

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

DANIEL MALL, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Loma Linda, CA, Employer**

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**Docket No. 05-629
Issued: November 14, 2005**

Appearances:

*Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On January 18, 2005 appellant, through his attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 18, 2004, denying modification of its finding that his right shoulder condition was not a consequential injury of his accepted employment-related left upper extremity injury. Appellant also appeals the Office's nonmerit decision dated December 22, 2004 which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established that his right shoulder condition is a consequential injury of his accepted employment-related left upper extremity injury; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 27, 1996 appellant, then a 58-year-old registered nurse, filed an occupational disease claim assigned number A13-1113478, alleging that on April 30, 1995 he first realized that the pain in his upper back and bilateral upper extremities was caused by his repetitive work activities.¹ He stated that he had been overusing the right upper extremity. The employing establishment controverted appellant's claim on the grounds that it was fraudulent.²

By letter dated October 18, 1996, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised him about the type of factual and medical evidence he needed to submit to establish his claim. Appellant did not respond.

In a decision dated December 5, 1996, the Office denied appellant's claim. The Office found that he failed to submit evidence establishing that he sustained an injury while in the performance of duty. In an undated letter received by the Office on January 6, 1997, appellant requested an oral hearing before an Office hearing representative.

By decision dated January 6, 1999, an Office hearing representative modified the Office's December 5, 1996 decision to reflect that appellant submitted the requested factual information, but affirmed the Office's finding that he failed to establish that he sustained an injury caused by his employment. On December 30, 1999 he requested reconsideration.

In a January 18, 2000 decision, the Office denied modification of the hearing representative's January 6, 1999 decision. The Office found the evidence of record insufficient to establish that appellant sustained an upper extremity injury caused by factors of his employment. He requested reconsideration by letter dated December 18, 2000.

On March 27, 2001 the Office issued a decision, which denied modification of the January 18, 2000 decision. In a March 26, 2002 letter, appellant requested reconsideration. He submitted a February 21, 2002 medical report of Dr. John B. Dorsey, a Board-certified orthopedic surgeon, in which he noted appellant's complaints of pain in the right and left upper extremities, that he had an accepted claim for the left upper extremity and a history of his medical treatment, work, social and family background. He provided a review of appellant's systems, normal findings on physical examination and testing of his head, neck and upper

¹ Prior to the instant claim, appellant filed a traumatic injury claim assigned number A13-1079185 on December 6, 1994 alleging that on that date a table fell on his left hand. The Office accepted his claim for a left wrist strain. On April 30, 1995 appellant filed a traumatic injury claim assigned number A13-1079393 alleging that on that date he hurt his left shoulder and left wrist when they were struck by a door. The Office accepted appellant's claim for left shoulder strain, left-sided de Quervain's tendinitis, left carpal tunnel syndrome and left adhesive capsulitis. The Office authorized him to undergo left-sided carpal tunnel and left-sided de Quervain's disease release which were performed on April 17, 1997. On April 11, 2002 the Office doubled the current claim into the claim assigned number A13-1079393, as both claims involved appellant's upper extremities. The Office then assigned claim number A13-1079393 as the master file number.

² The employing establishment stated that appellant was terminated on January 6, 1996 because he failed to renew his nursing license.

extremities with the exception of pain in reporting range of motion findings and a review of his medical records. Dr. Dorsey diagnosed bilateral carpal tunnel syndrome, bilateral lateral epicondylitis of the elbows and bilateral tendinitis of the shoulders, all of which he found to be work related. He noted that appellant's claim had been accepted for a left upper extremity injury, but not for a right upper extremity injury. Dr. Dorsey stated that it was reasonable to assume that, if appellant developed left carpal tunnel syndrome and tendinitis in the left upper extremity as a result of his employment, then he would have certainly developed the same conditions in the right upper extremity. He further stated that the right upper extremity was appellant's dominant extremity and was utilized more often than the left, not only because he was right-handed, but because appellant was favoring the left upper extremity as a result of a frozen shoulder. Dr. Dorsey concluded that appellant's claim should be accepted for a right upper extremity injury.

By letter dated April 22, 2002, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. Laurence A. Meltzer, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a May 15, 2002 report in which he provided a detailed review of the statement of accepted facts and appellant's case record. Dr. Meltzer noted his complaints of pain in the neck, shoulders, elbows, wrists, hands and upper back and provided a history of the development of his symptoms and medical, family and social background. He reported his normal findings on physical examination of appellant's cervical spine, thoracolumbar spine, upper extremities, shoulders, arms/forearms, wrists, hands and fingers and lower extremities. Dr. Meltzer also reported normal findings on neurological and x-ray examination.

Dr. Meltzer diagnosed partially recovered status post adhesive capsulitis of the left shoulder. In addition, he diagnosed complaints of bilateral carpal tunnel syndrome, lateral epicondylitis, cervical spine and low back pain that were all unsubstantiated by objective orthopedic examination. Dr. Meltzer stated that appellant was exaggerating his symptoms as he did not find any real evidence of adhesive capsulitis on the right side. He further stated that his restriction of motion was due more to the lack of cooperation based on his ability to abduct to 90 degrees but only bend forward or reach forward and touch the wall to 120 degrees. Dr. Meltzer related that it was highly unlikely that appellant would complain about pain over the lateral epicondyle with pronation and flexion of the wrist because these symptoms were exaggerated by him. Regarding carpal tunnel syndrome on the right, he stated that, although appellant underwent a nerve conduction study that revealed mild carpal tunnel syndrome, his symptoms were very atypical. Dr. Meltzer noted that patients with carpal tunnel syndrome have a positive Tinel's sign over the median nerve, but when he tapped appellant in areas that did not involve nerve functions, he complained of radiation as well in both hands. He opined that as a result, the diagnoses of right adhesive capsulitis, right lateral epicondylitis and carpal tunnel syndrome on the right were exaggerated. Dr. Meltzer found that appellant's right upper extremity problems were not attributable to factors of his employment. He stated that his work requirement of writing in charts 30 to 60 minutes a day did not constitute a repetitive use problem and this condition was not work related. Dr. Meltzer found that appellant had minimal right upper extremity problems which were not employment related. He stated that he would not have developed residuals one year and three months after his work activities ceased because if this were the cause of his problems, then stopping the activity should have stopped his problems to a "great extent." Dr. Meltzer further stated that since he believed appellant did not have a problem

with his right upper extremity, he did not sustain a consequential injury of the employment-related left upper extremity injury. He concluded that appellant did not require further medical treatment and that he was not disabled with regard to the right upper extremity.

In an August 19, 2002 decision, the Office denied modification of the March 27, 2001 decision. The Office found the evidence of record insufficient to establish that appellant sustained a right upper extremity injury as a consequence of the accepted employment-related left upper extremity injury based on Dr. Meltzer's May 15, 2002 report.

By decision dated November 19, 2002, the Office granted appellant a schedule award for a 27 percent impairment of the left upper extremity.

By letter dated February 3, 2003, appellant requested reconsideration and submitted Dr. Dorsey's September 26, 2002 report. He reviewed Dr. Meltzer's May 15, 2002 report and stated that he diagnosed bilateral carpal tunnel syndrome, bilateral epicondylitis of the elbows and bilateral tendinitis of the shoulders and not adhesive capsulitis as noted by Dr. Meltzer. Dr. Dorsey stated that appellant had repetitive use syndrome which did not present any objective findings. He explained that the diagnosis was generally made after listening to a patient's complaints and finding areas of pain and tenderness on examination. Dr. Dorsey stated that he did not believe there was any evidence of exaggeration and that appellant's problems were secondary to cumulative trauma based on the findings of Dr. V. Prabhu Dhalla, appellant's attending Board-certified orthopedic surgeon.

Appellant also submitted Dr. Dhalla's November 20, 2002 report in which he noted appellant's complaint of pain in the right shoulder. He reported his findings on physical examination and reviewed Dr. Dorsey's February 21, 2002 report and Dr. Meltzer's May 15, 2002 report. Dr. Dhalla agreed with Dr. Dorsey's findings. He stated that contrary to Dr. Meltzer's finding of symptom magnification, appellant continued to have limited range of motion of the right shoulder based on his own multiple examinations and appellant's recent back surgery which was performed by Dr. Thomas W. Jackson, appellant's attending Board-certified orthopedic surgeon. Dr. Dhalla noted that Dr. Jackson had to manipulate appellant's right shoulder to get some range of motion to be able to position him for surgery in the operating room. He concluded that his right shoulder problems were work related.

In a May 14, 2003 decision, the Office denied modification of the August 19, 2002 decision. The Office found that the evidence submitted by appellant was insufficient to outweigh Dr. Meltzer's opinion that he did not sustain a right upper extremity injury causally related to his accepted employment-related left upper extremity injury.

By letter dated September 11, 2003, appellant requested reconsideration. He submitted an August 1, 2003 affidavit from Violet D. Mall, his wife, who stated that she was a registered nurse and had been working in the medical profession for approximately 36 years. She contended that she was present during Dr. Meltzer's examination of appellant and that he failed to conduct a thorough examination as he only spent about five to seven minutes with him, he obtained a very short history from appellant, performed a cursory examination of several of his extremities and did not examine other extremities and Dr. Meltzer did not perform the tests he claimed to have performed.

In an August 4, 2004 letter, Dr. Meltzer responded to Mrs. Mall's letter as requested by the Office. He stated that regarding appellant and any other patient, he did not allow family members in the room when he examined a patient and, therefore, he did not believe Mrs. Mall was in the room. Dr. Meltzer further stated that there was no reason for her to be in the examination room and his policy was firm to prevent exaggerations or complaints such as the ones made by her. He related that, if he wrote about the tests in his report, then they were done at the time of the examination. Dr. Meltzer stated that he conducted an orthopedic examination and not a general physical examination which was complete. He concluded that his report was accurate and that the complaint was made against him because he found very little wrong with appellant.

In an August 18, 2004 decision, the Office vacated a December 12, 2003 decision, but affirmed the May 14, 2003 decision.³ The Office found that the evidence submitted by appellant was insufficient to establish that he sustained a right upper extremity injury causally related to the accepted left upper extremity injuries.

On September 16, 2004 the Office received a July 27, 2004 magnetic resonance imaging (MRI) scan report of Dr. Peggy J. Fritzsche, a Board-certified radiologist, regarding appellant's left shoulder. She found a decrease in the subacromial space secondary to low lying acromioclavicular (AC) joint, degenerative bony hypertrophy and tendinitis of the rotator cuff tendon particularly involving the supraspinatus component, but without evidence of a tear. Dr. Fritzsche further found fluid surrounding the long head of the biceps tendon without concomitant joint effusion suggestive of a biceps tenosynovitis and variable signal intensity of the anterior labrum consistent with degeneration.

The Office also received on September 16, 2004, Dr. Dhalla's August 30, 2004 report, in which he diagnosed hypertrophy of the AC joint of the left shoulder, cervical impingement of the left shoulder and adhesive capsulitis of the left shoulder. He recommended arthroscopy, partial arthrotomy of the left shoulder with subacromial decompression, a Mumford procedure of the shoulder with manipulation of the shoulder under anesthesia and an anterior capsular release.

Additionally, on September 16, 2004 the Office received a July 28, 2004 report by Dr. Jackson, who reported his range of motion and strength findings regarding appellant's right shoulder. In an August 30, 2004 surgery order form, Dr. Dhalla diagnosed osteoarthritis of the AC joint, subacromial impingement and adhesive capsulitis of the left shoulder. He ordered subacromial decompression and Mumford procedure of the left shoulder.

In a letter dated October 22, 2004, appellant requested reconsideration of the Office's August 18, 2004 decision. He submitted Mrs. Mall's September 9, 2004 statement in which she reiterated that Dr. Meltzer did not conduct a complete medical examination of appellant. She also alleged that he was verbally rude towards her and appellant during the examination.

³ The Board notes that the Office's December 12, 2003 decision is not in the record. In the August 18, 2004 decision, the Office stated that the December 12, 2003 decision denied appellant's request for reconsideration of the May 14, 2003 decision on the grounds that Mrs. Mall's allegations were found to be irrelevant and unfounded and his attorney's arguments regarding the sufficiency of the medical evidence were found to be of a repetitious nature or previously considered by the Office.

Mrs. Mall disputed Dr. Meltzer's statement that she was not in the examination room and his finding that appellant did not have any orthopedic problem on the right side of his body. She noted the incident where Dr. Jackson manipulated appellant's right shoulder during surgery. Mrs. Mall concluded that Dr. Meltzer not only failed to adequately assess appellant's medical condition, he did not consider Dr. Dhalla's reports.

By decision dated December 22, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted failed to show that the Office erroneously applied or interpreted a specific point of law; or to advance relevant legal evidence not previously considered by the Office and, thus, insufficient to warrant a merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The Board has recognized the principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁴ An employee has the burden of establishing that any specific condition for which compensation is claimed is causally related to the employment injury.⁵

Section 8123(a) of the Federal Employees' Compensation Act provides: "[i]f 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."⁶

ANALYSIS -- ISSUE 1

Appellant contended that his right upper extremity conditions were caused by the employment injuries to his left upper extremity. He submitted medical evidence in support of his claim. In a February 21, 2002 report, Dr. Dorsey, appellant's attending physician, provided normal findings on physical examination with the exception of pain when he obtained range of motion findings. He opined that appellant's bilateral carpal tunnel syndrome, bilateral lateral epicondylitis of the elbows and bilateral tendinitis of the shoulders were work related. Dr. Dorsey stated that since appellant's claim for a left upper extremity injury was accepted as work related by the Office, it was reasonable to assume that his right upper extremity conditions were also work related. He further stated that appellant's right upper extremity conditions were caused by overuse as he was not only right-handed but he favored the left upper extremity due to a frozen shoulder.

⁴ *Carols A. Marrero*, 50 ECAB 117, 119-120 (1998); *John Knox*, 42 ECAB 193, 196 (1990).

⁵ *William F. Gay*, 50 ECAB 276, 277 (1999).

⁶ *Richard L. Rhodes*, 50 ECAB 259 (1999); *Noah Ooten*, 50 ECAB 283 (1999); *Rosita Mahana (Wayne Mahana)*, 50 ECAB 331(1999); *Richard Coonradt*, 50 ECAB 360 (1999); *Gwendolyn Merriweather*, 50 ECAB 411 (1999); *Marsha R. Tison*, 50 ECAB 535 (1999).

Dr. Meltzer, an Office referral physician, reviewed Dr. Dorsey's report. He provided a detailed report concerning appellant's medical history, current complaints of upper extremity pain and diagnosed complaints of conditions that were unsubstantiated by objective orthopedic examination. Dr. Meltzer stated that as a result, the adhesive capsulitis, lateral epicondylitis and carpal tunnel syndrome of the right upper extremity were exaggerated. He found that appellant had minimal right upper extremity problems and noted that his repetitive work activities did not constitute a repetitive use problem. Dr. Meltzer explained that appellant would not have residuals for more than a year after he stopped performing his work activities if these activities caused his problems because the problems would have ceased after the activities ceased. He concluded that his right upper extremity conditions did not constitute a consequential injury of the accepted work-related left upper extremity injuries.

Dr. Dorsey reviewed Dr. Meltzer's May 15, 2002 report and explained that repetitive use syndrome did not present objective findings and that a diagnosis was generally made based on a patient's complaints and findings of pain and tenderness on examination.

In light of the discrepancy in the medical opinion evidence between Dr. Dorsey, appellant's attending physician, and Dr. Meltzer, an Office referral physician, as to whether he sustained a right upper extremity injury as a consequential injury of his accepted employment-related left upper extremity injuries, the Board finds that there is a conflict regarding causal relation.⁷

The Board will remand the case to the Office for appropriate development of the medical record to determine whether appellant sustained a right upper extremity injury as a consequential injury of his accepted employment-related left upper extremity injuries. On remand the Office should prepare a statement of accepted facts and a list of specific questions and refer appellant to an appropriate Board-certified physician to determine whether his right shoulder condition was caused by the employment-related left upper extremity injuries. Following this and any other further development as deemed necessary, the Office shall issue an appropriate decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the issue of whether appellant established that his right shoulder condition is a consequential injury of his accepted employment-related left upper extremity injuries due to an unresolved conflict of medical opinion evidence regarding the cause of his right shoulder condition.⁸

⁷ *Id.*

⁸ In view of the Board's disposition of this issue, it will not address the second issue.

ORDER

IT IS HEREBY ORDERED THAT the December 22 and August 18, 2004 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board