

ISSUES

The issues are: (1) whether appellant has established that his left shoulder condition is a consequence of his accepted right rotator cuff tear; and (2) whether the Branch of Hearings and Review abused its discretion in denying appellant's request for a review of the written record.

FACTUAL HISTORY

On January 28, 2002 appellant, then a 40-year-old distribution clerk, filed an occupational injury claim (Form CA-2), alleging that he developed a right shoulder condition as a result of repetitive employment activities.² His claim was accepted for right rotator cuff tear. The Office subsequently approved two surgical procedures, which occurred on December 6, 2002 and January 9, 2004, by Dr. Carolyn M. Hyde, a Board-certified orthopedic surgeon. On July 26, 2004 appellant elected disability retirement benefits in lieu of benefits under the Federal Employees' Compensation Act.

In a February 26, 2004 report, Dr. Hyde diagnosed a "full thickness rotator cuff tear with biceps tendon repair, failed repair after two attempts." She stated that the type of repair involved in appellant's case would never completely heal, because the fabric of the rotator cuff was rotten and did not hold stitches. Dr. Hyde indicated that, "because [appellant's] right shoulder wore out under work conditions, it [is] possible that his left shoulder could wear out too."

Appellant submitted a claim for medical benefits related to a left shoulder condition. In a report dated January 18, 2006, Dr. Hyde stated that she saw appellant on that date for pain in his neck and left shoulder. She opined that appellant's symptoms resulted from having to compensate for an incompletely cured right shoulder. Examination of the right shoulder showed elevation of flexion to 160 degrees, abduction to 140 degrees, and good power of resisted external and internal rotation. Resisted scaption was a bit weak. Dr. Hyde stated that the combination of abduction plus external rotation against resistance reproduced the characteristic weakness of an incomplete rotator cuff repair. Examination of the left shoulder revealed a painful arc of flexion, pain with resisted scaption and external rotation, and pain between the ranges of 80 to 110 degrees. Impingement signs were positive; pain was worse with resisted abduction and external rotation. Appellant had pain and tenderness in his neck along the spinous processes at the C5-6 area and some pain with compression. Dr. Hyde stated that, although appellant did not have a drop arm sign, the examination was somewhat suspicious of a left rotator cuff tear. X-rays showed mild acromioclavicular (AC) joint arthritis in both shoulders. Dr. Hyde opined that appellant might have some supraspinatus tendinopathy, if not a small tear on the left side, "which went through the same work life and stresses as the right side did to create the tendinopathy." The record also contains a report of a magnetic resonance imaging scan of the right shoulder dated February 14, 2006.

The Office referred Dr. Hyde's January 18, 2006 report, together with a statement of accepted facts, to the district medical adviser for his review and an opinion as to whether

² The record reflects that, on January 2, 2002, appellant underwent an open rotator cuff repair with acromioplasty, biceps tendon repair, and arthroscopic debridement and acromioplasty of the glenohumeral joint.

appellant's left shoulder condition was causally related to the accepted right shoulder injury. On March 2, 2006 the medical adviser opined that appellant had bilateral shoulder impingement syndromes and AC joint arthritis. He stated that appellant's neck and left shoulder symptoms were the natural progression of his underlying condition, rather than a result of compensating for an incompletely cured right shoulder or an aggravation of his December 15, 2001 injury.

By decision dated April 5, 2006, the Office denied appellant's claim. The Office found that the evidence failed to establish that the claimed left shoulder condition was causally related to the accepted right shoulder injury.

The record contains a May 17, 2006 letter to the Office from Congressman Lloyd Doggett inquiring as to the status of appellant's claim for medical treatment for his neck and left shoulder condition. Enclosed was a copy of an April 17, 2006 letter from appellant requesting the Congressman's assistance relative to the Office's denial of his neck and left shoulder condition.

On June 12, 2006 appellant requested a review of the written record. By decision dated August 4, 2006, an Office hearing representative denied the request as untimely. The hearing representative further found that the issue could be equally well addressed through a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The general rule respecting consequential injuries is 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.³ The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.⁴ With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant submitted insufficient medical evidence to establish a consequential relationship between his left shoulder condition and the accepted right rotator cuff tear. The medical evidence of record relevant to his left shoulder condition consists of a January 18, 2006 report from Dr. Hyde. The Board finds that this report is of diminished

³ See *Debra L. Dillworth*, 57 ECAB ____ (Docket No. 05-159, issued March 17, 2006). See also *Albert F. Ranieri*, 55 ECAB 598 (2004).

⁴ *Id.* See also *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

⁵ *Kathy A. Kelley*, 55 ECAB 206 (2004).

probative value and is insufficient to establish a causal relationship between the accepted injury and the claimed left shoulder condition.

Although she provided findings on examination, Dr. Hyde did not provide a rationalized opinion describing the physiological process whereby appellant's left shoulder condition developed as a natural consequence of his accepted right shoulder condition, rather than as a result of an intervening cause, or the natural progression of an underlying condition. This point is particularly relevant, given that appellant stopped working as a distribution clerk in 2004. Dr. Hyde attributed the newly diagnosed condition to compensation for an incompletely cured right shoulder. The Board has held that a medical report not fortified by sufficient explanation or rationale is of diminished probative value.⁶ Dr. Hyde's opinion is further compromised by its speculative and equivocal nature. She stated that the examination was "somewhat suspicious" of a left rotator cuff tear. Dr. Hyde opined that appellant might have some supraspinatus tendinopathy, if not a small tear on the left side, "which went through the same work life and stresses as the right side did to create the tendinopathy." Her statement is more of a hypothesis than an opinion, and is not rendered to a reasonable degree of medical certainty. Therefore, it lacks probative value.⁷

The Board finds the medical evidence of record is insufficient to discharge appellant's burden of establishing that his left shoulder condition was a consequential injury of the accepted right rotator cuff tear.

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of a final decision by the Office.⁸ Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁹ The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.¹⁰

Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The

⁶ See, e.g. *Brenda L. Dubuque*, 55 ECAB 212, 217 (2004).

⁷ See *Leonard J. O Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. § 10.615; *Gerard F. Workinger*, 56 ECAB ____ (Docket No. 04-1028, issued January 18, 2005).

¹⁰ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."¹¹

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹² In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹³

ANALYSIS -- ISSUE 2

The Office issued a decision on April 5, 2006 denying appellant's request to expand his claim to include a left shoulder condition. The record reflects that appellant sought a review of the written record following this decision by request dated June 12, 2006. This hearing request was denied as untimely on August 4, 2006. The Office properly advised appellant that it had exercised its discretionary authority and denied his request for the additional reason that the relevant issue of the case could be addressed by a request for reconsideration before the district Office and the submission of additional evidence.

Appellant's June 12, 2006 request for a review of the written record was made more than 30 days after the Office issued its April 5, 2006 decision. As his request was untimely, appellant was not entitled to a review of the record as a matter of right. The Office properly exercised its discretion in denying a review upon appellant's untimely request, determining that the issue could be equally well addressed through a reconsideration request and the submission of new evidence.¹⁴ The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.¹⁵ In the present case, the evidence of record does not establish that the Office abused its discretion in denying appellant's request for review of the written record.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof in establishing that his left shoulder condition was a consequence of his accepted left rotator cuff tear. The Board

¹¹ 20 C.F.R. § 10.616(a). See also *Gerard F. Workinger*, 56 ECAB ____ (Docket No. 04-1028, issued January 18, 2005).

¹² *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

¹³ *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹⁴ See *Joseph R. Giallanza*, 55 ECAB 186 (2003).

¹⁵ See *André Thyratron*, 54 ECAB 257 (2002).

further finds that the Office properly denied appellant's request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the August 4 and April 5, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 20, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board