic to document bridging symptoms in the left shoulder and cervical areas. He also submitted a March 27, 2001 report from Dr. Sergio Delgado, a Board-certified orthopedic surgeon, which set forth a history of appellant’s October 17, 1992 employment injury, reviewed prior medical reports and described appellant’s findings on physical examination. Dr. Delgado concluded:

“[Appellant] has residuals of myofascial injury to the left neck and left shoulder girdle musculature manifested by evidence of trigger points, spasm and guarding involving the left shoulder girdle region, left paracervical region and left supraclavicular region. He may also exhibit evidence of residuals of impingement syndrome of the left shoulder, although minimal in nature. [Appellant] also has evidence of possible radiculopathy on the left as compared to the right, although the clinical findings are mostly subjective in nature which could be better delineated by the EMG [electromyogram] of the left upper extremity.

“Based on the history of injury and post-injury development of complaints including [the] need for medical and chiropractic treatment on a continuous basis following that injury, I would conclude that he sustained injury to the cervical and left shoulder region following the accident of October 17, 1992, mechanisms of which injury are usually compatible with his present complaints. I feel that there is a medical condition involving the left shoulder and cervical region which is easily correlated with the injury sustained.”

* * *

“It is my opinion that the complaints following the injury are persistent to this time.

“As far as functional medical recommendations it would be advisable that [appellant] limit his work activities so that he does not work over four hours per day in his route, particularly in view of the nature of the route which requires a lot of driving over irregular roads with constant jarring to his neck and shoulder and that he would be advised not to do repetitive lifting, pushing and pulling involving the left arm as a result of the injury he sustained.”

By decision dated April 18, 2001, the Office found that the additional evidence was not sufficient to warrant modification of the March 17, 2000 decision.

By letter dated April 17, 2002, appellant requested reconsideration and submitted an April 11, 2002 report from Dr. Delgado stating that it was his belief, “within a reasonable degree of medical certainty[,] that the injury of October 17, 1992, caused injuries to [appellant’s] shoulder and neck which I have diagnosed objectively with the objective signs for such diagnoses described in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition.” Dr. Delgado indicated that the tables of the A.M.A., *Guides* he used in diagnosing appellant’s neck injury and impingement syndrome.

By decision dated May 2, 2002, the Office found that the additional evidence was not sufficient to warrant modification of the April 18, 2001 decision. The Office found that Dr. Delgado’s April 11, 2002 report was of diminished probative value, as it did not provide a sufficient explanation of why appellant continued to have symptoms from an injury more than nine years earlier and how the symptoms precluded appellant from working.

The Board finds that the case is not in posture for decision due to an unresolved conflict of medical opinion.

Dr. Pollock, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, concluded, in a December 1, 1998 report, that appellant’s “symptoms would have been expected to resolve within at least two, perhaps three months at most” and that “he should have been capable of working probably within three months of his injury at his regular employment.” When asked to explain the basis of this three-month estimate, Dr. Pollock stated, in a January 18, 2000 report, that his physical examination of appellant six years after the injury was “really unremarkable and so I could find no objective reason for his

continued complaints of pain and, therefore, thought [that] they would resolve in a normal course of time, as is normally found to be the case.”

One of appellant’s attending physicians, Dr. Delgado, also a Board-certified orthopedic surgeon, concluded in a March 27, 2001 report, that appellant’s “complaints following the injury are persistent to this time” and that appellant still had “residuals of myofascial injury to the left neck and left shoulder girdle musculature....” Dr. Delgado also indicated that appellant had restrictions for work that were related to his October 17, 1992 employment injury and would prevent appellant from performing regular, full-time duties as a rural carrier.

Section 8123(a) of the Federal Employees’ Compensation Act³ states in pertinent part “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.” The reports of Drs. Pollock and Delgado disagree as to whether appellant continued to have residuals of his October 17, 1992 employment injury and whether appellant was able to return to his regular work. As both doctors are Board-certified orthopedic surgeons and both provided rationale for their conflicting opinions, the case will be remanded to the Office for referral of appellant, the case record⁴ and a statement of accepted facts to an appropriate Board-certified specialist for a reasoned medical opinion if or when conditions of the neck and left shoulder related to appellant’s October 17, 1992 injury resolved and if or when his disability for work related to this injury ended.

³ 5 U.S.C. § 8123(a).

⁴ The Office should provide the x-rays and MRI scans from 1993 to the impartial specialist. Dr. Pollock, the Office’s referral physician, noted that these x-rays were not provided to him and that they would have been helpful in determining whether the degenerative changes in appellant’s cervical spine were related to his October 17, 1992 employment injury.

The May 2, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board, to be followed by an appropriate decision.

Dated, Washington, DC
October 29, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member