

FACTUAL HISTORY

On March 12, 2003 appellant, then a 39-year-old transportation security screener, filed a traumatic injury claim alleging that he sustained a right shoulder injury when he lifted a bag at work on that date. The Office accepted that appellant sustained right shoulder tendinitis and paid total disability compensation for various periods.¹

In April 2004 the Office referred appellant to Dr. Andrew J. Collier, Jr., a Board-certified orthopedic surgeon, for examination and evaluation of his ability to work.² In reports dated April 21, 2004, Dr. Collier determined that appellant continued to have residuals of his employment-related right shoulder injury, but indicated that he could work in a light-duty position with no lifting more than 15 pounds and no reaching, pushing or pulling with his right arm.

The record contains notes dated between March and May 2004 in which Dr. William C. Hamilton, an attending Board-certified orthopedic surgeon, indicated that appellant was totally disabled from work for various periods. He indicated that appellant continued to have right shoulder tendinitis. In a report dated June 21, 2004, Dr. Hamilton indicated that appellant's right shoulder tendinitis prevented him from working as a security screener and recommended that he participate in a physical therapy program.³ In notes dated in between April and July 2004, Dr. Steven M. Lipschutz, an attending Board-certified orthopedic surgeon, stated that appellant was partially or totally disabled for various periods due to right shoulder bursitis.

In May 2004 the employing establishment offered appellant a position as a modified transportation security screener which was tailored to the restrictions outlined by Dr. Collier. Appellant returned to the light-duty position on June 30, 2004 but stopped work at the end of the day. The Office did not pay appellant compensation after June 30, 2004 and appellant claimed that his March 12, 2003 employment injury prevented him from working after June 30, 2004.⁴

In a form report dated August 6, 2004, Dr. Hamilton indicated that appellant had right shoulder tendinitis and indicated that he had been totally disabled since April 13, 2004.⁵

¹ Appellant periodically stopped work and then returned to work in light-duty positions.

² The Office characterized Dr. Collier as an impartial medical specialist. There was no conflict in the medical evidence regarding appellant's ability to work at the time of the referral and therefore he actually served as an Office referral physician. Section 8123(a) of the Act provides 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." 5 U.S.C. § 8123(a).

³ In a note dated June 21, 2004, Dr. Hamilton indicated that appellant could return to work "under current restrictions" effective June 23, 2004.

⁴ The record contains a July 13, 2004 claim for compensation (Form CA-7) in which appellant claimed compensation beginning July 1, 2004. The record also contains a claim for recurrence of disability (Form CA-2a) in which appellant claimed an employment-related recurrence beginning June 30, 2004.

⁵ He also indicated that appellant had right wrist and elbow contusions.

In a report dated October 20, 2004, Dr. Collier determined that appellant continued to have residuals of his March 12, 2003 right shoulder injury after June 30, 2004. He indicated that appellant could not return to regular duty, but he that could perform light-duty work which did not require lifting more than 20 pounds or reaching above his shoulders with his right arm.

By decision dated November 10, 2004, the Office denied appellant's claim for compensation on or after June 30, 2004. It found that appellant did not meet his burden of proof that he sustained a recurrence of total disability due to his March 12, 2003 employment injury when he stopped working in his light-duty position on June 30, 2004. The Office indicated that Dr. Collier's October 20, 2004 report showed that appellant could perform light-duty work.

On November 12, 2004 appellant requested reconsideration of his claim. He submitted copies of an August 24, 2004 personal statement, August 6 and October 24, 2004 reports of Dr. Hamilton, a business card of Dr. Hamilton and an undated memorandum from Moss Rehabilitation.

By decision dated November 23, 2004, the Office denied appellant's request for further merit review.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁶ Generally, the Office can meet this burden by showing that the employee returned to work, even if that work is light duty rather than the date-of-injury position, if thereafter the employee earns no less than he had before the employment injury.⁷ A short-lived and unsuccessful attempt to return to duty, however, does not automatically discharge the Office's burden to justify termination of compensation.⁸

ANALYSIS

The Office accepted that appellant sustained right shoulder tendinitis on March 12, 2003 and paid total disability compensation for various periods. Appellant returned to work for only one day on June 30, 2004.⁹ In its November 10, 2004 decision, the Office characterized appellant's claim for compensation starting July 1, 2004 as a claim for recurrence of total disability due to his March 12, 2003 employment injury. It placed the burden of proof for continuing compensation on appellant, indicating that he had the burden of proof to show that he

⁶ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

⁷ *Billy Sinor*, 35 ECAB 419 (1983).

⁸ *Janice F. Migut*, 50 ECAB 166 (1998) (appellant returned to work for two days; the burden remained on the Office to justify termination of benefits).

⁹ The modified transportation security screener position contained various work restrictions.

was totally disabled from light-duty work. The Office found that appellant did not meet this burden of proof and did not pay compensation after June 30, 2004. As noted, however, a short-lived return to work does not shift the burden of proof regarding employment-related disability. The Board has held that such a shift in burden in proof is not appropriate when there is a brief return to work and the medical evidence does not establish that the claimant could continue to perform the light-duty job.¹⁰

The medical evidence does not clearly establish that appellant's employment-related disability had ceased by July 1, 2004. There is no medical evidence which shows that appellant no longer had residuals of his March 12, 2003 employment injury on or after June 30, 2004. All the medical evidence of record indicates that appellant was either partially or totally disabled due to his employment-related right shoulder condition from July 1, 2004 onwards.

In a report dated October 20, 2004, Dr. Collier, a Board-certified orthopedic surgeon and referral physician, determined that appellant continued to have residuals and partial disability due to the March 12, 2003 right shoulder injury after June 30, 2004. In notes and reports dated in June 2004, Dr. Hamilton, an attending Board-certified orthopedic surgeon, indicated that appellant was partially or totally disabled from work due to right shoulder tendinitis for various periods after June 30, 2004.¹¹ In notes dated in June and July 2004, Dr. Lipschutz, an attending Board-certified orthopedic surgeon, stated that appellant was partially or totally disabled for various periods after June 30, 2004 due to his employment-related right shoulder condition.¹²

The Board finds no probative medical evidence establishing that appellant's employment-related condition had ceased on or after June 30, 2004 or that his inability to perform the light-duty job was not related to his employment injury. It remains the Office's burden of proof to terminate compensation, and the Board finds that the Office has not met its burden in this case. The Office's November 10, 2004 decision impermissibly terminated appellant's compensation effective July 1, 2004.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective July 1, 2004 and that appellant is entitled to continuing compensation

¹⁰ See *Cheryl A. Weaver*, 51 ECAB 308 (2000) (claimant returned to work for one day); *Carl C. Graci*, 50 ECAB 557 (1999) (claimant returned to work for one day).

¹¹ In a form report dated August 6, 2004, Dr. Hamilton indicated that appellant had right shoulder tendinitis and indicated that he had been totally disabled since April 13, 2004.

¹² The reports of Dr. Collier, the Office physician and appellant's attending physicians contained different assessments of the extent of appellant's employment-related disability from work after June 30, 2004. Therefore, it could be said that there was a continuing unresolved conflict in the medical evidence regarding this matter. See *supra* note 2 regarding conflicts in the medical evidence. When a conflict requires referral to an impartial medical specialist, the conflict could only be resolved by a well-rationalized report of such a specialist. See *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980). There was no proper referral to an impartial medical specialist regarding appellant's disability after June 30, 2004.

commencing July 1, 2004. Given the Board's determination regarding the merit issue of this case, it is not necessary for the Board to consider the nonmerit issue.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 10, 2004 decision is reversed.

Issued: June 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member