U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT L. JAMES and DEPARTMENT OF THE NAVY, ATLANTIC DAM NECK FIRE DEPARTMENT, Virginia Beach, VA

Docket No. 98-1915; Submitted on the Record;
Issued April 11, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim of brachial plexitis as resulting from the May 11, 1996 employment injury; and (2) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability commencing May 2, 1997 causally related to the May 11, 1996 employment injury.

On May 16, 1996 appellant, then a 49-year-old firefighter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that, on May 11, 1996, while doing a ladder drill test and then performing his regular work out on the universal weight apparatus at the employing establishment, he sustained injuries to his upper left arm and shoulder and had continuing pain in the left side of his neck.

On May 12, 1996 appellant was seen in the health clinic of the employing establishment, complaining of shoulder pain and numbness for two to three days. He denied any specific injury. The clinic determined that appellant had a deltoid injury. Appellant returned to the clinic on May 13, 1996 and stated that his left shoulder had gotten progressively worse since the injury and the clinic noted "bursitis -- shoulder." On May 14, 1996 the clinic notes indicate that appellant was still complaining of mild-to-moderate pain. A registered nurse placed appellant on light duty with restrictions of no heavy lifting or strenuous activity of 10 days. The diagnosis was musculoskeletal strain, rule out bursitis.

On May 17, 1996 appellant was examined by Dr. Michael Graham, a Board-certified orthopedic surgeon, who noted in a medical report dated May 22, 1996, that appellant told him that, on May 11, 1996, he felt a twinge of discomfort while lifting ladders during a drill, that on the same day he lifted weights after which he began to notice a worsening pain in his shoulder and that, by that evening, appellant was unable to raise his arm at all above the level of his head. He reviewed x-rays, stated that they showed no evidence of significant arthritis in the shoulder and stated that he suspected that appellant had a rotator cuff tear. Dr. Graham referred appellant

to Dr. John D. O'Neil, a radiologist, who conducted a magnetic resonance imaging (MRI) scan of appellant's left shoulder on the same date and found "normal cuff with no evidence of tear or tendenopathy" and "narrowing of the anterior subacromial arch secondary to acromial morphology and anterior tilt" which may lead to outlet impingement.

On May 22, 1996 after Dr. Graham had reviewed appellant's MRI scan of the left shoulder, he opined that, even though the MRI scan indicated that appellant had a possible impingement of the left shoulder, he believed that appellant had damage to the axillary nerve of the left shoulder, possibly occurring from the tetanus shot, leaving appellant with some deltoid wasting and sensory alteration. He based his conclusion on the fact that appellant told him that the day prior to the onset of his symptoms, he had a tetanus shot in the left deltoid area, that he began to feel some pain within hours of the shot and by the next day the pain was much more severe and he began to notice a progressive weakness in that area.

Dr. Graham referred appellant to Dr. Norman R. Freeman, a Board-certified neurologist and psychiatrist. He reported on May 28, 1996 that appellant advised that he felt fine until he had a tetanus shot, which was given in the left deltoid region, as part of his employment-related physical. Dr. Freeman noted that at the same time he "had a TB test in his mid-volar forearm." Appellant told Dr. Freeman that, after the tetanus shot, he had a lot of soreness in his left deltoid region, but that he did not pay much attention to it, as he thought that it would just be brief discomfort, but that he continues to have a lot of soreness in his left shoulder and that it began to increase while he was working on May 11, 1996, when he did quite a bit of physical work and he began to experience weakness in his left proximal arm, that he also began to experience tingling and numbness in the left upper extremity radiating down the upper arm and into the volar forearm and into his thumb. He diagnosed appellant as suffering from "probable acute brachial plexitis, a disorder which can occur spontaneously, but has also been described following vaccinations." Dr. Freeman noted that characteristic symptoms in appellant's case include "prominent weakness at the shoulder, severe pain about the shoulder and sensory disturbance that does not correspond to an axillary nerve territory." He also opined that one should consider axillary nerve injury due to the recent injection at the left shoulder (although this would be unusual). In Dr. Freeman's medical report dated June 5, 1996, he noted that appellant was just in his office for electrodiagnostic studies, which were consistent with his diagnosis of acute brachial neuritis and he ordered further tests.

In a medical report dated June 12, 1996, Dr. Graham noted that the MRI scan of the spine demonstrated discovertebral disease with narrowing of the forearm at C4-5 and C5-6, bilaterally. Additionally, he reported that the MRI scan of the brachial plexus absent gadolineum was "essentially unremarkable." Dr. Graham went on to report that appellant's pain seems to have "eased up." In the absence of other findings, he noted his agreement with Dr. Freeman that brachioplexus neuritis related to the vaccination he had on the job. Dr. Graham opined that this was a nerve-related problem and that appellant should continue under the care of Dr. Freeman.

In a medical report dated June 18, 1996, Dr. Freeman diagnosed appellant as suffering from brachial plexis. He noted that there were degenerative changes of the cervical spine MRI scan, but that the level is most likely nerve root impingement, C4-5, had findings that were actually worse on the asymptomatic right side. Dr. Freeman also noted that, in appellant's

electrodiagnostic studies, there was no paraspinal muscle involvement. Furthermore, he noted that appellant's pain as "much decreased" and that he was having some limited increase in motor strength. Accordingly, Dr. Freeman opined that appellant's total findings go along more with an acute brachial plexitis.

The employing establishment submitted two statements. The first, dated June 15, 1996, was from the aforementioned assistant fire division chief, who noted that no personnel heard appellant complaining of pain in his upper arm on May 11, 1996 and that he was observed lifting weights in the weight room and he informed him that as he was on light duty, appellant should refrain from working out on duty. The second statement was from a fire captain, who stated that on May 11, 1996 he observed appellant working on his car and at no time did he mention hurting his arm, but that the next morning appellant related that he had gotten a shot a few days prior and that his arm has hurt since.

On August 13, 1996 the Office accepted appellant's claim for brachial plexitis.

In a medical report dated July 29, 1996, but not received by the Office until November 25, 1996, Dr. Freeman reiterated his impression of "acute brachial plexitis, post vaccination, mostly resolved." He also noted that appellant had been improving rapidly, with "almost normal range of motion now at the left shoulder and strength not far from baseline." At that time, Dr. Freeman released appellant to return to work full duty.

In a February 19, 1997 medical report, Dr. Freeman noted that appellant still had symptoms of numbness and some tingling in the left deltoid region and that at times the numbness and tingling radiate a little distally into the left outer arm and that not infrequently he has some soreness in his upper arm and shoulder. He found appellant's status to be postbrachial plexitis, post vaccination, with some residual.

In his May 16, 1997 report, Dr. Freeman noted that appellant was approximately one year from the onset of brachial plexus problems; electrodiagnostic studies were performed to reconfirm the diagnosis and assess appellant's residual degree of the problems. He noted that these electrical studies were again consistent with a diagnostic of brachial plexopathy and were partially suggestive of upper trunk involvement, though the current study is a chronic neuropathic picture, rather than an acute picture as in June 1996. Dr. Freeman further noted, "the decreased interference pattern and the changes in the active motor units would be considered marked."

On October 17, 1997 appellant filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA-2a) for his continuing brachial neuritis commencing May 2, 1997 and the employing establishment controverted the claim.

In his medical report dated October 29, 1997, Dr. Freeman noted that there was no substantial change in appellant's condition and that he continued to be postbrachial plexis, post vaccination, with some residual. He submitted an attending physician's report dated November 24, 1997, in which he diagnosed brachial plexitis, post vaccination, noting that it was the fuller adverse effect of the tetanus shot. Dr. Freeman listed appellant's permanent effects as "mild weakness, some muscle atrophy in proximal left arm. Numbness in upper arm and

forearm. Soreness and burning in upper arm with exercise. EMG [electromyography] -- May 1997 shows chronic changes."

By letter dated January 6, 1998, the Office requested further factual and medical information from appellant regarding his alleged recurrence of disability and allotted him 30 days within which to respond. He did not file a timely response.

In a decision dated February 26, 1998, the Office denied appellant's claim for the alleged recurrence of disability on the grounds that the evidence of record failed to establish a causal recurrence. Furthermore, the Office rescinded the decision issued August 13, 1996 and terminated benefits, due to insufficient evidence to support that the claimed condition is causally related to the incident or work factors supposed to have occurred on May 11, 1996.[1]

The Board finds that the Office improperly rescinded its acceptance of appellant's claim for brachial plexitis.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In order to rescind prior acceptance of a claim, the Office must establish that its prior acceptance was erroneous through new and different evidence.[2] This evidence must be substantial and probative evidence confirming the fact that the injury did not occur as appellant alleged.[3] The Office does not meet its burden of proof to rescind by merely showing that its acceptance may have been erroneous.[4] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation for its rationale for rescission.[5] In the present case, appellant filed a claim stating that, while he was in the performance of duty, he suffered injuries to his upper left arm and shoulder and had continuing pain in the left side of his neck. The Office accepted appellant's claim for brachial plexitis on August 13, 1996. The Office therefore has the burden of justifying termination of the rescission of that acceptance by establishing that the original determination was erroneous.

The Board finds that the medical evidence relied on by the Office in rescinding its acceptance of appellant's claim is insufficient to establish that this condition was not causally related to his employment.

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[1] The Board notes that subsequent to the issuance of the February 26, 1998 decision, the Office received additional medical evidence. By letter dated June 11, 1998, the Office informed appellant that it had received this evidence, but that if appellant wished to dispute the decision, he must follow his appeal rights. The Board cannot consider evidence that was not before the Office at the time of the final decision, in this case, February 26, 1998; *see* 20 C.F.R. § 501.2(c)(1).

[2] *Michael W. Hicks*, 50 ECAB ___ (Docket No. 97-2902, issued April 12, 1999); *George E. Riley*, 44 ECAB 458 (1993).

[3] *Beatrice Meir*, 40 ECAB 1309 (1989).

[4] *Michael W. Hicks, supra* note 2.

[5] *See Alice M. Roberts*, 42 ECAB 747 (1991).

It is unclear upon exactly what evidence the Office based its decision to revoke acceptance of the claim, as it does not give an adequate explanation for its reason to rescind its acceptance. Nevertheless, the Board notes that, in order to justify rescission, the Office must establish that the prior acceptance was erroneous through new and different evidence, not merely second guessing the initial set of adjudicating officials.[6] Accordingly, all evidence submitted prior to the Office's August 13, 1996 acceptance of the claim will not justify a rescission of acceptance. Looking at the evidence submitted after that date, it is clear that this evidence would also not be sufficient to establish that the Office properly rescinded its acceptance of appellant's claim. Dr. Freeman's reports submitted after this date indicated that he still firmly believed that appellant suffered from brachial plexitis, post vaccination, resulting from his employment injury. Accordingly, the Board reverses the Office's decision and finds that the employing establishment did not effectively rescind its prior acceptance of this claim.

The Board finds that this case is not in posture for decision on the issue of whether appellant established a recurrence of his employment injury after May 2, 1997. Dr. Freeman noted continued problems with brachial plexitis after this date. In his May 16, 1997 report, he indicates that the new electrical studies were again consistent with a diagnosis of brachial plexopathy, though the picture in the recent studies was more of a chronic neuropathic picture, rather than an acute picture as in June 1996. Dr. Freeman also noted, "the decreased interference pattern and the changes in the active motor units would be considered marked." Furthermore, he submitted an attending physician's report dated November 24, 1997, in which he opined that appellant suffered from "brachial plexitis, post-vaccination." While these reports are not sufficient to meet appellant's burden of proof to establish his claim, the reports, in combination with Dr. Graham's earlier report indicating his agreement with Dr. Freeman that appellant's brachioplexus neuritis was related to the vaccination on the job, raise an uncontroverted inference between appellant's claimed recurrence of disability and the tetanus shot appellant received from the employing establishment and are sufficient to require the Office to further develop the medical evidence and the case record.[7]

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issue of whether appellant sustained a recurrence of disability on or after May 2, 1997 causally related to the May 11, 1996 employment injury. The Office should prepare a statement of accepted facts and refer appellant, together with the case record, to a physician in the appropriate field of medicine, to obtain a medical opinion on this matter. After such development of the case record as the Office deems necessary, an appropriate decision should be issued.

The decision of the Office of Workers' Compensation Programs dated February 26, 1998 is reversed in part and the Office's holding regarding appellant's recurrence claim is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

[6] *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

[7] *See Robert A. Redmond*, 40 ECAB 796, 801 (1989).

Dated, Washington, D.C.
April 11, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member