

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

D.M., Appellant)
and) Docket No. 08-2016
DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY) Issued: March 16, 2009
ADMINISTRATION, Ronkonoma, NY,)
Employer)

)

Appearances:

Thomas S. Harkins, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 17, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 22, 2008 denying his request to expand his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has met his burden of proof in establishing that all of the conditions diagnosed by his treating physicians are causally related to his accepted July 31, 2004 employment injury.

FACTUAL HISTORY

This case is before the Board for the third time. Previously, appellant appealed the Office's April 5, 2006 decision, which expanded his claim to include cervical strain with radiculopathy, left shoulder strain, and temporary aggravation of herniated discs, but denied his

request to include additional conditions. In a February 6, 2007 decision, the Board affirmed the Office's decision as to the additional conditions accepted, but set aside the decision as to its refusal to accept additional conditions, due to a conflict in the medical opinion evidence, and remanded the case for referral to an impartial medical examiner.¹ The facts and the circumstances of that decision are hereby incorporated by reference. In a February 11, 2008 order, the Board remanded the case to the Office for proper issuance of the Office's June 20, 2007 decision denying expansion of his claim.²

Pursuant to the Board's instructions, the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Arnold M. Illman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion between the Office medical adviser and appellant's treating physicians on the issue of causal relationship. The Office asked Dr. Illman to diagnose all conditions that were caused or aggravated by the July 31, 2004 work injury, and, if a condition was aggravated by the accepted injury, to indicate whether the aggravation was temporary or permanent. It informed Dr. Illman that appellant's treating physician, Dr. Harshad Bhatt, opined that appellant's diagnosed shoulder and back conditions, which included cervical, thoracic and lumbar strains; traumatic herniation and bulges of the multiple lumbar intervertebral discs; multiple cervical intervertebral disc herniations; left cervical radiculopathy; diffuse lumbar disc bulge at L2-3; left lumbar radiculopathy; thoracic disc pathology and bilateral shoulder strain, were a direct result of the July 31, 2004 injury, and that the impingement condition arose independently from appellant's degenerative changes. The Office told Dr. Illman that appellant's other treating physician, Dr. Luz Del Carmen Cespedes, opined that appellant's multiple posterior disc herniations at C3-4, C4-5, C5-6 and C6-7; hypertrophic changes in the acromioclavicular (AC) joint; lateral down-sloping acromion extending to about the supraspinatus; inferiorly extending acromial spur and supraspinatus tendinosis/tendinopathy, were caused by the accepted July 31, 2004 work injury. Dr. Illman was asked to reconcile these opinions with that of the district medical adviser, who stated that multiple cervical disc herniations would not be expected to result from simply heavy lifting, and opined that, if the disc herniations were preexisting, then they could have been aggravated temporarily by the lifting. The medical adviser also opined that other anatomical changes on the magnetic resonance imaging (MRI) scan were preexisting and of no consequence, noting that MRI scans are often over-read without clinical correlation, and recommended that the Office accept cervical strain with radiculitis, and shoulder strain with tendinitis or tendinopathy.

In a report dated April 23, 2007, Dr. Illman diagnosed a resolved sprain of the cervical spine, and an impingement syndrome of the shoulder, which over time developed into adhesive capsulitis. He opined that appellant did not have any conditions that were aggravated by the accepted work injury; that he had no disability referable to his cervical spine; and that he was partially disabled due to his left shoulder condition.

On examination of the cervical spine, Dr. Illman found no muscle spasm palpated. Appellant was able to touch his chin to his chest. There were 45 degrees of extension and 60 degrees of right and left lateral rotation and flexion. Reflexes were +4 bilaterally in the biceps

¹ Docket No. 06-1328 (issued February 6, 2007).

² Docket No. 07-2305 (issued February 11, 2008).

and triceps. There was normal light touch sensation of both upper extremities. Anterior flexion demonstrated +5 strength in the shoulders bilaterally. Flexion and extension of the elbows was full and demonstrated +5 strength, as did flexion and extension of the wrists, grasp strength and abduction of the fingers. On examination of the left shoulder, there was no tenderness or obvious atrophy noted. Appellant demonstrated 90 degrees of abduction, 110 degrees of anterior flexion, slight loss of internal rotation and full external rotation. Subjectively, he stated that he had discomfort on extremes of motion.

A report of an MRI scan of the cervical spine revealed multiple herniated discs. However, Dr. Illman stated that these findings were not medically significant, and that the condition did not arise from the accepted injury. A report of an MRI scan of the left shoulder showed a sloping acromion, which he indicated is an anatomic variant noted in the general population, and degenerative changes at the AC joint, which he opined preexisted the accepted injury. Dr. Illman stated that tendinosis is usually found in an inflammation of the supraspinatus tendon.

In a decision dated April 22, 2008, the Office denied appellant's claim for expansion of the accepted conditions based on Dr. Illman's report. It determined that his current conditions of cervical disc disease, cervical radiculopathy, cervical muscle spasm, internal derangement of the left shoulder, adhesive capsulitis of the left shoulder, impingement syndrome of the left shoulder, partial thickness tear of left shoulder and effusion of the left shoulder were not related to the accepted July 31, 2004 incident.

LEGAL PRECEDENT

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.³ Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁴

Section 8123 of the Act 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.⁵ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial

³ *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

⁴ *John W. Montoya*, 54 ECAB 306 (2003).

⁵ 5 U.S.C. § 8123.

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.⁶

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.⁷ However, when the impartial specialist is unable to clarify or elaborate on his original report, or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁸

ANALYSIS

In accordance with the Board's directive, the Office referred appellant to an impartial medical examiner in order to resolve the conflict in medical opinion as to whether appellant's current conditions were causally related to the accepted July 31, 2004 employment incident. However, Dr. Illman failed to address all of the questions posed to him by the Office, and provided inadequate rationale for his opinions. Therefore, the Board finds that this case is not in posture for a decision and must be remanded to the Office for further development of the medical evidence.

The Office asked Dr. Illman to diagnose all conditions that were caused or aggravated by the July 31, 2004 work injury, indicating whether any aggravation was temporary or permanent, and to address the divergent opinions of the medical adviser and appellant's treating physicians in rendering an opinion on whether the diagnosed conditions were causally related to the accepted incident. Dr. Illman diagnosed a resolved sprain of the cervical spine, and an impingement syndrome of the shoulder, which he stated developed, over time, into adhesive capsulitis. He opined that appellant did not have any conditions that were aggravated by the accepted work injury; that he had no disability referable to his cervical spine and that he was partially disabled due to his left shoulder. However, Dr. Illman did not address the opinions of the medical adviser and treating physicians, as requested by the Office and did not provide adequate rationale for his opinions. Although he listed examination findings, he did not explain how they supported his opinions. Dr. Illman stated that the multiple herniated discs demonstrated by MRI scan were not medically significant and did not arise from the accepted injury and that degenerative changes at the AC joint preexisted the accepted injury. However, he

⁶ *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

⁷ *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

⁸ *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

offered no basis for these opinions, and did not explain why the herniated discs and degenerative changes could not have been caused or aggravated by the accepted incident, particularly in light of the fact that the Office accepted appellant's claim for aggravation of herniated discs. Dr. Illman did not discuss possible causes of appellant's impingement syndrome, or explain why it was not causally related to the accepted shoulder strain condition. He stated that tendinosis is usually found in an inflammation of the supraspinatus tendon, but he did not explain whether or not this condition could have resulted from the accepted lifting incident. In fact, Dr. Illman never addressed the mechanics of the accepted July 31, 2004 incident in relation to the conditions diagnosed by appellant's treating physicians. As his report is not sufficiently rationalized, it is of diminished probative value.⁹

The Office referred appellant to Dr. Illman for the specific purpose of resolving the conflict in medical evidence. For reasons stated above, the Board finds that Dr. Illman's report is insufficient to resolve the conflict. Therefore, the case will be remanded to the Office for a supplemental opinion from Dr. Illman, which provides clarification and elaboration. If he is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.¹⁰ After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that this case is not in posture for a decision, as there exists an unresolved conflict in the medical opinion evidence as to whether appellant's current conditions of cervical disc disease, cervical radiculopathy, cervical muscle spasm, internal derangement of the left shoulder, partial thickness tear of the left shoulder, and effusion of the left shoulder, are causally related to the accepted July 31, 2004 injury.

⁹ *Willa M. Frazier*, 55 ECAB 379 (medical conclusions unsupported by rationale are of limited probative value on the issue of causal relationship).

¹⁰ See *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 22, 2008 is set aside and remanded for action consistent with the terms of this decision.

Issued: March 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board