

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

J.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 08-1459
Issued: November 6, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated April 10, 2008. Under 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 abused its discretion by denying appellant authorization for left shoulder arthroscopy with rotator cuff repair surgery.

FACTUAL HISTORY

Appellant, a 50-year-old mail carrier, experienced pain in his left shoulder on November 14, 2006 while reaching to pick up a tray of mail. He filed a claim for benefits, which the Office accepted for rotator cuff strain and upper shoulder strain. The Office paid appropriate compensation for temporary total disability.

In a report dated June 11, 2007, Dr. Charles I. Minnis, a specialist in orthopedic surgery, stated that when he last examined appellant in December 2006 he found what appeared to be a

full thickness rotator cuff tear of his left shoulder; surgical treatment was advised. He related that appellant complained of pain and popping in his shoulder and that using his arm to any strenuous degree is painful. Dr. Minnis recommended surgery for a tear of the rotator cuff.

On July 9, 2007 Dr. Minnis requested authorization for left shoulder arthroscopy with rotator cuff repair.

In a report dated September 23, 2007, an Office medical adviser reviewed the medical record and recommended that the Office deny authorization for the requested left shoulder arthroplasty. He stated that there was not sufficient evidence in the record to support a determination that appellant's torn left rotator cuff was causally related to an accepted condition. The Office medical adviser noted that there was evidence in the medical record which suggested that the torn rotator cuff shown by magnetic resonance imaging (MRI) scan preexisted the November 14, 2006 employment injury. He advised that in the absence of medical records predating the November 14, 2006 injury, the Office could not authorize the recommended surgery.

By letter dated November 13, 2007, the Office asked appellant for additional medical evidence to support his request for left shoulder arthroscopy with rotator cuff repair surgery. It asked appellant for all chiropractic records and reports since 2001, all diagnostic test results since 2004 and all medical record and reports since 2006. The Office requested that appellant submit this information within 30 days.

In a November 2, 2007 report, Dr. Minnis reiterated his diagnosis of torn left rotator cuff. He essentially reiterated his previous findings and conclusions and again recommended surgery to ameliorate appellant's condition.

In a December 21, 2007 report, the Office medical adviser noted that appellant did not submit any additional medical evidence pertaining to the work relatedness of his torn rotator cuff, nor had he submitted any of the medical evidence requested by the Office which preexisted the November 2006 work injury. He did not recommend surgery.

The Office found that there was a conflict in the medical evidence between Dr. Minnis and the Office medical adviser regarding whether appellant's surgery was related to an accepted condition. It referred appellant to Dr. William C. Kostman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a report dated February 13, 2008, Dr. Kostman stated findings on examination and reviewed appellant's history of injury and his medical records. He noted that appellant had a history of left shoulder complaints, for which he was treated by a chiropractor for several years prior to the November 14, 2006 traumatic injury. Dr. Kostman stated:

“[Appellant's] MRI scan dated November 29, 2006 describes severe tendinopathy at the supraspinatus and infraspinatus tendon, with high grade partial thickness tear of the supraspinatus. I do not believe this finding is a direct consequence of injuries described [on] November 14, 2006. To the best of my medical knowledge, MRI scan findings as described above are related to preexistent ... rotator cuff tendinitis prior to the date of November 14, 2006. I do

not believe that the injury described November 14, 2006 is the predominant factor in developing MRI scan findings as described above.”

When asked to provide a work-related diagnosis for appellant’s left shoulder condition, Dr. Kostman stated:

“I believe [appellant] to have a history of rotator cuff tendinitis and a large partial thickness tear involving his rotator cuff. I do not believe that lifting several ounces of mail 18 inches has any effect on the natural course of that condition.”

In a supplemental report dated March 5, 2008, Dr. Kostman indicated that the rotator cuff repair surgery recommended by Dr. Minnis was not the result of the November 14, 2006 employment injury. He stated:

“I do not believe that [the November 14, 2006 work injury] changed the natural history of his preexistent rotator cuff tendinitis condition, and that his condition would progress as it has, evident by his MRI scan findings, regardless of the event as described on November 14, 2006. Events associated with everyday living would allow for progression of this disease process; and as described earlier, the event as described on November 14, 2006, I do not believe to the best of my medical knowledge[,] has any bearing on the progression of his rotator cuff tendinitis.”

By decision dated April 10, 2008, the Office denied authorization for left shoulder arthroscopy with rotator cuff repair. It found that the weight of the medical evidence, as represented by Dr. Kostman’s impartial medical opinion, indicated that the recommended surgical intervention was not related to his employment.

LEGAL PRECEDENT

Section 8103 of the Federal Employees’ Compensation Act¹ provides that 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 Office 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 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 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

¹ 5 U.S.C. § 8101 *et seq.*

² 5 U.S.C. § 8103.

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.³

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.⁴

ANALYSIS

In this case, the Office accepted that appellant had sustained the conditions of left rotator cuff strain and left upper shoulder strain. Dr. Minnis stated in his June 11, 2007 report that appellant had complaints of left shoulder pain and noted that MRI scan results indicated a full thickness tear of appellant's left rotator cuff. Based on these complaints and findings, he recommended surgical intervention in the form of subacromial decompression and/or rotator cuff tear repair. On July 9, 2007 Dr. Minnis formally requested authorization for left shoulder arthroscopy with rotator cuff repair. The Office medical adviser, however, found that the need for such surgery was not related to any employment-related incident or activity, but rather was necessitated by a preexisting condition. To resolve this conflict in the medical evidence, the Office referred appellant to Dr. Kostman for an impartial medical examination. As noted above, the only restriction on the Office's authority to authorize medical treatment is one of reasonableness. In his February 13 and March 5, 2008 reports, Dr. Kostman explicitly ruled out a causal relationship between appellant's left rotator cuff tendinitis and factors of his employment. He stated that MRI scan findings, which indicated the full rotator cuff tear in appellant's left shoulder, indicated that appellant's left rotator cuff tendinitis would have progressed regardless of the work injury appellant sustained on November 14, 2006. Dr. Kostman concluded that appellant had a history of rotator cuff tendinitis and a large partial thickness tear involving his rotator cuff and that the accepted employment incident of lifting 18 inches of mail did not have any effect on the natural course of that condition.

The Board finds that the Office properly found that Dr. Kostman's referee opinion negated a causal relationship between appellant's condition and the proposed left shoulder arthroscopy with rotator cuff repair surgery. Dr. Kostman's opinion is sufficiently probative, rationalized, and based upon a proper factual background and the Office properly accorded his opinion the special weight of an impartial medical examiner.⁵

Therefore, given the fact that the weight of the medical evidence of record, as represented by Dr. Kostman's referee opinion, indicates that appellant's torn left rotator cuff condition is not work related, the Office did not unreasonably deny appellant's request for surgery to ameliorate this condition. It did not abuse its discretion to deny appellant authorization for left shoulder arthroscopy with rotator cuff repair surgery.

³ *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁴ 5 U.S.C. § 8123 (a).

⁵ *Gary R. Seiber*, 46 ECAB 215 (1994).

CONCLUSION

The Board finds that the Office did not abuse its discretion to deny appellant authorization for left shoulder arthroscopy with rotator cuff repair.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 6, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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