

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

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| J.B., Appellant and DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, MACDILL AIR FORCE BASE, Tampa, FL, Employer |))))))))))) | Docket No. 10-1994 Issued: May 5, 2011 |
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| <i>Appearances:</i> <i>Alan J. Shapiro, Esq., for the appellant</i> <i>Office of Solicitor, for the Director</i> | <i>Case Submitted on the Record</i> |
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DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2010 appellant filed a timely appeal from a June 9, 2010 decision of the Office of Workers' Compensation Programs that denied her claim. Pursuant to the Federal Employees' Compensation Act¹ and 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 met her burden of proof to establish that she sustained a right shoulder condition as a consequence of the accepted left shoulder tendinitis.

On appeal, appellant's attorney asserts that the June 9, 2010 decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 28, 2004 appellant, then a 48-year-old store sales clerk, filed a traumatic injury claim, alleging that she injured her left arm and upper back while scanning items at a register.² She stopped work and the Office accepted that she sustained left shoulder tendinitis. On June 6, 2007 Dr. Jeffrey L. Tedder performed arthroscopic debridement and chondroplasty of the left shoulder. Appellant was placed on the periodic rolls at that time and did not return to work.

On April 29, 2008 appellant's representative requested that appellant's claim be accepted for a consequential injury to her right shoulder. By letter dated June 20, 2008, the Office informed her of the evidence needed to support this claim. In a September 17, 2009 decision, it denied the claim for a consequential right shoulder condition. Appellant timely requested a review of the written record.³ By decision dated June 9, 2010, an Office hearing representative affirmed the September 17, 2009 decision.⁴

The medical evidence relevant to the right shoulder condition includes a July 22, 2004 report, in which Dr. H. Gerard Siek, Jr. noted that appellant injured her left shoulder on July 22, 2004 working at a register. Dr. Siek stated that she could not use her right arm that day due to a previous injury. In an August 16, 2004 report, he noted complaints of right shoulder pain. Right shoulder examination included normal range of motion. Dr. Siek diagnosed chronic tendinitis of the right shoulder. In an August 8, 2005 report, Dr. Keith Simon, a Board-certified surgeon, noted appellant's complaint of pain in the posterior arms and hands. He provided examination findings and diagnosed resolving thoracic strain/sprain and bilateral trapezius sprain/strain. Dr. Simon opined that the diagnosed conditions were related to the March 26, 2004 employment injury.⁵ By report dated November 28, 2005, Dr. Siek described the March 26, 2004 injury and noted the July 14, 2005 magnetic resonance imaging (MRI) scan findings. He advised that bilateral shoulder range of motion was painful and limited with tenderness over the triceps and biceps tendons and greater tuberosity on the right. Dr. Siek's diagnoses included a partial tear of the rotator cuff of the right shoulder with tendinitis involving the triceps tendon, chronic fibromyalgia and chronic fatigue syndrome. An October 17, 2007 functional capacity examination advised that appellant did not demonstrate maximal effort. On January 15, 2008 Dr. Tedder advised that her left shoulder continued to improve but that she continued to suffer from right shoulder pain and on June 3, 2008 advised that both shoulders were sore.

² The record reveals that appellant injured her back at work on March 26, 2004 while moving boxes. The claim was accepted for thoracic sprain/strain and bilateral trapezius sprain/strain. On November 28, 2005 the claim was closed.

³ Appellant's attorney initially requested a hearing, that was changed to a review of the written record.

⁴ The Board notes that the Office also developed appellant's claim for a consequential emotional condition. By decision dated September 18, 2009, the Office denied the claim. Appellant did not file an appeal with the Board of the September 18, 2009 decision. On December 15, 2009 the Office proposed to terminate appellant's wage-loss compensation. By decision dated March 23, 2010, it finalized the termination on the grounds that her current left shoulder condition was not caused by the July 22, 2004 employment injury. By decision dated September 30, 2010, an Office hearing representative affirmed the March 23, 2010 decision.

⁵ Dr. Simon was apparently an Office referral physician for the March 26, 2004 claim. *Supra* note 2.

In a January 15, 2009 report, Dr. James W. Dyer, an Office medical adviser, reviewed the medical record. He advised that the initial medical evidence indicated that appellant injured her left shoulder on July 22, 2004 because she could not use her right upper extremity due to a previous injury and that the right shoulder injury preexisted the July 22, 2004 employment injury and was not a consequence of the left shoulder surgery. By report dated March 19, 2009, Dr. Lawrence Blumberg, a Board-certified orthopedic surgeon, who performed a second opinion evaluation for the Office, described the July 22, 2004 employment injury. He reviewed the medical records. Appellant's report of right shoulder complaints began in March 2004. Dr. Blumberg provided findings on physical examination of the right shoulder and diagnosed preexisting degenerative disease of both shoulders, status post left shoulder arthroscopic surgery. In answer to specific Office questions, he advised that appellant's right shoulder complaints were not due to the left shoulder condition or to any specific injury of July 22, 2004 and that she could perform the duties of her regular job for eight hours daily.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁶ Regarding the range of compensable consequences of an employment-related injury, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results" and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Thus, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.⁷

A claimant bears the burden of proof to establish a claim for a consequential injury.⁸ As part of this burden, he or she 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.⁹

⁶ *Mary Poller*, 55 ECAB 483 (2004).

⁷ A. Larson, *The Law of Workers' Compensation*, § 10.01 (November 2000).

⁸ *J.J.*, Docket No. 09-27 (issued February 10, 2009).

⁹ *Charles W. Downey*, 54 ECAB 421 (2003).

ANALYSIS

The Office accepted that on July 22, 2004 appellant sustained an employment-related left shoulder tendinitis for which she underwent surgery on June 6, 2007. The issue at present is whether she established that she sustained a right shoulder condition as a consequence of the employment-related left shoulder injury and the Board finds that she has not submitted sufficient medical evidence to meet her burden of proof.

The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.¹⁰

The record supports that appellant had July 14, 2005 MRI scan findings of a right shoulder partial tear. None of the physicians, however, provided an opinion that related this condition to the July 22, 2004 employment injury. In a March 19, 2009 report, Dr. Blumberg, an Office referral physician, reviewed the record and appellant's complaint of right shoulder pain. He diagnosed degenerative disease of both shoulders and advised that her right shoulder complaints were not due to the left shoulder condition or the July 22, 2004 employment injury. Dr. Dyer, an Office medical adviser, also reviewed the record and advised on January 15, 2009 that appellant's right shoulder condition preexisted the July 22, 2004 employment injury. None of the attending physicians related any right shoulder condition to the July 22, 2004 employment injury or advised that it was a consequence of the left shoulder injury. On July 22, 2004 Dr. Siek reported that appellant was not using her right arm at all that day when she injured her left shoulder. In a November 28, 2005 report, he merely referenced a March 26, 2004 employment injury, reviewed a July 14, 2005 MRI scan and described physical examination findings. Dr. Simon advised that appellant's right shoulder condition was caused by a March 26, 2004 employment injury.¹¹ Dr. Tedder reported right shoulder symptoms.¹²

The Board finds that these reports are insufficient to establish appellant's claim for a consequential injury because none of the physicians provided an opinion explaining that appellant's right shoulder condition was a consequence of the accepted left shoulder injury. The record does not an opinion by a physician, supporting causal relationship that was of reasonable medical certainty and supported with affirmative evidence that explained with medical rationale that appellant's right shoulder condition is a consequence of the July 22, 2004 employment injury, the accepted left shoulder injury or in any way to her federal employment.¹³

¹⁰ *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹¹ *Supra* note 2.

¹² Appellant also submitted reports dated July 12 and 14, 2005 from a physician's assistant and nurse practitioner respectively. Such reports are not considered medical evidence as these persons are not considered physicians under the Act. *Sean O'Connell*, 56 ECAB 195 (2004).

¹³ *See Conard Hightower*, 54 ECAB 796 (2003).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her right shoulder condition was a consequence of the accepted left shoulder injury.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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