United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 09-1414**
	)	**Issued: April 14, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Isle, MN, Employer	)	

Appearances:
Allen R. Webb, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal of a February 23, 2009 decision of the Office of Workers' Compensation Programs affirming the May 22, 2008 termination of his compensation benefits. 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 the Office met its burden of proof to terminate appellant's compensation benefits for his left arm on May 22, 2008.

On appeal, counsel for appellant contends that the report of the impartial medical specialist is not sufficient to represent the weight of medical opinion.

FACTUAL HISTORY

On July 27, 2005 appellant, then a 51-year-old rural carrier, filed an occupational disease claim for numbness in his left little and ring fingers and his left forearm from hyperextending his left arm while driving at work. He stopped work following his October 7, 2005 left ulnar nerve

anterior transposition surgery. Appellant returned to light duty on January 24, 2006 and missed time from work intermittently thereafter. The Office accepted his claim for left lesion of the ulnar nerve and left ulnar nerve anterior transposition surgery. It later accepted left shoulder rotator cuff impingement syndrome. The Office paid appropriate compensation benefits.

On August 31, 2005 Dr. Peter Schmitz, a Board-certified orthopedic surgeon, diagnosed left tardy ulnar nerve. On October 7, 2005 he performed left ulnar nerve anterior transposition surgery. In reports dated December 19, 2005 and January 23, 2006, Dr. Schmitz noted appellant's continued complaint of left arm numbness. He also noted appellant's complaint of left shoulder pain and acromioclavicular (AC) joint tenderness. Dr. Schmitz indicated that x-rays revealed AC joint degenerative arthrosis and he diagnosed impingement syndrome. On May 23, 2006 he noted treating appellant for a work-related shoulder injury. Dr. Schmitz indicated that appellant initially had a left shoulder injury that had become a bilateral shoulder injury from the right shoulder compensating for the left shoulder. He opined that both were work-related conditions. Dr. Schmitz submitted work status reports. In an August 2, 2006 work status form, he advised that appellant could work with permanent restrictions as outlined in a June 7, 2006 functional capacity evaluation (FCE) that found appellant could perform medium work.

An August 1, 2006 report from Dr. Thomas Jetzer, Board-certified in occupational medicine and an employing establishment physician, noted appellant's history of ulnar transposition with complaints of numbness not substantiated by testing or examination. Dr. Jetzer also noted subclinical and asymptomatic carpal tunnel syndrome of which appellant was not aware. He found no evidence of left hand or arm dysfunction with normal range of motion as well as no shoulder abnormality. Dr. Jetzer opined that AC joint arthritis was due to aging as it was bilateral. He advised that appellant could work under the restrictions in the FCE.

On November 29, 2006 the Office requested that an Office medical adviser address whether appellant's right shoulder condition was a consequential injury and whether his claim should include bilateral shoulder spurs. On December 9, 2006 an Office medical adviser reviewed the medical records and determined it was unclear when appellant's bilateral shoulder pain began to develop. He noted that the evidence inconsistently diagnosed AC joint arthritis and he was unable to determine if this condition was aggravated by the accepted altered left upper extremity mechanics to be considered a consequential injury. The medical adviser recommended a second opinion. He stated that appellant's bilateral shoulder spurs from his AC joint arthritis were due to degenerative changes.

On January 10, 2007 the Office referred appellant to Dr. Paul Yellin, a Board-certified orthopedic surgeon, for a second opinion. In a February 9, 2007 report, Dr. Yellin reviewed the medical records and summarized the history of injury. On examination, he found normal range of motion of the cervical spine, normal extension and normal range of motion of both shoulders and wrists. Dr. Yellin stated that appellant's left shoulder problem started at the same time he developed numbness in his left little and ring fingers. He noted that appellant also started to develop the same findings on the right hand. Appellant attributed these conditions to his work activities but did not specify a specific onset date. Dr. Yellin opined that appellant's left shoulder degenerative spurring resulted from normal aging process and that using his arm in an outstretched position at work did not cause degenerative left shoulder arthritis. He advised that

appellant's right shoulder condition was not the result of anything relating to the left arm, and therefore the right AC joint arthritis was not consequential to the left arm condition. Dr. Yellin opined that the AC joint arthritis of both shoulders was due to normal aging. He advised that appellant could work regular full-time duties as a rural mail carrier. Dr. Yellin found no objective pathologic disfunction to the upper extremities. There was no clinical abnormality, loss of range of motion or loss of strength in either shoulder. Dr. Yellin advised that no further medical treatment for the shoulders was required. He opined that the right ulnar nerve symptoms were consistent with appellant's work activities.

In a March 19, 2007 letter, the Office notified appellant that there was a conflict in medical opinion between Dr. Schmitz, who found that appellant could only work five hours per day with restrictions and that his bilateral AC joint arthritis was a consequential injury to the accepted occupational injury, and Dr. Yellin, who found that appellant could work full-time regular duty without restrictions and that his bilateral AC joint arthritis was not a consequential injury. The Office referred appellant with a statement of accepted facts to Dr. Mark Gregerson, a Board-certified orthopedic surgeon, to resolve the conflict.

In a May 14, 2007 report, Dr. Gregerson reviewed the medical evidence and summarized the history of injury. Upon examination, he found full range of motion of the left elbow with the ability to fully flex, extend, pronate and supinate without pain. Dr. Gregerson found no elbow instability, good alignment and normal motion of the upper extremities. He noted no left hand intrinsic atrophy. Regarding the right elbow, Dr. Gregerson found repetitive snapping of the ulnar nerve in the medial epicondylar groove on range of motion causing tingling in the ulnar two digits. He also found good alignment to the right elbow with full range of motion and no instability. Dr. Gregerson indicated that both shoulders were tender to palpation over the superior spur of the AC joint. X-rays of both shoulders taken during the examination revealed subacromial spurring. Dr. Gregerson diagnosed ulnar nerve entrapment of both elbows status post ulnar nerve subcutaneous release of the left elbow with ongoing ulnar nerve symptoms bilaterally. He also diagnosed subacromial spurring with rotator cuff impingement in both shoulders. Dr. Gregerson opined that the ulnar nerve entrapment, rotator cuff impairment and subacromial spurring were not directly caused by appellant's work duties as repetitive mail delivery with the left arm could aggravate the left ulnar nerve entrapment or rotator cuff impairment but could not cause right-sided symptoms. He stated that subacromial spurring and rotator cuff impairment could be due to appellant's individual anatomy. Dr. Gregerson advised that appellant's claim should not be expanded to include right shoulder AC joint arthritis or bilateral shoulder spurs.

Dr. Gregerson noted that appellant's current physical restrictions were secondary to his preexisting conditions, which may have been aggravated over time by work and living activities but that hyperextension of the left arm was not causally linked to the temporary restrictions necessary for appellant's condition. He opined that appellant did not require further treatment for his accepted injuries but needed further testing including an EMG of both arms to determine if he had permanent damage to his ulnar nerve and to confirm whether he had right elbow ulnar nerve entrapment. Dr. Gregerson recommended a magnetic resonance imaging (MRI) scan of both shoulders to determine the exact pathology of the shoulder. He noted that treatment recommendations depended on the test results. Dr. Gregerson opined that appellant's repetitive mail sorting in the overhead position aggravated his preexisting conditions in both shoulders and

elbows. In a May 14, 2007 work capacity evaluation, he found that appellant could work eight hours per day with restrictions that included "limited" reaching above the shoulders, repetitive elbow movements, and pulling, pushing and lifting overhead.

On February 12, 2007 Dr. Schmitz noted that the numbness, tingling and weakness in appellant's left hand had localized to the ulnar distribution. He also noted some right hand ulnar nerve symptoms. Dr. Schmitz found AC joint arthritis in both shoulders and limited appellant to working five hours daily within restrictions set forth in the FCE. On August 13, 2007 he reviewed Dr. Gregerson's report and concurred with his assessment that appellant's anatomy and overhead work activities caused his condition. Dr. Schmitz continued noting appellant's work status and restrictions.

On June 19, 2007 the Office requested clarification from Dr. Gregerson regarding whether appellant continued to experience residuals of his accepted work condition and whether he had other conditions as a result of his employment. It also coordinated diagnostic testing as Dr. Gregerson recommended. In a report dated August 31, 2007, from an unidentified source, nerve conduction testing indicated right and left cubital tunnel syndrome and mild abnormal distal motor latency in the left medial nerve.

In an October 10, 2007 supplemental report, Dr. Gregerson noted that appellant would not undergo an EMG or MRI scan per his recommendation. He also noted that the record contained an August 31, 2007 unsigned progress note discussing the findings of a nerve conduction test, but that the test results were not available for his review. Dr. Gregerson diagnosed bilateral ulnar nerve entrapment and status post left ulnar nerve subcutaneous release and bilateral rotator cuff impingement. He opined that it was possible that the left arm ulnar nerve symptoms were aggravated by repeated mail delivery but that this would not explain appellant's right arm symptoms. Therefore, appellant's ulnar nerve entrapment was partially due to his ulnar nerve anatomy as well as work- and nonwork-related activities. Dr. Gregerson opined that overhead repetitive lifting and casing of mail could lead to aggravated rotator cuff impingement, which was grossly caused by appellant's own anatomy. However, this was not clear as appellant did not undergo an MRI scan. Dr. Gregerson stated that appellant had continued ulnar nerve symptoms on the left. He advised that appellant's work activities temporarily aggravated his preexisting shoulder and elbow condition. Dr. Gregerson also stated that appellant's work activities were not the direct cause of his aggravated preexisting bilateral rotator cuff impingement and left ulnar nerve entrapment. He further noted that there was no material change to alter appellant's preexisting condition as a result of work activities. Dr. Gregerson opined that, based on the statement of accepted facts and accepted conditions, appellant should avoid heavy repetitive overhead lifting to protect his elbow and shoulder. He stated that these restrictions were permanent and related to his preexisting anatomical condition, not his work activities which only temporarily aggravated this condition. In an October 10, 2007 work capacity evaluation, Dr. Gregerson indicated that appellant could work eight hours per day within restrictions.

In an August 30, 2007 MRI scan report, Dr. William Schwartau, a Board-certified diagnostic radiologist, found mild supraspinatus tendinitis of the right shoulder and mild degenerative changes about the AC joint of the left shoulder.

On December 4, 2007 the Office requested that Dr. Gregerson clarify the conflicting restrictions listed in both work capacity evaluations. In a December 17, 2007 supplemental report, Dr. Gregerson noted he was submitting a new work capacity evaluation that superseded previous evaluation forms and was based on information provided to him. In a work capacity evaluation of the same date, he indicated that appellant could work eight hours per day with restrictions on reaching above the shoulder, repetitive elbow movement and pushing, pulling and lifting all limited to five hours per day. Dr. Gregerson also indicated "see supplemental report dated October 10, 2007" regarding causal responsibility for restrictions.

On March 12, 2008 the Office proposed to terminate appellant's compensation. It accepted that he sustained a resolved temporary aggravation of preexisting left shoulder rotator cuff impingement syndrome; however, the weight of the medical evidence rested with Dr. Gregerson who determined that appellant's work-related condition had resolved without residuals of the accepted conditions.

In a March 25, 2008 report, Dr. Schmitz noted that appellant continued to have ulnar neuropathy and sensory ulnar deficits on the left side. He also noted that previous EMG results showed evidence of early carpal tunnel syndrome and cubitus tardy ulnar nerve on the right side. Dr. Schmitz recommended that appellant continue to work within limitations outlined in the FCE. He also opined that all of these conditions were work aggravated conditions.

In a May 22, 2008 decision, the Office terminated appellant's compensation benefits effective that day.

Appellant requested an oral hearing which was held on November 13, 2008. In a July 14, 2008 report, Dr. Robert Wengler, a Board-certified orthopedic surgeon, advised that appellant presented with residuals of tardy ulnar nerve palsy of the left upper extremity developed as a function of work activities as a rural carrier. He indicated that this activity stressed the ulnar nerve as it traversed the ulnar notch behind the elbow and ultimately resulted in tardy ulnar palsy. Dr. Wengler provided an impairment rating for appellant's condition. He opined that appellant was not capable of returning to preinjury work but could work eight hours per day within restrictions. In another report of the same date, Dr. Wengler noted appellant's complaint of numbness in the fourth and fifth fingers on the left hand as well as weakness. Upon examination, he found tardy ulnar nerve palsy of the left upper extremity and status post ulnar nerve transposition without relief of symptoms. Dr. Wengler also noted further orthopedic intervention was not necessary. On October 15, 2008 he provided a revised impairment rating.

In a February 23, 2009 decision, an Office hearing representative affirmed the May 22, 2008 decision, finding the weight of medical evidence rested with Dr. Gregerson who determined that appellant's disability and symptoms were not residuals of his accepted work injury.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has disability

[1] *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[4]

Section 8123(a) 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 a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[6]

ANALYSIS

The Office properly determined that a conflict existed in the medical evidence as to whether appellant had any disability or residuals due to his accepted left arm condition and whether his AC joint arthritis was due to his work. Appellant's treating physician, Dr. Schmitz, submitted reports indicating that appellant had continuing left arm residuals and bilateral AC joint arthritis due to the accepted occupational injury, which limited his ability to work, while the second opinion physician, Dr. Yellin, opined that appellant could work full-time regular duty without restrictions as appellant's AC joint arthritis condition was age related. The Office referred appellant to Dr. Gregerson for an impartial examination to resolve the medical conflict.

The Board finds that Dr. Gregerson's opinion is equivocal and not well rationalized. Therefore, it is insufficient to resolve the conflict between Drs. Schmitz and Yellin. In a May 14, 2007 report, Dr. Gregerson failed to directly address whether appellant's accepted conditions resulted in continued residuals or disability. He also did not clearly identify appellant's preexisting conditions or distinguish how those conditions, and not appellant's accepted conditions, required continued work restrictions. Dr. Gregerson concluded that appellant's work limitations were secondary to his preexisting conditions. However, he inconsistently stated that appellant's preexisting conditions "may have been aggravated" from work activities while later subsequently noting that such conditions were not causally linked to the temporary restrictions necessary for appellant's condition.

[2] *Vivien L. Minor*, 37 ECAB 541 (1986).

[3] *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

[4] *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

[5] *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009).

[6] *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008).

In an October 10, 2007 supplemental report, Dr. Gregerson did not specifically discuss appellant's accepted conditions and therefore failed to address whether the accepted conditions resulted in continued residuals or disability. Also, his conclusions were supported by contradictory findings. For example, Dr. Gregerson opined that appellant's work activities temporarily aggravated his preexisting shoulder and elbow condition, but that it was not the direct cause of his aggravated preexisting bilateral rotator cuff impingement and left ulnar nerve entrapment. The Board has found that an employment injury does not have to be a direct cause of a condition to be compensable under the Act.[7] Dr. Gregerson concluded that appellant's permanent work restrictions were due to his preexisting anatomical condition, not his work activities which only temporarily aggravated this condition. He did not specify when the temporary aggravation had ceased.

Dr. Gregerson's December 17, 2007 supplemental report and work capacity evaluation listed appellant's work restrictions without further addressing whether such restrictions applied to appellant's accepted conditions. Despite his recommendation for further diagnostic testing, Dr. Gregerson never performed additional testing and his reports do not consider the August 30, 2007 MRI scan of appellant's shoulders.

Dr. Gregerson did not adequately explain the apparent inconsistencies between finding that appellant had fully recovered from his work injuries while noting that his work duties had aggravated his left arm and shoulder conditions. His opinion is of diminished probative value as it contains insufficient medical rationale to support that appellant no longer has residuals or disability from his accepted condition.[8]

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. There remains an unresolved conflict in the medical evidence.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits for his left arm condition effective May 22, 2008.

[7] It is not necessary for the work injury, by itself, to have caused a condition for it to be compensable. It need only to have contributed to it. Where a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship. If the medical evidence revealed that a work factor contributed in any way to the employee's condition, such condition would be considered employment related for the purpose of compensation benefits. *Arnold Gustafson*, 41 ECAB 131 (1989).

[8] *Willa M. Frazier*, 55 ECAB 379 (2004) (the Board has held that medical conclusions unsupported by rationale are of little probative value).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2009 is reversed.

Issued: April 14, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board