

**United States Department of Labor
Employees' Compensation Appeals Board**

MANUEL GROSS, Appellant)
and) Docket No. 05-158
DEPARTMENT OF DEFENSE, DEFENSE) Issued: March 24, 2005
CONTRACT MANAGEMENT COMMAND,)
Pittsfield, MA, Employer)

)

Appearances:
Manuel Gross, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 15, 2004 appellant filed a timely appeal of an October 15, 2003 decision of the Office of Workers' Compensation Programs, finding that appellant's employment-related condition resolved as of April 21, 1998 and denying a claim for a recurrence of disability as of June 5, 1998. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in finding that appellant's accepted left shoulder impingement had resolved by April 21, 1998; and (2) whether appellant has established a recurrence of disability as of June 5, 1998.

FACTUAL HISTORY

On January 6, 1998 appellant, then a 60-year-old contract administrator, filed an occupational disease claim for continuation of pay/compensation (Form CA-1) alleging that

on December 23, 1997 he sustained injuries when he slipped on a patch of ice and fell while in the performance of duty. The reverse of the claim form indicated that appellant did not stop working. Appellant initially received treatment at the employing establishment medical center. In a report dated February 5, 1998, Dr. Ann Frodey, an internist, reported that after the slip and fall appellant had discomfort in his left shoulder and upper back, with some numbness and tingling in the left hand that resolved quickly. Dr. Frodey noted that x-rays showed no fracture and appellant's symptoms "resolved nicely" but on January 18, 1998 appellant went cross country skiing and had recurrent pain in his left shoulder.

In a report dated March 5, 1998, Dr. Rollin Johnson, an orthopedic surgeon, provided a history and results on examination. Dr. Johnson diagnosed impingement of the subacromial space on the left side; he reported that appellant could have a tear of the rotator cuff, but it was premature to make that statement based on current findings.

By report dated April 21, 1998, Dr. Johnson stated that appellant had completed physical therapy and was free of pain. Dr. Johnson reported that appellant had excellent range of motion with full abduction, full forward flexion and could reach as high as T9 behind his back. He indicated that activities such as golf, tennis and cross country skiing may aggravate the condition and appellant should return to these activities in a gradual fashion.

On February 19, 1999 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that he sustained a recurrence of disability on June 5, 1998. He indicated that he sustained a left shoulder injury on June 5, 1998 when he picked up a bag. By letter dated March 15, 1999, the Office advised appellant that it had accepted a left shoulder impingement resulting from the December 23, 1997 incident, which had resolved by April 21, 1998. In a separate letter dated March 15, 1999, the Office requested additional evidence regarding a recurrence of disability.

By decision dated June 22, 1999, the Office denied the claim for a recurrence of disability. Appellant requested reconsideration of his claim by letter dated March 14, 2000. He submitted a report dated March 17, 2000 from Dr. Johnson, who stated that appellant was backpacking in June 1998 when he reached behind to pick up a backpack and felt severe pain in the left shoulder. Dr. Johnson indicated that a magnetic resonance imaging (MRI) scan in October 1999 showed a rotator cuff tear,¹ and he diagnosed subacromial impingement syndrome of the left shoulder with rotator cuff tear and C6-7 cervical radiculopathy. He further stated, "The patient had no significant symptoms prior to the injury that occurred on December 23, 1997. On this basis, it is my medical opinion the injury either caused or aggravated a preexisting condition of both the cervical spine and the shoulder accounting for his current symptoms. The event that occurred on June 5, 1998 was an exacerbation of the preexisting problem."

In a letter dated May 15, 2000, appellant requested that his claim be expanded to include a rotator cuff tear of the left shoulder. By letter dated May 22, 2000 to appellant's representative, Dr. Johnson noted that his April 21, 1998 report stated that appellant was asymptomatic. He further stated, "I clearly stated that stressing this with rough tennis and cross

¹ The record indicates that the MRI scan was dated July 23, 1999.

country skiing could aggravate this. This in no way suggests that this was a concluded situation or that his injuries were resolved. The only conclusion you can make is that his pain was temporarily abated." Dr. Johnson stated that the injury of June 5, 1998 was an aggravation of a preexisting injury that occurred on December 23, 1997.

Appellant again requested reconsideration by letter dated May 1, 2002. In a decision dated July 18, 2002, the Office found that the request for reconsideration was untimely.

On appeal to the Board, the case was remanded to the Office on the grounds that appellant had filed a timely request for reconsideration.² By decision dated October 15, 2003, the Office found that the evidence failed to establish an employment-related condition after April 21, 1998 or that appellant suffered a recurrence of disability as of June 5, 1998. The Office did not make any specific findings with respect to causal relationship between the December 23, 1997 employment injury and a rotator cuff tear or cervical radiculopathy.

LEGAL PRECEDENT -- ISSUE 1

The Office has the burden proof to terminate authorization for medical treatment and it must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.³

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related condition, which continued after termination of compensation benefits.⁴

ANALYSIS -- ISSUE 1

The Office found that residuals of the accepted left shoulder impingement had resolved by April 21, 1998 based on the report of Dr. Johnson on that date. On April 21, 1998 Dr. Johnson reported that appellant was asymptomatic, pain free and the results on examination reported were normal. There is no indication that appellant needed any continuing medical care for the employment injury. Based on this evidence the Office properly concluded that appellant was not entitled to continuing benefits for the accepted employment injury. The burden of proof shifted to appellant to establish entitlement to compensation benefits.

Dr. Johnson later stated in a May 22, 2000 letter, that he had noted in his April 21, 1998 report that activities such as tennis and cross country skiing could aggravate the condition and this indicated that the injury had not yet resolved. But Dr. Johnson did not describe the nature and extent of any continuing employment-related condition after April 21, 1998. The possibility

² Docket No. 02-2313 (issued September 5, 2003).

³ *Furman G. Peake*, 41 ECAB 361 (1990).

⁴ *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

of a future injury does not constitute an injury under the Federal Employees' Compensation Act and therefore no compensation can be paid for such a possibility.⁵ Dr. Johnson acknowledged that appellant was asymptomatic on April 21, 1998 and the possibility of future aggravations does not establish a continuing employment-related condition. The Board finds that the evidence of record did not establish continuing entitlement to compensation benefits due to the accepted employment injury after April 21, 1998.

The Board notes that appellant had requested that his claim be expanded to include a rotator cuff tear. The Office did not make any findings in this regard and therefore on return of the case record it should issue a decision on whether the evidence establishes any additional employment-related conditions or periods of disability.

LEGAL PRECEDENT -- ISSUE 2

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁶

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁷

ANALYSIS -- ISSUE 2

With respect to the claim for a recurrence of disability as of June 5, 1998, the record indicated that appellant was on leave and was reaching behind and picked up a backpack and sustained pain in the left shoulder. A recurrence of disability, as noted above, is a spontaneous change in a medical condition without an intervening injury. The Board has held that the subsequent progression of an employment-related condition "remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."⁸ If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, *i.e.*, "so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be

⁵ *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).

⁶ *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

⁷ 20 C.F.R. § 10.5(x).

⁸ *Raymond A. Nester*, 50 ECAB 173, 175 (1998).

unreasonable in the circumstances.”⁹ The incident appellant described is neither a spontaneous return of symptoms nor a direct and natural progression of the injury. The operative factor did not appear to be a progression of the compensable injury but the result of an intervening injury caused by the reaching and lifting of a backpack. This is an independent nonindustrial intervening event rather than the natural progression of an employment injury. Accordingly, appellant has not established a recurrence of disability as of June 5, 1998.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating medical benefits as of April 21, 1998 based on the report of that date from Dr. Johnson. The Board further finds that appellant did not establish a recurrence of disability as of June 5, 1998 as he sustained an intervening injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated October 15, 2003 is affirmed.¹⁰

Issued: March 24, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Id.*

¹⁰ On return of the case record the Office should issue a decision with respect to a rotator cuff tear.