United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 09-1967**
	)	**Issued: September 9, 2010**
U.S. POSTAL SERVICE, SOUTH JERSEY PROCESSING & DISTRIBUTION CENTER, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2009 appellant timely appealed the April 17, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of her wage-loss compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective September 23, 2008.

FACTUAL HISTORY

Appellant, a 49-year-old modified manual clerk, has an accepted occupational disease claim for left shoulder (trapezius) sprain and exacerbation of chronic cervical sprain, which arose

on or about June 18, 2005 (xxxxxx183 and xxxxxx048).[1] She also has an accepted claim for a September 11, 2002 right upper extremity injury (xxxxxx936).[2] At the time of her June 18, 2005 injury, appellant was working in a limited-duty capacity as a consequence of her previous employment injury. Beginning July 25, 2005 she received appropriate wage-loss compensation. The Office then placed appellant on the periodic compensation rolls effective October 2, 2005. Appellant continued to receive wage-loss compensation for temporary total disability for approximately three years.[3]

In February 2008 appellant's treating physician, Dr. Craig H. Rosen, restricted her to limited duty with no overhead use and no repetitive use of the left shoulder.[4] He also imposed a 10-pound limitation with respect to pushing, pulling and lifting. Additionally, Dr. Rosen recommended that appellant obtain a new magnetic resonance imaging (MRI) scan, which she did on April 16, 2008. He reviewed appellant's new left shoulder MRI scan when he saw her on May 13, 2008. Dr. Rosen noted that the latest scan showed tendinosis in the rotator cuff. He also noted evidence of fluid and what appeared to be a small area of cortical impaction and bone contusion at the posterior and superior aspect of the humeral head. Appellant reported tenderness in the area as well as anteriorly. Dr. Rosen indicated that she adamantly denied any trauma to the shoulder. He further noted that appellant's left upper extremity was still intact from a neurovascular standpoint. Dr. Rosen recommended obtaining a bone scan for further evaluation. He also advised that appellant remain at the same job status as previously detailed in February 2008.

Dr. Zohar Stark, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on July 1, 2008. He also reviewed various medical records and a May 27, 2008 statement of accepted facts (SOAF). Dr. Stark stated there were no objective findings on physical examination indicating that the accepted condition of left shoulder sprain was still active. He also advised that appellant reached maximum medical improvement and was capable of returning to her date-of-injury job with no restrictions.[5] Dr. Stark further indicated that

[1] The Office mistakenly assigned two separate claim numbers to appellant's June 27, 2005 claim (Form CA-2) for injury to her neck, left arm and left shoulder. Once it realized its mistake the two identical claims were combined and claim number xxxxxx048 was designated as the master file.

[2] With respect to the September 11, 2002 employment injury, appellant's accepted conditions include right lateral epicondylitis, right carpal tunnel syndrome, right shoulder impingement syndrome, right bicipital tenosynovitis and right brachial neuritis. The Office also authorized a December 12, 2003 right shoulder arthroscopic procedure. Additionally, appellant received a May 17, 2006 schedule award for 46 percent impairment of the right upper extremity.

[3] While on the periodic compensation rolls appellant participated in Office-sponsored vocational rehabilitation that included enrollment in a community college program for medical office administration. She reportedly exacerbated her left shoulder condition carrying textbooks during the spring and summer of 2007. The Office suspended rehabilitation services in October 2007 pending further medical evaluation.

[4] Dr. Rosen is a Board-certified orthopedic surgeon. He previously treated appellant for her right upper extremity condition and he also performed the December 12, 2003 right shoulder arthroscopic procedure authorized under claim number xxxxxx936.

[5] Dr. Stark was aware that appellant previously injured her right shoulder, which required surgery. He was also aware that she had been working in a limited-duty capacity at the time of her June 18, 2005 left shoulder injury.

appellant was not disabled from any type of job regarding the accepted condition of left shoulder sprain.

The Office requested a supplemental report from Dr. Stark because it had previously been omitted from the SOAF information regarding appellant's other accepted conditions. It amended the May 27, 2008 SOAF to include information regarding appellant's duplicate claim (xxxxxx048) that had been accepted for left shoulder sprain and exacerbation of chronic cervical sprain. The amended SOAF also noted her September 11, 2002 claim (xxxxxx936) that had been accepted for "right shoulder tendinitis."

In a July 31, 2008 supplemental report, Dr. Stark noted that he had reviewed the recently amended SOAF. Based on his July 1, 2008 examination, he indicated that there was no evidence that appellant's condition from all of her claims still persisted. Dr. Stark reiterated that she had reached maximum medical improvement and that she was able to return to her preinjury job with no restrictions. He concluded that appellant was "not disabled with regard to the accepted conditions of left shoulder sprain and exacerbation of chronic cervical strain nor right shoulder tendinitis."

On August 21, 2008 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Stark's opinion. It afforded appellant 30 days to submit additional evidence or argument to the extent she disagreed with the proposed termination of benefits.

The Office subsequently received a September 2, 2008 letter from appellant's counsel challenging Dr. Stark's opinion.[6] It also received a July 22, 2008 report from Dr. Jeffrey S. Leitman, a family practitioner, who indicated that appellant was unable to accept the job she had been offered. Although he did not identify a specific job offer, Dr. Leitman indicated that appellant had restrictions on both of her shoulders and could not do any overhead and repetitive work. He also noted that she was restricted with her lifting, pulling and carrying. Additionally, the Office received a September 10, 2008 left shoulder bone scan that revealed increased periarticular tracer uptake in the shoulders, left greater than right. Diagnostic considerations included arthritis as well as post-traumatic change.

On September 23, 2008 the Office issued a final decision terminating appellant's compensation and medical benefits. It was not persuaded by counsel's challenge to Dr. Stark's opinion, noting that counsel's "dissatisfaction" with the reports in question was "not sufficient to warrant the continuation of ... wage[-]loss compensation and medical benefits." The Office further found that the recent bone scan and Dr. Leitman's July 22, 2008 report were outweighed by Dr. Stark's opinion.

Appellant requested a hearing, which was held on January 12, 2009. At the hearing counsel reiterated his previous challenge to Dr. Stark's opinion. He also submitted a new report from Dr. Rosen dated October 2, 2008, which counsel argued created a conflict in medical opinion.

[6] Counsel argued, in part, that Dr. Stark's opinion was based on a flawed factual medical history, particularly with respect to appellant's September 11, 2002 employment injury.

In his October 2, 2008 report, Dr. Rosen provided a summary of the treatment he provided appellant for her left shoulder condition dating back to January 2006. He also noted that he had previously treated her for her right shoulder, including surgery. Dr. Rosen indicated that appellant had permanent restrictions regarding her right shoulder. With respect to her left shoulder, Dr. Rosen stated that he similarly imposed permanent restrictions in April 2006 and then discharged her from his care. Appellant returned in July 2007 complaining that she had developed left shoulder pain from carrying heavy books while attending school over the past few months. Dr. Rosen reported that her examination was again consistent with mild to moderate left shoulder anterior instability. He placed appellant in physical therapy and maintained her limited-duty work restriction. Dr. Rosen also commented on her April 16, 2008 left shoulder MRI scan, which revealed some tendinosis in the rotator cuff. He also noted his March 13, 2008 examination findings as well as the results of the September 10, 2008 bone scan. When Dr. Rosen last saw appellant on September 23, 2008 she still complained of persistent left shoulder pain. He indicated that he had arranged for her to undergo left shoulder arthroscopy with anterior capsular placation.

Regarding causal relationship, Dr. Rosen explained that appellant's initial injury on June 18, 2005 aggravated her underlying left shoulder instability, which remained symptomatic. He further explained that he placed her on permanent limited duty in April 2006 and advised her to return on an as needed basis. Appellant returned in July 2007 after carrying books at school, which further aggravated her shoulder. Dr. Rosen stated that appellant's underlying anterior instability and current problems were part of her body habitus, which was aggravated on June 18, 2005 and then further aggravated in spring of 2007. He indicated that appellant remained consistently symptomatic until most recently when arrangements were made for her to undergo arthroscopic surgery. Dr. Rosen also stated that there was "no doubt that [appellant's] repetitive job [at the employing establishment] did not help with her left shoulder pain." He stated that her prognosis was guarded. Between the June 18, 2005 original injury and the spring of 2007 aggravation, Dr. Rosen could not state the exact percentage of each injury responsible for appellant's continued and ongoing shoulder complaints.

By decision dated April 17, 2009, the hearing representative affirmed the September 23, 2008 decision terminating compensation and medical benefits. She found that Dr. Rosen's opinion was of diminished probative value and that the weight of the medical evidence rested with Dr. Stark's well-reasoned report. Dr. Rosen's opinion was purportedly based solely on subjective complaints of pain. The hearing representative further commented that even if the symptoms of pain could be shown to be work related, there was no objective evidence to establish that the residuals were restricting appellant's functional abilities to the point that she could not perform the job she held at the time of her June 18, 2005 injury.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[7] Having determined that an employee has a disability causally related to her federal employment, the Office may not terminate compensation without

[7] *Curtis Hall*, 45 ECAB 316 (1994).

establishing that the disability has either ceased or that it is no longer related to the employment.[8] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[9] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[10]

ANALYSIS

Appellant's counsel argues that there is an unresolved conflict in medical opinion between Dr. Rosen and Dr. Stark.[11] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[12] It is the Office that bears the burden to justify modification or termination of benefits.[13] Counsel correctly argued that Dr. Stark had not been apprised of the full extent of appellant's September 11, 2002 employment injury. Based on the May 27, 2008 amended SOAF the only accepted condition of which Dr. Stark was aware regarding the September 11, 2002 employment injury was "right shoulder tendinitis." The Office failed to inform him at that time that appellant's September 11, 2002 injury had also been accepted for right lateral epicondylitis, right carpal tunnel syndrome, right bicipital tenosynovitis and right brachial neuritis. The amended SOAF also did not mention that appellant received a schedule award for 46 percent impairment of the right upper extremity. Absent a comprehensive factual background, it is different for Dr. Stark to conclude that all of appellant's employment-related injuries had resolved. The Board further notes that Dr. Rosen's latest opinion was not based entirely on appellant's subjective complaints of pain. Dr. Rosen referenced both the April 16, 2008 left shoulder MRI scan and the September 10, 2008 bone scan.

While neither Dr. Rosen's nor Dr. Stark's opinion is fully rationalized, their respective findings are at least equally weighted. With respect to the existence and extent of any ongoing employment-related residuals, the Board finds that the relevant and probative medical evidence is in equipoise. Because there is an unresolved conflict in medical opinion, the Office has not met its burden to justify termination of benefits.[14] Accordingly, its decision to terminate appellant's compensation and medical benefits shall be reversed.

[8] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[9] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[10] *Calvin S. Mays*, 39 ECAB 993 (1988).

[11] The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a) (2006); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[12] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[13] *Curtis Hall*, *supra* note 7.

[14] *Id.*

CONCLUSION

The Office improperly terminated appellant's benefits effective September 23, 2008.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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