United States Department of Labor
Employees' Compensation Appeals Board

B.A., Appellant	)	
and	)	**Docket No. 08-1777**
	)	**Issued: February 10, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Bremerton, WA, Employer	)	

Appearances:
Charles P. Smith, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 10, 2008 appellant, through his representative, filed a timely appeal from July 10 and September 10, 2007 and March 6 and April 16, 2008 merit decisions of the Office of Workers' Compensation Programs denying his claim for disability compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he was partially disabled beginning November 26, 2006 causally related to his accepted employment injury.

FACTUAL HISTORY

On May 26, 2006 appellant, then a 57-year-old mail processing/distribution clerk, filed an occupational disease claim alleging that he sustained left and right shoulder strain and arthritis causally related to factors of his federal employment. He worked modified duty beginning

September 17, 2005 due to a prior employment injury, assigned Office file number xxxxxx012.[1] The Office accepted the claim for a bilateral suprascapularis sprain of the shoulder and upper arm and bilateral/lateral epicondylitis. Appellant did not stop work.

In a report dated November 22, 2006, Dr. Frank E. Haydu, Board-certified in emergency medicine, diagnosed bilateral rotator cuff tendinopathy, lumbar strain, left hip strain, bilateral knee strain and lateral epicondylitis. He noted that appellant was considering retiring on disability. In a November 22, 2006 duty status report, Dr. Haydu found that appellant could work four hours per day with restrictions.

On December 13, 2006 appellant filed a claim for compensation for intermittent disability from November 25 to December 8, 2006. A time analysis form indicated that he worked four hours per day from November 25 to December 8, 2006 and claimed compensation for four hours per day. Appellant continued to submit claims for compensation for four hours per day subsequent to December 8, 2006.

On December 14, 2006 the Office requested that appellant describe his work restrictions and provide a detailed medical report explaining why he was unable to work full time due to his employment injury. In a December 20, 2006 response, appellant explained that he was claiming partial disability in accordance with the restrictions provided in the November 22, 2006 duty status report.

On December 18, 2006 Dr. Haydu stated:

> "[Appellant] has had ongoing problems with his shoulders, his back, his knees, his wrists and his elbows. He has been working an eight-hour shift. [Appellant] is having increasing difficulty functioning at that level due to progressively worsening problems with his multiple joints. So at this point, we have taken him down to half a day … to allow him to adjust to the workload a little bit more effectively. [Appellant] does not seem to be able to tolerate a full eight-hour day."

On January 10, 2007 Dr. Haydu diagnosed bilateral rotator cuff tendinitis and shoulder strains. He noted that appellant had work restrictions of four hours per day with no lifting over five pounds and minimal overhead reaching. On February 14, 2007 Dr. Haydu diagnosed bilateral rotator cuff strains and degenerative shoulder changes, bilateral knee strain, left hip strain and degenerative disc disease. He related that appellant could not tolerate working full time.

The Office referred appellant to Dr. Richard Hall, a Board-certified orthopedic surgeon, for a second opinion examination. On February 12, 2007 Dr. Hall diagnosed left elbow pain with lateral epicondylitis and angiofibroblastic dysplasia occurring with work exposure but self-limiting, right shoulder sprain, preexisting left shoulder rotator cuff impingement with degenerative changes, right shoulder strain/sprain and rotator cuff impingement and degenerative

[1] The Office accepted that appellant sustained a lumbar and sacral strain due to an injury on September 17, 2005 under file number xxxxxx012.

disc disease of the spine. He found that appellant continued to have objective findings of his bilateral shoulder strains and epicondylitis. Dr. Hall opined that appellant was not totally or partially disabled from his limited-duty employment due to his accepted conditions and could, with work hardening, resume his regular work duties.

On April 25, 2007 the Office requested that Dr. Haydu provide comments on Dr. Hall's report. In an April 30, 2007 response, Dr. Haydu stated that the majority of appellant's problem was "due to ongoing degenerative osteoarthritis exacerbated by his work" and that it was "excessively optimistic" to find that he could return to his usual work with no restrictions. He recommended pain management treatments and possible early retirement.

On May 16, 2007 the Office determined that a conflict existed between Dr. Hall and Dr. Haydu regarding appellant's work restrictions.[2] By letter dated May 29, 2007, the Office referred him, together with a statement of accepted facts, to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical examination.[3]

In a report dated June 12, 2007, Dr. Hubbard reviewed the history of injury and the medical evidence of record.[4] He discussed the statement of accepted facts which described appellant's work restrictions beginning January 2006. On examination Dr. Hubbard found shoulder pain with motion and significant crepitus in the bilateral subacroial and possibly the glenohumeral joints with probable minimally positive impingement signs. He diagnosed bilateral shoulder strains by history with objective resolution and bilateral/lateral epicondylitis by history with objective resolution on physical examination.[5] Dr. Hubbard reviewed the reports of a magnetic resonance imaging (MRI) scan study of the right shoulder finding a labral tear and tendinisis of the rotator cuff and an MRI scan study of the left shoulder showing no rotator cuff tear, a slight subdeltoid bursitis and a degenerative tear of the inferior labrum. He diagnosed

[2] By letter dated May 16, 2007, received by the Office on May 29, 2007, appellant authorized a representative to assist him with his claim. On May 31, 2007 the Office requested that the representative submit written authorization from appellant. In a June 5, 2007 response, appellant authorized his attorney to represent him and noted that he had signed an authorization for his representative in his previous letter. He requested that his appointment with Dr. Hubbard be postponed until his representative had the opportunity to review the case record.

[3] The Office requested that Dr. Hubbard address whether appellant had residuals of his accepted bilateral shoulder strain and bilateral/lateral epicondylitis under file number xxxxxx354 and lumbar and sacral sprain under file number xxxxxx012.

[4] By letter dated May 16, 2007, received by the Office on May 29, 2007, appellant authorized a representative to assist him with his claim. The attorney requested a copy of the case record. On May 31, 2007 the Office requested that the representative submit written authorization from appellant. In a June 5, 2007 response, appellant authorized his attorney to represent him and noted that he had signed an authorization for his representative in his previous letter. He requested that his appointment with Dr. Hubbard be postponed until his representative had the opportunity to review the case record.

[5] Dr. Hubbard also found that appellant had no residuals of his lumbar strain under file number xxxxxx012.

bilateral acromioclavicular joint degeneration, bilateral degenerative labral tears, bilateral tendinisis of the rotator cuff structures and possible bilateral subacromial bursitis. Dr. Hubbard stated:

> "No objective findings on physical examination indicate that the above work-related conditions are still active and causing symptoms as a result of his work activities. No additional medical conditions due to the claimant's repetitive work activities were noted and essentially all findings by diagnostic test and/or physical examination are commonly noted in humans experiencing the aging process.
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> "The duty status reports beginning 2005 have been reviewed. Based on objective findings of physical examination and diagnostic tests, [he] would be capable of working greater than four hours per day. It seems most probable that the inability of [appellant] to tolerate nonsteroidal anti-inflammatory drugs and other drugs to control his pain is due to abnormal liver function tests and is a major reason, but not the primary reason, why he is not capable of current work activities without restrictions…."
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> * * *
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> "By history, the current accepted diagnosed shoulder and elbow conditions were cause by repetitive work activities. Uncharacteristic, however, is by history the degree of abnormality identified has not been controlled effectively by medical treatment and management including reduced work-related activity physical demands. Thus by history the upper extremity conditions have not subjectively resolved."
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> "By physical examination and diagnostic tests, [appellant] does not suffer from any residuals of the accepted work-related/injury conditions. The enclosed work capacity evaluation has been completed noting physical restrictions, temporary or permanent. The permanent restrictions are due primarily to unrelated degenerative changes of the bilateral acromioclavicular and glenohumeral joins identified by MRI [scan] imaging."

Dr. Hubbard opined that appellant could perform his usual employment without restrictions and that he was able "from a physical viewpoint" of working in his limited-duty position for eight hours per day from November 2006 onward.

By decision dated July 10, 2007, the Office denied appellant's claim for partial disability beginning November 25, 2006 on the grounds that the weight of the evidence established that it was not causally related to his accepted work injury.

On July 24, 2007 appellant requested an oral hearing. He also submitted a claim for compensation (Form CA-7) requesting compensation for wage loss from July 7 to 20, 2007. Appellant claimed four hours per day of wage loss. By letter dated July 24, 2007, the Office requested medical evidence showing that he was partially disabled beginning July 7, 2007 due to

his bilateral shoulder tendinitis. Appellant submitted statements from coworkers discussing his decreased ability to perform his work duties. In a report dated July 31, 2007, Dr. Haydu reviewed the findings of Dr. Hubbard and diagnosed a rotator cuff injury. He stated, "I will restrict him with regard to lifting and reaching for the next month, but not with regards to specific hours of total hours of work as that would be difficult to justify based on just his shoulder claim alone…."

By decision dated September 10, 2007, the Office denied appellant's claim for compensation for partial disability from July 7, 2007 onwards. It determined that Dr. Hubbard's opinion established that he could work eight hours per day.

On September 14, 2007 appellant requested an oral hearing on the Office's September 10, 2007 decision.[6] On November 28, 2007 the Office provided appellant with an oral hearing regarding the July 10, 2007 decision. At the hearing, appellant's attorney noted that Dr. Hall referenced a rotator cuff injury and argued that the Office should have developed that issue to determine if he sustained a new injury. The attorney also questioned why the Office selected an impartial medical examiner outside of his zip code.

In a report dated November 29, 2007, Dr. Haydu opined that appellant's degenerative arthritis, shoulder injuries and back condition were related to his repetitive work activities. On December 12, 2007 he related that he required surgery due to his accepted employment-related shoulder injury. In a December 18, 2007 duty status report, he found that appellant could work with restrictions.

On January 30, 2008 the Office held a hearing on the September 10, 2007 decision.

By decision dated March 6, 2008, an Office hearing representative affirmed the July 10, 2007 decision, finding that appellant had not established that he was partially disabled beginning November 25, 2006. By decision dated April 16, 2008, an Office hearing representative affirmed the September 10, 2007 decision. She found that appellant had not established partial disability due to his employment injury beginning July 7, 2007. Both hearing representatives relied upon the opinion of Dr. Hubbard in determining that appellant failed to establish that he was partially disabled from his modified duty due to his accepted work injury.

LEGAL PRECEDENT

The term disability as used in the Federal Employees' Compensation Act[7] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[8] Whether a particular injury caused an employee disability for employment

[6] On September 27, 2007 Dr. Haydu diagnosed chronic shoulder pain and rotator cuff tendinitis and, in an accompanying duty status report, opined that appellant could work with restrictions. He completed similar form reports on September 30 and October 30, 2007.

[7] 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

[8] *Paul E. Thams*, 56 ECAB 503 (2005).

is a medical issue which must be resolved by competent medical evidence.[9] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[10] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.[11]

Section 8123(a) provides that, 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.[12] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Office accepted that appellant sustained a shoulder and upper arm sprain and bilateral/lateral epicondylitis. Appellant worked full time with restrictions until November 25, 2006, when he began working four hours per day. The Office separately adjudicated appellant's claim for compensation for four hours per day from November 25, 2006 onward and his claim for four hours per day from July 7, 2007 onwards. The pertinent issue, however, is whether appellant sustained any periods of partial disability due to his work injury such that he could work only four hours per day on or after November 25, 2006.

Dr. Haydu, appellant's attending physician, opined that he could work four hours per day with restrictions. Dr. Hall, who provided a second opinion examination, found that appellant was not partially disabled for his limited-duty employment. The Office properly determined that

[9] *Id*.

[10] *Id*.

[11] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[12] 5 U.S.C. § 8123(a).

[13] 20 C.F.R. § 10.321.

[14] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

a conflict existed between Dr. Haydu and Dr. Hall and referred appellant to Dr. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical examination.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

The Board finds that the July 12, 2007 opinion of Dr. Hubbard, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. He reviewed the medical evidence of record, including the results of diagnostic studies and listed detailed findings on examination. Dr. Hubbard diagnosed bilateral acromioclavicular joint degeneration, bilateral degenerative labral tears, bilateral tendinisis of the rotator cuff structures and possible bilateral subacromial bursitis, all of which he attributed to the normal aging process. Dr. Hubbard opined that the accepted conditions of bilateral shoulder strain and bilateral epicondylitis had resolved. He provided rationale for his opinion by noting that the findings on physical examination and the results of the objective studies supported his conclusion. Dr. Hubbard asserted that appellant was physically capable of performing his limited-duty position for eight hours per day from November 2006 onward. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.

The remaining evidence submitted by appellant subsequent to Dr. Hubbard's report is insufficient to meet his burden of proof to show that he was partially disabled from employment. In a report dated July 31, 2007, Dr. Haydu reviewed Dr. Hubbard's findings. He provided work restrictions but no restrictions of hours as it "would be difficult to justify based on just his shoulder claim alone." On November 29, 2007 Dr. Haydu attributed appellant's degenerative arthritis, shoulder injuries and back condition to repetitive work. He did not, however, address disability from employment. In duty status reports dated September to December 2007, Dr. Haydu listed work restrictions but did not find that appellant could work in a part-time capacity. Consequently, his reports are insufficient to show partial disability from employment. Further, as Dr. Haydu was on one side of the conflict resolved by Dr. Hubbard, his additional reports are insufficient to overcome the special weight accorded Dr. Hubbard's opinion or to create a new conflict.[16]

On appeal, appellant's attorney contended that Dr. Hall and Dr. Hubbard referenced additional conditions that may be employment related. He stated that Dr. Hall mentioned a rotator cuff injury and Dr. Hubbard alluded to a possible pain disorder. The attorney contended that the Office should further develop these issues and determine whether they were employment related. However, where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the

[15] *Id.*

[16] *Alice J. Tysinger*, 51 ECAB 638 (2000).

condition is causally related to the employment injury through the submission of rationalized medical evidence.[17]

Appellant's attorney further contends that the second opinion and referee examination were outside the local commuting area. The Board notes, however, that the attorney did not make any objection to the selection of the impartial medical examiner prior to the receipt of his report. Further, the attorney has not submitted any evidence to support that the Office failed to comply with its rotational procedures. Accordingly, appellant has not established that Dr. Hubbard was improperly selected as the impartial medical examiner.[18]

Appellant's attorney also noted that Dr. Hubbard did not find that appellant could work his usual employment duties or find that his work injury caused no disability. Dr. Hubbard, however, specifically found that he had no residuals of his accepted conditions and that he could work in his limited-duty position full time from November 2006 and continuing.

CONCLUSION

The Board finds that appellant has not established that he was partially disabled beginning November 26, 2006 causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 16 and March 6, 2008 and September 10 and July 10, 2007 are affirmed.

Issued: February 10, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

[18] *See L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).