United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Ronkonoma, NY, Employer	)	**Docket No. 06-1328** **Issued: February 6, 2007**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 5, 2006, vacating its January 25, 2005 decision and accepting appellant's claim for certain conditions related to his July 31, 2004 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has met his burden of proof in establishing that all of the conditions diagnosed by his treating physician are causally related to his accepted July 31, 2004 employment injury.

FACTUAL HISTORY

On July 31, 2004 appellant, a 56-year-old baggage screener, filed a traumatic injury claim alleging that he injured his left arm and shoulder while lifting luggage onto a table. He did not stop working. On September 10, 2004 appellant accepted a light-duty job assignment.

Appellant submitted a September 2, 2004 report of an x-ray of the cervical spine and left shoulder. An undated emergency room discharge form signed by B. Colell, reflected "no evidence of fracture." Appellant submitted progress notes from Dr. Luz del Carmen Cespedes, a Board-certified internist. Notes dated August 24, 2004 reflected appellant's report that on July 31, 2004 he felt a sharp pain in his left shoulder when he lifted a large piece of luggage at work. Dr. Cespedes noted tenderness to palpation at the anterior and superior level of the left shoulder, with some muscle spasm. He provided diagnoses of left rotator cuff syndrome, left bicipital tendinitis and left epicondylitis. On September 7, 2004 Dr. Cespedes indicated that appellant presented for a follow-up visit related to a left shoulder injury that occurred while he was lifting luggage at work. Reiterating his earlier diagnoses, he added "cervicalgia."

Appellant submitted numerous reports and progress notes from his treating physician, Dr. Harshad C. Bhatt.[1] In an August 30, 2004 employee work ability and limitations form, Dr. Bhatt reported that appellant had injured his left shoulder and upper arm while lifting a heavy bag from the floor to a table on July 31, 2004. He provided a diagnosis of cervical radiculopathy and recommended that appellant be restricted from lifting, carrying, twisting, bending, squatting, driving or reaching over his shoulder. In an August 31, 2004 report, Dr. Bhatt stated that appellant developed neck and shoulder pain as a result of the July 31, 2004 work injury. Examination of the cervical spine revealed the presence of muscle spasms in the paracervical and paraspinalis muscles. Tenderness was noted in the bilateral paracervical area and over the spinous process of the C6-7 vertebrae. He found sensory loss in the C6-7 area. Bakody's sign was positive for cervical nerve root compression. The Solo Hall sign was positive. Range of motion testing of the cervical spine and left shoulder recorded abnormal findings. Dr. Bhatt provided diagnoses of cervical disc diseases; cervical radiculopathy; cervical muscle spasm; internal derangement of the left shoulder; and impingement syndrome of the left shoulder. Regarding causal relationship, Dr. Bhatt stated that "all of the above injuries [were] causally related to the accident of July 31, 2004." He further opined that appellant had "severe and total disability." On September 4, 2004 Dr. Bhatt diagnosed cervical radiculopathy and recommended that appellant be restricted from lifting, carrying, squatting, kneeling, driving or reaching above his shoulder. In a September 14, 2004 report, he stated that appellant showed no essential change. Dr. Bhatt provided diagnoses of cervical radiculopathy; cervical muscle spasm; internal derangement of the left shoulder; adhesive capsulitis and bursitis of the left shoulder; impingement syndrome and effusion of the left shoulder. Again, he opined that all diagnosed conditions were causally related to the July 31, 2004 work injury. New York State Workers' Compensation billing forms reflected that Dr. Bhatt treated appellant from August 31 through September 16, 2004, and September 20 through October 7, 2004, for work-related injuries that occurred on July 31, 2004, when he was lifting baggage. The record contains Dr. Bhatt's unsigned range of motion examination results dated September 20, 2004. In a September 28,

[1] Dr. Bhatt represents that he is an orthopedic surgeon. However, the Board cannot verify his credentials.

2004 report, Dr. Bhatt modified his diagnoses to include cervical radiculopathy; cervical muscle spasm; internal derangement of the left shoulder; impingement syndrome of the left shoulder; tendinitis of the supraspinatus tendon; effusion of the left shoulder; and contusion of the left shoulder. He again opined that all conditions were causally related to the July 31, 2004 work injury. On October 28, 2004, Dr. Bhatt opined that appellant was totally disabled as a result of injuries sustained on July 31, 2004. Range of motion testing of the left shoulder again revealed abnormal findings. His diagnoses included cervical radiculopathy; cervical muscle spasm; and internal derangement of the left shoulder.

Appellant submitted a report of a magnetic resonance imaging (MRI) scan of the cervical spine dated October 1, 2004 and a November 4, 2004 report of an MRI scan of the left shoulder. Appellant submitted numerous physicians' notes bearing illegible signatures for the period August 31 to December 8, 2004.

Appellant submitted a report dated October 12, 2004, from Dr. Sima Anand, a treating physician, who noted appellant's claim that he was involved in a work-related accident on July 31, 2004. He found the range of motion of appellant's cervical spine to be within normal limits. Lumbar spine range of motion produced pain at the end of the range, and there was tenderness over the thoracic paraspinal area. He also noted weakness in the left deltoid. Dr. Anand provided diagnoses of thoracic myofascial derangement and internal derangement of the left shoulder. He stated that, if the events occurred as appellant described them, then his symptoms were causally related to the July 31, 2004 accident.

On November 23, 2004 appellant submitted a claim for a recurrence of disability as of November 18, 2004. He stated that the original injury occurred on July 31, 2004. After his return to work, an MRI scan had revealed the presence of a bone spur in his left shoulder. He stopped work on November 18, 2004, after Dr. Bhatt changed his duty status to "no physical activity."

In a letter dated December 17, 2004, the Office asked appellant for additional details regarding the circumstances of his injury and treatment. In an undated response, appellant stated that, on July 31, 2004, he lifted three 90-pound bags onto the sampling table. While lifting the last bag, he felt a sharp pain in his left shoulder and left arm. He indicated that he had no other injuries to his shoulder or arm.

Appellant submitted a December 7, 2004 report from Dr. Bhatt, accompanied by a December 6, 2004 report of a range of motion examination of the left shoulder. In his December 7, 2004 report, Dr. Bhatt stated that appellant was unable to move his left shoulder joint, and that he tested positive for left shoulder impingement sign, apprehension test, and Kennedy impingement. He provided diagnoses of internal derangement of the left shoulder; impingement syndrome of the left shoulder; and partial tear supraspinatus left shoulder. Dr. Bhatt again opined that all conditions were related to the July 31, 2004 work injury. In a January 4, 2005 employee work ability form, Dr. Bhatt diagnosed cervical radiculopathy and "shoulder rotation -- suffered tear." Citing the date of injury as July 31, 2004, he also recommended that appellant be restricted from performing physical activities from January 10 through February 1, 2005.

By decision dated January 21, 2005, the Office denied appellant's claim. Accepting that appellant experienced symptoms of an underlying condition while at work on July 31, 2004, the Office found that the medical evidence failed to establish a causal relationship between his employment and a worsening of his condition.

Appellant submitted billing forms and physicians' notes, bearing illegible signatures, for the periods August 31 to September 16, 2004 and January 3 to 26, 2005. Notes from Dr. Cespedes for the period November 2, 2004 through January 4, 2005 reflect that appellant experienced pain at the left rotator cuff level following a July 31, 2004 injury. Dr. Cespedes provided diagnoses of derangement of the left shoulder and supraspinatus tendinosis/ tendinopathy.

Appellant submitted reports from Dr. Bhatt dated January 4, February 22 and August 4, 2005. On January 4, 2005 Dr. Bhatt found a full thickness tear supraspinatus of the left shoulder; impingement syndrome of the left shoulder; and internal derangement of the left shoulder. He recommended arthroscopic surgery to correct these conditions, which he opined were causally related to the July 31, 2004 work injury. On February 22, 2005 Dr. Bhatt indicated a left shoulder MRI scan revealed supraspinatus tendinitis, partial tear, effusion and impingement. His diagnoses also included adhesive capsulitis of the left shoulder. Noting that appellant was in his usual state of health until he was involved in the July 31, 2004 work injury, he opined that all of appellant's conditions were causally related to that injury. On August 5, 2005 Dr. Bhatt provided clinical impressions of cervical disc diseases; herniated cervical disc at C3 to C7 levels; cervical radiculopathy; cervical muscle spasm; internal derangement of the left shoulder; and impingement syndrome of the left shoulder.

On January 4, 2006 appellant, through his representative, submitted a request for reconsideration. The representative alleged that the evidence of record established that appellant had sustained a traumatic injury on July 31, 2004, and that he had sustained a recurrence of disability on November 18, 2004. In support of his request, appellant submitted numerous copies of previously submitted medical reports and test results. New medical evidence included a March 9, 2005 narrative report from Dr. Cespedes, and an August 25, 2005 narrative report from Dr. Bhatt.

In his March 9, 2005 report, Dr. Cespedes related appellant's medical history and the history of the alleged July 31, 2004 injury. Appellant reported that when he lifted a large piece of luggage on that date, he felt a sharp pain in his left arm and shoulder. At the time of his first visit on August 24, 2004, appellant was found to have moderate tenderness on palpation of the anterior and superior levels of the left shoulder, with some muscle spasm and tenderness of bicipital tendon, and left external epicondilous. At that time, Dr. Cespedes diagnosed appellant with left rotator cuff syndrome; left bicipital tendinitis; and left epicondilitis. He examined appellant again on September 7, October 5, November 2 and December 7, 2004, and January 4, 2005. On September 7, 2004 his diagnoses included cervicalgia. An MRI scan of the cervical spine revealed multiple posterior disc herniations at C3-4, C4-5, C5-6 and C6-7. Straightening of the cervical lordosis was indicative of a reflex muscle spasm. An MRI scan of the left shoulder revealed hypertrophic changes in the acromioclavicular joint, lateral down-sloping acromion extending to about the supraspinatus, inferiorly extending acromial spur and

supraspinatus tendinosis/tendinopathy. Dr. Cespedes opined that appellant's July 31, 2004 injury was the proximate cause of his diagnosed medical conditions.

In his August 25, 2005 report, Dr. Bhatt related the history of injury, noting that appellant had experienced significant pain in his neck and left upper extremity on July 31, 2004 when he lifted three 90-pound bags onto a table. As a result of his initial examination on August 31, 2004, Dr. Bhatt diagnosed cervical disc diseases; cervical radiculopathy; cervical muscle spasm; internal derangement of the left shoulder; and impingement syndrome. He later included tendinitis of the left supraspinatus tendon; contusion of the left shoulder; partial tear supraspinatus left shoulder; adhesive capsulitis; effusion of the left shoulder; and full thickness supraspinatus left shoulder. Following his August 4, 2005 examination he expanded his diagnoses to include herniated cervical discs at the C3-7 levels. Dr. Bhatt's final clinical impression included: cervical, thoracic and lumbar strains secondary to trauma; traumatic herniation and bulges of the multiple lumbar intervertebral discs; multiple cervical intervertebral disc herniations; left cervical radiculopathy; diffuse lumbar disc bulge at L2-3; left lumbar radiculopathy; thoracic disc pathology; post-traumatic headaches resolved; and bilateral shoulder strain. Dr. Bhatt opined that to a reasonable degree of medical certainty, "the limitations which [appellant was] experiencing are a result of the spinal strains, ligamentous disruption, radiculopathies, herniations and impingement" described in his report. He also opined that, given appellant's lack of pain prior to the incident, appellant's disc herniations were a direct result of the July 31, 2004 injury. He explained that the impingement condition arose independently from appellant's degenerative changes.

The Office forwarded Dr. Cespedes' March 9, 2005 report and Dr. Bhatt's August 25, 2005 report to the district medical adviser for his review. The Office informed the medical adviser that appellant felt a sharp pain in his left shoulder and left arm when he lifted three 90-pound bags on July 31, 2004; that he had been treated by Drs. Cespedes and Bhatt since August 2004; that he had preexisting cervical disc diseases; and that multiple diagnostic MRI scan examinations were taken in late 2004. The Office asked the adviser to opine whether, based on the history and facts, the conditions diagnosed by appellant's physicians resulted from the described lifting incident.

On March 7, 2006 the district medical adviser stated that multiple cervical disc herniations would not be expected to result from simply heavy lifting. If the disc herniations were preexisting, then they could have been aggravated temporarily by the lifting. The medical adviser opined that the whole clinical picture had been over-diagnosed. He further opined that other anatomical changes on the MRI scan were preexisting and of no consequence, noting that MRI scans are often overread without clinical correlation. The medical adviser stated that he would accept "cervical strain with radiculitis," and "shoulder strain with tendinitis or tendinopathy."

By decision dated April 5, 2006, the Office vacated and set aside its January 25, 2005 decision, and issued a *de novo* decision accepting appellant's claim for cervical strain with radiculitis; left shoulder strain; and temporary aggravation of herniated discs. The Office noted that the decision did not address appellant's recurrence claim, since it had never been

developed.[2] The Office also indicated that appellant was entitled to continuation of pay for a period of disability from August 1, 2004 to September 4, 2004, as he had accepted a light-duty job on September 5, 2004.[3]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of proof to establish the essential elements of the claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the "fact of injury," namely, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged and that such event, incident or exposure caused an injury.[6]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[7] Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[8]

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[2] As of the date of the filing of this appeal, the Office had not issued a decision on appellant's claim for recurrence of disability. The Board does not have jurisdiction over the recurrence claim, as it is in an interlocutory posture. (The Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case). 20 U.S.C. § 501.2(c).

[3] The Office found that appellant was entitled to continuation of pay for the period of disability from August 1, 2004 to September 4, 2004. However, the Board notes that appellant did not stop working immediately following his July 31, 2004 injury. Therefore, appellant is not entitled to continuation of pay for the above-referenced period.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Betty J. Smith*, 54 ECAB 174 (2002); *see also Tracey P. Spillane*, 54 ECAB 608 (2003). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q), (ee).

[7] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[8] *John W. Montoya*, 54 ECAB 306 (2003).

An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.[9]

ANALYSIS

The Board finds that there is a conflict between the opinions of the Office medical adviser and appellant's treating physicians. In all of his numerous medical reports, Dr. Bhatt opined that appellant's diagnosed shoulder and back conditions were causally related to the July 31, 2004 injury. Dr. Bhatt's final clinical impression included cervical, thoracic and lumbar strains secondary to trauma; traumatic herniation and bulges of the multiple lumbar intervertebral discs; multiple cervical intervertebral disc herniations; left cervical radiculopathy; diffuse lumbar disc bulge at L2-3; left lumbar radiculopathy; thoracic disc pathology; and bilateral shoulder strain. He also opined that appellant's disc herniations were a direct result of the July 31, 2004 injury and explained that the impingement condition arose independently from appellant's degenerative changes. Dr. Cespedes opined: appellant's multiple posterior disc herniations at C3-4, C4-5, C5-6 and C6-7; hypertrophic changes in the acromioclavicular joint; lateral down-sloping acromion extending to abut the supraspinatus; inferiorly extending acromial spur; and supraspinatus tendinosis/tendinopathy were caused by the July 31, 2004 work injury. By contrast, the district medical adviser stated that multiple cervical disc herniations would not be expected to result from simply heavy lifting. He opined that if the disc herniations were preexisting, then they could have been aggravated temporarily by the lifting. The medical adviser opined that the whole clinical picture had been over-diagnosed. He further opined that other anatomical changes on the MRI scan were preexisting and of no consequence, noting that MRI scans are often overread without clinical correlation. The medical adviser stated that he would accept "cervical strain with radiculitis" and "shoulder strain with tendinitis or tendinopathy."

Appellant's physicians examined appellant on numerous occasions. Their opinions were based on a complete factual and medical background of the claimant, were of reasonable medical certainty and were supported by medical rationale. After reviewing the evidence and facts of the case, the medical adviser provided a rationalized opinion that conflicted, in part, with the opinions of the attending physicians. The Board notes that, although the Office accepted appellant's claim for cervical strain with radiculitis, left shoulder strain, and temporary aggravation of herniated discs, it did not accept all of the conditions diagnosed by appellant's physicians, including multiple disc herniations and impingement syndrome. The Board, therefore, finds that a conflict in medical opinion has been created.

Section 8123 of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician, who shall make an examination.[10] The case, therefore, will be remanded for an impartial medical specialist to resolve the conflict in medical opinion, and to

[9] *Dennis M. Mascarenas,* 49 ECAB 215, 218 (1997).

[10] 5 U.S.C. § 8123.

determine which of appellant's diagnosed conditions are causally related to the July 31, 2004 employment injury. On remand, the Office should refer the case record and a statement of accepted facts to an appropriate physician pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board will affirm the Office's April 5, 2006 decision to the extent that it accepted appellant's claim for cervical strain with radiculitis, left shoulder strain and temporary aggravation of herniated discs. However, the case is not in posture for decision regarding the remaining conditions diagnosed by appellant's treating physicians, as there exists an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2006 is affirmed in part and set aside in part, and the case is remanded to the Office for further action consistent with this decision.

Issued: February 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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