

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

A.N., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, San Diego, CA, Employer**)

**Docket No. 10-1411
Issued: March 7, 2011**

Appearances:

Edward Daniel, 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 April 20, 2010 appellant filed a timely appeal from the October 22, 2009 merit decision of the Office of Workers' Compensation Programs denying her compensation after February 19, 2006. 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 had residuals of her accepted employment injuries after February 19, 2006.

FACTUAL HISTORY

In November 2004 the Office accepted that appellant, then a 43-year-old security screener, sustained cervical and lumbar strains, left shoulder bursitis and left hip bursitis due to the performance of her work duties. Appellant stopped work in late 2004 and received compensation for periods of disability.

In a June 21, 2005 report, Dr. Sidney L. Levine, an attending Board-certified orthopedic surgeon, advised that appellant continued to complain of pain, stiffness and limited motion in her left shoulder, with pain upon range of motion testing. Due to appellant's ongoing left shoulder symptoms and a diagnosis consistent with left shoulder capsulitis and impingement syndrome, it was recommended that she undergo surgical examination under anesthesia and, if necessary, manipulation of the shoulder under anesthesia and/or arthroscopy with subacromial decompression. Dr. Levine found that appellant continued to be disabled due to residuals of her accepted employment injuries.

In a June 29, 2005 report, Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon served as an Office referral physician. He reported the findings of his physical examination and stated that appellant was doing well enough with her lumbar spine and cervical spine that she could return to work in a limited-duty capacity on a part-time basis. Dr. Sabourin noted that the findings in the lumbar and cervical spine were extremely limited and there did not appear to be any significant neurological deficit, radiculopathy or atrophy. He noted that appellant's main problem was with her left shoulder, which exhibited limited motion and warranted the diagnosis of adhesive capsulitis.¹ Dr. Sabourin indicated that appellant's left shoulder condition was expected to resolve. In a supplemental report dated July 19, 2005, he recommended that appellant work four hours a day in a limited-duty position. Dr. Sabourin stated, "It again is my opinion that her fragile physical spine along with an expected improvement in her shoulder problems will allow her to increase the capacity to work over the next six months to where she should be able to work full time."²

The Office determined that there was a conflict in the medical opinion between Dr. Levine and Dr. Sabourin regarding appellant's work-related residuals. It referred her to Dr. Louis Lurie, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.

In a September 21, 2005 report, Dr. Lurie detailed appellant's factual and medical history and reported findings on physical examination. He diagnosed left shoulder tendinitis, cervical strain and lumbar strain, but noted that appellant no longer had adhesive capsulitis as she had essentially a full range of left shoulder motion. Dr. Lurie stated, "There are no objective findings in this case. There are no injury-related factors of disability." He advised that appellant work in a limited-duty position with restrictions of lifting no more than 50 pounds and no repetitive lifting overhead. Dr. Lurie stated that the restrictions were not required by present objective findings, but rather were designed to prevent future injury. The Office requested that Dr. Lurie provide a supplemental opinion addressing residuals. In a December 8, 2005 report, Dr. Lurie stated, "This patient currently no longer has any residuals based on the objective findings.... The patient has returned to her preinjury status, considering the lack of objective evidence. In short, the patient has recovered from the accepted conditions in the claim." He recommended limited-duty work with occasional lifting of up to 70 pounds (no more than four times a day), but stated that any restrictions were "purely prophylactic."

¹ Dr. Sabourin suggested that appellant's adhesive capsulitis was related to her accepted work injuries.

² Dr. Sabourin indicated that he felt that the adhesive capsulitis of appellant's left shoulder arose from the work-related tendinitis of her left shoulder.

In a January 10, 2006 letter, the Office advised appellant of its proposal to terminate her compensation benefits based on the reports of Dr. Lurie. It provided her 30 days to submit evidence and argument contesting the proposed action. Appellant submitted a January 30, 2006 report in which Dr. Robert Maywood, an attending Board-certified orthopedic surgeon, detailed findings for her left shoulder and back. Dr. Maywood disagreed with Dr. Lurie's opinion that appellant no longer had any work-related residuals.

In a February 16, 2006 decision, the Office terminated appellant's compensation effective February 19, 2006, finding that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Lurie.

Appellant requested reconsideration of her claim and alleged that she sustained adhesive capsulitis of her left shoulder as a consequence of her accepted left shoulder bursitis. She submitted numerous treatment notes of attending physicians, including Dr. Maywood and Dr. James P. Tasto, an attending Board-certified orthopedic surgeon. In reports dated June 15 to December 4, 2006, Dr. Tasto diagnosed inflammatory capsulitis and adhesive capsulitis of the left shoulder.

In an April 30, 2007 decision, the Office affirmed its February 16, 2006 decision. It found that the medical evidence appellant submitted after the termination of her compensation did not establish that she had work-related disability related to her accepted conditions.

Appellant requested reconsideration of her claim and asserted that her left shoulder condition was still related to her work. In an April 23, 2007 report, Dr. Tasto diagnosed left shoulder adhesive capsulitis. He noted that appellant had complaints of some aching pain in the shoulder as well as into the biceps and down the arm with activities. On December 3, 2007 Dr. Tasto stated that she continued to have mild to moderate complaints and restricted left shoulder motion. On February 11, 2008 he noted that appellant had persistent discomfort in her left shoulder. On March 3, 2008 Dr. Tasto mentioned that her left shoulder symptoms had not changed since her last visit. He concluded that the majority of appellant's symptoms continued to be secondary to her adhesive capsulitis which was probably 90 percent resolved.

In an August 20, 2008 decision, the Office affirmed its April 30, 2007 decision, finding that the submitted evidence did not establish continuing work-related residuals.

Appellant requested reconsideration of her claim and submitted a January 20, 2009 report of Dr. Christopher T. Behr, an attending Board-certified orthopedic surgeon, who noted that appellant sustained a work-related injury to her left shoulder which was diagnosed as adhesive capsulitis and rotator cuff impingement syndrome. Dr. Behr stated:

"This occurred on a cumulative trauma basis with the date of injury of August 4, 2004. After reviewing the job description for ... security screener, it is my medical opinion, using reasonable medical probability that [appellant's] left shoulder conditions did arise out of and within the course of her employment. After reviewing the extensive medical records she did receive appropriate treatment for her condition. [Appellant's] condition has reached maximal medical improvement and she is permanent and stationary."

In an October 22, 2009 decision, the Office affirmed the August 20, 2008 decision. It found that Dr. Behr did not provide a well-rationalized opinion on continuing work-related residuals.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,³ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁷

Section 8123(a) of the Act provides in pertinent part: "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."⁸ In situations where 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.⁹

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹⁰

³ 5 U.S.C. §§ 8101-8193.

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

⁶ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ *Charles W. Downey*, 54 ECAB 421 (2003).

ANALYSIS

In November 2004, the Office accepted that appellant sustained cervical and lumbar strains, left shoulder bursitis and left hip bursitis due to the performance of her work duties. Appellant stopped work in late 2004 and received compensation for total disability.

The Office determined that a conflict arose in the medical opinion between Dr. Levine, an attending Board-certified orthopedic surgeon, and Dr. Sabourin, a Board-certified orthopedic surgeon who served as an Office referral physician, on the issue of whether appellant continued to have residuals of the accepted employment injuries.¹¹ In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Lurie, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.¹²

The Office determined that the weight of the medical evidence was represented by the opinion of Dr. Lurie, the impartial medical specialist.¹³ The September 21 and December 8, 2005 reports of Dr. Lurie establish that appellant had no ongoing disability due to her accepted employment injuries after February 19, 2006. Dr. Lurie provided medical rationale for his opinion by explaining that appellant exhibited no objective findings on diagnostic testing and physical examination of the accepted employment conditions. He recommended work restrictions but stated that they were prophylactic in nature and not warranted by any work-related condition.¹⁴

After the Office's February 16, 2006 decision terminating appellant's compensation effective February 19, 2006, she submitted additional medical evidence addressing residuals of her employment injury. As the termination of benefits was based on the opinion of the impartial medical examiner, Dr. Lurie, the burden shifts to appellant to establish that she is entitled to compensation after that date.¹⁵

The Board has reviewed the additional evidence submitted by appellant and finds that it is not sufficient to establish that she has any continuing residuals or disability after February 19, 2006 due to her accepted conditions.

¹¹ In a June 21, 2005 report, Dr. Levine posited that appellant continued to be disabled due to residuals of her accepted employment injuries. In contrast, Dr. Sabourin indicated in June 29 and July 19, 2005 reports that appellant exhibited extremely limited findings on examination. He found that appellant could perform limited-duty work but did not indicate that these restrictions were required by work-related residuals.

¹² See *supra* note 8 and accompanying text.

¹³ See *supra* note 9 and accompanying text.

¹⁴ Appellant submitted a January 30, 2006 report in which Dr. Maywood, an attending Board-certified orthopedic surgeon, detailed findings for her left shoulder and back and indicated that he disagreed with Dr. Lurie's opinion that she no longer had work-related residuals. However, Dr. Maywood did not explain why the described findings were related to a work injury.

¹⁵ See *supra* note 7.

Before the Office and on appeal to the Board, appellant argued that she sustained a work-related consequential injury in that her left shoulder adhesive capsulitis developed from her accepted left shoulder capsulitis.¹⁶ Appellant submitted numerous reports from Dr. Tasto who diagnosed inflammatory and/or adhesive capsulitis of the left shoulder. However, Dr. Tasto did not provide a fully rationalized opinion explaining how her left shoulder condition was work related, either through direct causation by work duties or as a consequence of an accepted work injury.

On appeal, counsel argued that appellant's claim for compensation after February 19, 2006 was established by a January 20, 2009 report of Dr. Behr, an attending Board-certified orthopedic surgeon, who stated that appellant sustained a work-related injury to her left shoulder which was diagnosed as adhesive capsulitis and rotator cuff impingement syndrome. Dr. Behr stated that this injury occurred on a cumulative trauma basis with the date of injury of August 4, 2004. After reviewing the job description for security screener, he asserted that it was his opinion that appellant's left shoulder conditions arose out of and within the course of her employment. The Board notes that this report is of limited probative value regarding appellant's residual disability after February 19, 2006 because the physician did not provide adequate medical rationale in support of his conclusions. Dr. Behr did not describe the medical process through which work factors would have caused or contributed to the diagnosed left shoulder conditions or explain why appellant continued to have such work-related conditions for such an extended period after stopping work in late 2004.¹⁷ Neither of the conditions addressed by Dr. Behr were accepted by the Office as employment related.

CONCLUSION

The Board finds that appellant did not establish residuals of her accepted employment conditions after February 19, 2006, the date the Office terminated her compensation benefits.

¹⁶ See *supra* note 10.

¹⁷ In mid 2005 Dr. Sabourin suggested that the adhesive capsulitis of appellant's left shoulder arose from the work-related tendinitis of her left shoulder. However, he did not provide adequate explanation for this statement.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2011
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