

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JESSE G. MARTINEZ and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Houston, TX

*Docket No. 99-1669; Submitted on the Record;  
Issued October 23, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issue is whether appellant had any employment-related disability after January 31, 1996.

The case has been on appeal previously.<sup>1</sup> In a July 3, 1997 decision, the Board noted that appellant claimed that he aggravated a previous right shoulder injury after he was assigned to new duties collating magazines, bundling them and putting them in trays. Appellant's supervisor stated that appellant's limited duty was to cut out addresses from second class mail, write out postal forms and place the mail in envelopes. He noted appellant was restricted from lifting more than 10 pounds, standing and reaching above his shoulders.

The Board instructed the Office of Workers' Compensation Programs to combine appellant's case record with the records from his August 13, 1986 employment injury, after which he had been assigned to light duty. The Board indicated that the Office should prepare a statement of accepted facts, including a description of appellant's work duties on and after the August 13, 1986 employment injury. The Office was to request a report from Dr. Eric H. Scheffey, an orthopedic surgeon and appellant's treating physician, on whether appellant's work duties caused or contributed to any change in the nature or extent of appellant's right shoulder condition.

In a March 11, 1998 decision, the Office found that appellant's disability due to a torn rotator cuff of the right shoulder had ceased by January 31, 1996. Appellant requested a hearing, which was conducted on October 21, 1998. In a January 4, 1999 decision, the Office hearing representative found that the weight of the medical evidence established that appellant had no disability after January 30, 1996.

The Board finds that the case is not in posture for decision.

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<sup>1</sup> Docket No. 95-1355 (issued July 3, 1997).

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>2</sup>

However, in this case, the Office found that the medical evidence established that appellant was disabled from January 30, 1994 through January 30, 1996. Once the Office accepts a claim, it has the burden of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.<sup>3</sup> The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant. The burden is on the Office with respect to the period subsequent to the date when compensation is terminated or modified.<sup>4</sup> The Office has not met that burden here.

In response to the Board's July 3, 1997 decision, an official at the employing establishment indicated that in 1988 appellant began working in the express mail unit. In 1991 he was assigned to repair damaged mail. From 1993 to 1994 appellant was assigned to the nixie magazine section where he worked on one piece of mail at a time. He would look for the return address, cut it and then place it in a postage due envelope and send it back to the sender. He would also correct zip codes to mailing when available.

The Office prepared a statement of accepted facts describing these job duties and sent the statement to Dr. Scheffey, requesting his opinion on whether appellant's right shoulder condition was causally related to his employment. In a September 19, 1997 report, he noted that appellant had a previous rotator cuff tear on May 4, 1987 but had improved and had returned to work. Dr. Scheffey related that appellant was later moved into the magazine section where he had to lift magazines and move them over his head. This increased lifting of magazines was consistent with the physical findings in his examination of appellant. As a result, appellant was unable to return to work.

Dr. Scheffey reported that a February 18, 1994 magnetic resonance imaging (MRI) scan showed an impingement syndrome of the shoulder. He concluded that appellant was unable to work since January 30, 1994.

The Office requested clarification, noting that the statement of accepted facts had not given a history of heavy lifting. In an October 10, 1997 report, Dr. Scheffey indicated that appellant reported that the magazine lifting was an assignment given to him for several weeks.

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<sup>2</sup> *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>3</sup> *Edwin Lester*, 34 ECAB 1807 (1983).

<sup>4</sup> See *George J. Hoffman*, 41 ECAB 135 (1989); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

He stated that the duties provided a fatigue-type disruption to appellant's shoulder girdle. Dr. Scheffey pointed out that the injury involved a part of appellant's shoulder that was not involved in the previous injury. He indicated that the history and physical findings, including the MRI scan, documented a new injury. Dr. Scheffey concluded that the injury occurred when appellant was collating magazines.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Jeffrey Tucker, a Board-certified orthopedic surgeon, for an examination and a second opinion on whether appellant's employment had caused any disability for his light-duty position after January 30, 1994. In a January 11, 1998 report, Dr. Tucker indicated that a November 19, 1997 MRI scan showed evidence of a prior acromionectomy. He noted that the rotator cuff was intact. Dr. Tucker diagnosed status post rotator cuff tear with subsequent surgical repair and partial right acromionectomy, with residuals. He reviewed appellant's medical history, noting that he had been off work since January 30, 1994 and had subsequent surgery for repair of the rotator cuff.

Dr. Tucker stated that appellant had residuals of pain of the right shoulder and decreased range of motion in the shoulder. He indicated that appellant had a seven percent permanent impairment of the shoulder due to loss of motion and reported January 31, 1996 as the date of maximum improvement from any injury sustained on or about January 30, 1994. Dr. Tucker concluded that appellant was capable of returning to light duty with the restrictions of no heavy lifting or reaching above his shoulders.

Dr. Tucker submitted a copy of the November 17, 1997 report of the MRI scan. Dr. Lawrence Hurdiss, a Board-certified radiologist, stated that the scan showed postoperative changes in the acromioclavicular joint and distal acromion. He also noted a diffuse area of tendinitis in the supraspinatus tendon. Dr. Hurdiss reported an intrasubstance tear within the distal one centimeter of the supraspinatus tendon without indication of a tear through that structure. He indicated that the MRI scan showed a suspected chronic tear or truncation of the superior and anterior margin of the glenoid labrum.

The Office requested a clarification from Dr. Tucker on whether appellant had any disability after January 30, 1994. In a March 3, 1998 report, he stated that appellant had a decreased range of motion in the right shoulder, which was not disabling and would not prevent appellant from performing his limited-duty position in the nixie mail section of the employing establishment. Dr. Tucker indicated that the medical evidence showed that appellant's shoulder condition resulted in an impingement type syndrome characterized by pain and decreased range of motion. He related appellant's condition to his work in the nixie mail section. Dr. Tucker concluded that appellant had been unable to perform his limited duties in the nixie mail section until January 31, 1996 when he reached maximum improvement and was capable at that time of working with restrictions of no heavy lifting or reaching above the shoulders.

Dr. Tucker concluded that appellant's work in the nixie section of the employing establishment caused disability which ceased approximately two years later. He, however, gave no rationale or explanation for his conclusion that appellant was able to resume his limited-duty position at the employing establishment as of January 31, 1996.

Furthermore, Dr. Tucker stated that the November 17, 1997 MRI scan showed an intact rotator cuff. Dr. Hurdiss, however, stated that the MRI scan showed a tear in the supraspinatus tendon and either tears or truncation of the anterior and superior margins of the glenoid labrum. Dr. Tucker did not discuss these findings or their implications in a determination of whether appellant had been able to resume his limited-duty job as of January 31, 1996. Drs. Scheffey and Tucker agreed that appellant's duties in his limited-duty position caused his right shoulder condition and disability. Dr. Tucker's report, however, conflicts with Dr. Scheffey's report that appellant was unable to return to work. The case, therefore, must be remanded for resolution of the conflict in the medical evidence.

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should be requested to give a diagnosis of appellant's condition. He should then state, within reasonable medical certainty, whether appellant could perform the limited duties of the position he held on January 30, 1994 and, if so, whether he could perform those duties as of January 31, 1996 or as of some later date. The specialist should present rationale in support of his opinion. After further development as it may find necessary, the Office should issue a *de novo* decision.

The January 4, 1999 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action as set forth in this decision.

Dated, Washington, DC  
October 23, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member