United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 09-1169**
	)	**Issued: January 14, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Islip, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2009 appellant, through his representative, filed a timely appeal from July 23, 2008 and February 25, 2009 merit decisions of the Office of Workers' Compensation Programs denying physical therapy. 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 is whether the Office abused its discretion in denying ongoing physical therapy.

FACTUAL HISTORY

On March 24, 2006 appellant, then a 62-year-old transportation security screener, sustained a left shoulder injury while lifting a bag onto the examination table. On December 21, 2006 the Office accepted the claim for sprain of left shoulder, upper arm and rotator cuff. On April 19, 2007 appellant underwent an authorized left shoulder arthroscopy and arthroscopic

subacromial decompression. He returned to part-time limited duty on July 4, 2007. The Office authorized physical therapy from May 7 through November 29, 2007.

In a December 13, 2007 prescription note, Dr. Anthony Cappellino, a Board-certified orthopedic surgeon, prescribed continuing physical therapy for the left shoulder, two to three times a week for the following six weeks.

The Office referred appellant, together with a statement of accepted facts, to Dr. Lee M. Kupersmith, a Board-certified orthopedic surgeon, who was asked to address whether physical therapy should be authorized.

In a February 12, 2008 medical report, Dr. Kupersmith reviewed appellant's medical and occupational history and reported his complaints of continued left shoulder pain and weakness. Physical examination revealed normal sensation and no tenderness around the sternoclavicular joint, acromioclavicular joint or the anterior deltoid and cuff. Appellant demonstrated normal ranges of motion and 5/5 in supraspinatus and infraspinatus strength testing bilaterally. He also had a negative subscapular lift off and a negative O'Brien sign bilaterally. Dr. Kupersmith diagnosed status post left shoulder arthroscopy and rotator cuff repair. He opined that appellant had fully recovered from the effects of his injury and surgery and was able to return to full duty without restrictions. Dr. Kupersmith found that appellant did not require any additional treatment or physical therapy.

In a physical therapy referral sheet dated January 3, 2008, Dr. Cappellino recommended that appellant undergo physical therapy two to three times a week to decrease pain. In a January 3, 2008 medical report, he stated that appellant was in physical therapy and doing fairly well; however, he was experiencing some issues with weakness and occasional tenderness. Dr. Cappellino requested authorization for continuing physical therapy, two to three times a week for six to eight weeks. In reports dated February 14 through May 8, 2008, he continued to recommend physical therapy for continuing pain and weakness in appellant's left shoulder.

By letter dated May 22, 2008, the Office advised Dr. Cappellino that it was unable to authorize physical therapy and requested additional medical opinion to support the need for physical therapy.

The Office determined that a conflict of medical opinion between Dr. Cappellino and Dr. Kupersmith arose regarding appellant's continuing disability and need for physical therapy. It referred appellant, together with a statement of accepted facts, to Dr. Bradley White, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

In a July 8, 2008 medical report, Dr. White reviewed appellant's medical history and his complaints of left shoulder pain and weakness, with particular difficulty using the left upper extremity above shoulder level. Physical examination did not reveal any deformity, swelling, ecchymosis or discernible joint effusion. No muscle wasting of the rotator cuff musculature was present but there was some loss of deltoid bulk. Appellant could reach full elevation of the shoulder actively but had some difficulty above the horizontal. He had difficulty internally rotating behind his back and could only reach the sacrum. On muscle testing, there was good deltoid strength in abduction, extension and flexion. Rotator cuff strength in the external and

internal rotator was good. Supraspinatus abduction, with the arm abducted and internally rotated, was weak and produced discomfort in the region of the greater tuberosity. Positive impingement existed in flexion and internal rotation, producing anterior shoulder pain. Neurological examination of upper extremities was normal. Dr. White diagnosed left shoulder rotator cuff tendinitis with impingement and partial thickness tear of the supraspinatus, status post arthroscopic rotator cuff decompression and repair. He stated that the left shoulder rotator cuff tendinitis and partial thickness supraspinatus tear were related to the work injury but that the degenerative changes in the acromioclavicular joint were not causally related. Dr. White opined that there was no indication for any further orthopedic surgical treatment or physical therapy and that appellant had reached maximum medical improvement. He advised that appellant exhibited a permanent partial disability with reference to his recurrent and persisting left shoulder complaints of pain and weakness.

By decision dated July 23, 2008, the Office denied authorization for physical therapy. It found that Dr. White's medical report was entitled to the special weight accorded an impartial medical examiner and represented the weight of the medical evidence.

On August 7, 2008 appellant, through his attorney, requested a telephonic hearing before an Office hearing representative, which took place on December 9, 2008.

In medical reports dated July 31, 2008 through January 14, 2009, Dr. Cappellino reported on appellant's complaints of discomfort. He opined that appellant reached maximum medical improvement but would benefit from physical therapy three to four times a month.

By decision dated February 25, 2009, the Office hearing representative affirmed the July 23, 2008 decision. She found that the Office did not abuse its discretion in denying continuing physical therapy.[1]

LEGAL PRECEDENT

Section 8103 of the Federal Employees' Compensation Act states in pertinent part: The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[2] The Office's obligation to pay for medical treatment under section 8103 of the Act extends only to treatment of employment-related conditions and appellant has the burden of establishing that the requested treatment is for the effects of an employment-related condition. Proof of causal relationship must include rationalized medical evidence.[3] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the

[1] The Board notes that appellant filed a claim for a schedule award on February 19, 2009. The Office has not issued a final decision on this claim and it is not before the Board on appeal. *See* 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. § 8103(a).

[3] *Stella M. Bohlig*, 53 ECAB 341 (2002).

fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[4]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[5] When there exists 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.[6]

ANALYSIS

The Office accepted that appellant sustained a left shoulder, upper arm and rotator cuff sprain as a result of the March 16, 2006 employment injury. Appellant underwent an authorized left shoulder arthroscopy and arthroscopic subacromial decompression and began authorized physical therapy. The issue is whether the Office abused its discretion in denying continuing physical therapy.[7]

On December 13, 2007 Dr. Cappellino prescribed continuing physical therapy for the left shoulder, two to three times a week for the following six weeks. He subsequently provided medical reports recommending additional physical therapy.[8]

The Office determined that a second opinion evaluation was necessary and referred appellant to Dr. Kupersmith, who, on February 12, 2008, found that appellant had fully recovered from the effects of his injury and surgery and did not require physical therapy. It found that a conflict of medical opinion arose between Dr. Cappellino and Dr. Kupersmith

[4] *Daniel J. Perea*, 42 ECAB 214 (1990).

[5] 5 U.S.C. § 8123(a). *See also Robert W. Blaine*, 42 ECAB 474 (1991).

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[7] The Office authorized physical therapy for over 120 days after the surgery as required by its procedure manual. Thus, it properly determined that medical justification was necessary prior to authorizing additional physical therapy. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Physical Therapy*, Chapter 2.810.16 (January 2006).

[8] The Board notes that appellant also submitted several reports from his physical therapist, Amy Rose, addressing the need for continuing physical therapy. As a physical therapist is not included in the definition of a physician under the Act, these reports are of diminished probative value. *See* 5 U.S.C. § 8101(2).

regarding appellant's need for physical therapy. The Office properly referred appellant to Dr. White, an impartial medical examiner, for a resolution of the conflict.[9]

In a July 8, 2008 report, Dr. White diagnosed left shoulder rotator cuff tendinitis with impingement and partial thickness tear of the supraspinatus, status post arthroscopic rotator cuff decompression and repair. He advised that the neurological examination was normal and that the degenerative changes noted in the acromioclavicular joint were not causally related to the accepted employment injuries. After a full physical examination, Dr. White opined that appellant had reached maximum medical improvement and did not require any further orthopedic surgical treatment or physical therapy.

The Board finds that Dr. White's medical report constitutes the special weight of the medical evidence. Dr. White's report is well rationalized and based on a complete medical and factual history. He found that appellant did not require physical therapy as was recommended. The opinion of Dr. White is entitled to the special weight accorded to impartial medical examiners.[10]

Subsequently, Dr. Cappellino noted appellant's complaints of discomfort. He opined that appellant reached maximum medical improvement but would benefit from physical therapy. The Board finds that Dr. Cappellino's medical reports are not sufficient to overcome the weight of Dr. White's medical opinion. Dr. Cappellino did not provide a rationalized opinion explaining why ongoing physical therapy was necessary to treat the accepted conditions. He did not address the specific modalities, procedures or tests and measures to be administered, describe the functional deficits which were to be treated, provide the expected duration and frequency of treatment or include the specific functional goals of the additional therapy.[11] From the reports, it appears that Dr. Cappellino only prescribed physical therapy for treatment of pain. As Dr. Cappellino was on one side of the medical conflict that Dr. White resolved, his additional medical reports are not sufficient to overcome the weight of the impartial evidence.[12]

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying ongoing physical therapy.

[9] *See Thomas J. Fragale*, 55 ECAB 619 (2004).

[10] *See Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Physical Therapy*, Chapter 2. 810.16 (January 2006).

[12] *See William Morris*, 52 ECAB 400 (2001).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2009 and July 23, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 14, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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