United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 10-910**
	)	**Issued: April 11, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Baltimore, MD, Employer	)	

Appearances:
Alan J. Shapiro, *Esq*., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2010 appellant, through counsel, filed a timely appeal from the September 14 and November 2, 2009 merit decisions of the Office of Workers' Compensation Programs that denied authorization for surgery and terminated his compensation benefits. He also timely appealed from a December 23, 2009 nonmerit decision which denied reconsideration. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[2]

ISSUES

The issues are: (1) whether the Office properly exercised its discretion in denying appellant's request for additional left shoulder surgery; (2) whether the Office properly terminated his wage-loss compensation and medical benefits effective November 2, 2009; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record on appeal contains evidence received after the Office issued its December 23, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

(3) whether the Office properly denied appellant's November 23, 2009 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 54-year-old patient services assistant, sustained an injury at work on June 11, 2001 when his chair slid from beneath him and he fell to the floor. He landed on his buttocks, using his outstretched left arm to break the fall. Appellant jammed his left shoulder, which had recently been surgically repaired.[3] He also injured his neck and low back. The Office accepted appellant's claim for left shoulder strain resolved. Appellant resumed full duty on September 21, 2001. On October 17, 2006 the Office granted appellant a schedule award for 45 percent impairment of the left upper extremity.[4]

Appellant developed in 2006, an infection in his surgically-treated left shoulder. The Office approved an April 1, 2008 procedure to remove the infected left shoulder prosthesis.[5] Antibiotic beads were inserted in the joint space during surgery. Appellant was left without a functioning left shoulder joint. He received wage-loss compensation.

Dr. Edward G. McFarland, a Board-certified orthopedic surgeon, proposed a multi-stage left shoulder reconstruction process involving a bone graft followed by another shoulder implant.[6] The Office referred the matter to an Office medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon. In a report dated October 19, 2008, Dr. Berman expressed reservations about additional surgery.[7] He did not find the proposed surgery to be reasonable given the high risk of recurrent infection and the limited mobility that would arise from the new shoulder joint. Dr. Berman explained that appellant's shoulder musculature had been severely compromised due to the April 2008 removal of the prosthesis. While a new prosthesis could provide additional stability to the shoulder, it was unlikely there would be any motion because of the poor condition of the musculature. Dr. Berman advised against authorizing surgery and suggested a second opinion from a specialist in shoulder replacement surgery.

Dr. Robert A. Smith, a Board-certified orthopedic surgeon and Office referral physician, examined appellant November 14, 2008. He noted that appellant had undergone left shoulder

[3] Appellant had a preexisting left shoulder condition dating back to 1991 when he reportedly fell from a six-story building. In January 2001 he underwent a left total shoulder arthroplasty. At the time of the June 11, 2001 employment injury, appellant had been working in a light-duty capacity and was undergoing physical therapy due to his preexisting left shoulder condition.

[4] The overall impairment included components for loss of shoulder motion (27 percent) and for appellant's January 2001 total shoulder arthroplasty (24 percent).

[5] The Office authorized surgery based on the September 10, 2007 report of Dr. Willie E. Thompson, a Board-certified orthopedic surgeon and district medical adviser, who opined that the requested surgery was related to the "work injury of June 11, 2001 by aggravation of a preexisting condition."

[6] Dr. McFarland performed the April 1, 2008 left shoulder resection arthroplasty. He first examined appellant in October 2007 at which time he reported that appellant had fallen "six floors [in] a work-related accident back in 1991." Dr. McFarland did not mention him having subsequently injured his left shoulder at work on June 11, 2001.

[7] Dr. Berman assumed the latest proposed surgery was work-related based on the Office's authorization of appellant's April 1, 2008 surgery.

replacement surgery in January 2001, followed by the June 11, 2001 employment injury. Dr. Smith noted that during 2006, appellant started to have pain which signaled the onset of an infection in the left shoulder that ultimately lead to removal of the infected prosthetic device in April 2008. He explained that an infectious process, in and of itself, could cause septic loosening of a prosthetic device with destruction of the bone, which appeared to have happened in appellant's case. Dr. Smith thought it was highly unlikely that appellant developed an infection in June 2001 as a result of the employment injury as it was unlikely that an infection would have gone unnoticed until 2006. Most septic joint infections developed through a hematogenous-type mechanism where bacteria gain entrance to the arthroplasty through the bloodstream. Dr. Smith noted that there was no evidence that the June 11, 2001 employment incident caused an open injury to the shoulder. He further noted that appellant had a history of diabetes, which also predisposed him to infection. Dr. Smith concluded there was no causal relationship between appellant's current left shoulder septic condition and the June 11, 2001 employment incident. Regarding the accepted condition of left shoulder strain, he advised that appellant had reached maximum medical improvement and required no further medical treatment. Dr. Smith acknowledged that appellant's current left shoulder condition required further care, but advised that no further surgery should be undertaken unless there was proof of complete eradication of any deep infection in the joint. If the infection could be eradicated, a new prosthetic device could be reinserted in the shoulder. Dr. Smith found that appellant could only work in a sedentary position with no use of the left upper extremity.

In a report dated February 4, 2009, Dr. McFarland noted that appellant could return to sedentary duties with no use of his left upper extremity. He advised that appellant's left arm should remain in a sling at all times while in the workplace. Dr. McFarland reviewed Dr. Smith's November 14, 2008 evaluation, but he did not comment on any issues beyond appellant's ability to resume working. On March 9, 2009 appellant returned to work full time as a supply technician.[8]

In August 2009, Dr. McFarland requested authorization for left shoulder surgery scheduled for September 29, 2009. The proposed surgery involved removal of the antibiotic beads, iliac crest bone grafting and a reverse prosthesis.

The Office found a conflict in medical opinion between Dr. Smith and Dr. McFarland on the issues of causation, the need for further surgery and appellant's physical restrictions/work capacity. Appellant was referred to Dr. William I. Smulyan, a Board-certified orthopedic surgeon selected as the impartial medical specialist.

On August 26, 2009 Dr. Smulyan advised that appellant had preexisting left shoulder osteoarthritis resulting in a total shoulder arthroplasty in 2001. He noted that appellant sustained a shoulder sprain on June 11, 2001 and currently had chronic shoulder pain. Due to septic arthritis, appellant had an April 2008 resection arthroplasty, with antibiotic bead placement in the left shoulder. Dr. Smulyan found no causal relationship between appellant's preexisting left shoulder osteoarthritis and the June 11, 2001 employment injury. He also found no causal relationship between the June 11, 2001 injury and the subsequent infection of the left shoulder. Dr. Smulyan explained that there was no evidence of any acute infection after the June 11, 2001

[8] According to the employer, appellant applied for the position and was selected based upon merit promotion procedures.

injury and that the injury did not relate to appellant's subsequent need for further extensive treatment of the left shoulder. He found that the accepted June 11, 2001 left shoulder sprain had resolved without residuals. Dr. Smulyan did not disagree with the proposed surgery, but acknowledged the potential risk of further infection. He agreed that appellant was not capable of using his left upper limb in a rapid work setting. Dr. Smulyan advised that appellant would probably be better working as a supply technician than as a patient services assistant and stated: "while [appellant] continues to experience significant difficulty because of having had septic arthritis in his left shoulder, the injury of June 11, 2001, which was a sprain of the shoulder has resolved and has caused no residuals."

By decision dated September 14, 2009, the Office denied appellant's request for surgery. It found that the surgery recommended by Dr. McFarland was not causally related to the June 11, 2001 employment injury, which resolved without residual. The Office based its determination on Dr. Smulyan's August 26, 2009 opinion.[9]

On September 22, 2009 the Office issued a proposed termination of compensation and medical benefits based on Dr. Smulyan's August 26, 2009 opinion. It afforded appellant 30 days to submit additional evidence or argument to the extent he disagreed with the proposed termination of benefits.

The Office subsequently received preoperative examination reports dated June 14, 2007, February 11 and March 20, 2008 that were prepared in anticipation of appellant's previous April 1, 2008 surgery. It also received February 2, 2009 progress notes from Dr. Latoya Edwards, a Board-certified family practitioner, and physical therapy treatment records from April to September 2009. Dr. Edwards also provided a September 17, 2009 preoperative examination report, including recent laboratory results and a September 14, 2009 electrocardiogram.

In a November 2, 2009 decision, the Office terminated appellant's compensation and medical benefits. It noted that the evidence received after the September 22, 2009 notice did not address Dr. Smulyan's August 26, 2009 findings.

On November 23, 2009 appellant requested reconsideration of the termination decision. In a November 20, 2009 report, Dr. McFarland advised that appellant was recovering from a reverse total shoulder arthroplasty with iliac crest bone grafting performed on September 29, 2009. He commented that it was a fairly extensive operation due to significant deficits in appellant's shoulder "from a work-related accident." Dr. McFarland explained the recovery process and the type of treatment appellant would require. He offered a prognosis of a "relatively pain-free existence…."

By decision dated December 23, 2009, the Office denied appellant's request for reconsideration.

[9] Appellant underwent surgery by Dr. McFarland on September 29, 2009.

LEGAL PRECEDENT -- ISSUE 1

An injured employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which the Office considers medically necessary to treat the work-related injury.[10] The Office has broad discretion in reviewing requests for medical services under 5 U.S.C. § 8103(a), with the only limitation on the Office's authority being that of reasonableness.[11] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts.[12]

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the medical expenditure was incurred for treatment of the effects of an employment-related injury or condition.[13] Proof of causal relationship must include rationalized medical evidence.[14] In addition to demonstrating causal relationship, the injured employee must show that the requested services, appliances or supplies are medically warranted.[15]

ANALYSIS -- ISSUE 1

The Board finds that the Office properly exercised its discretion in denying authorization of appellant's request for left shoulder surgery. Dr. McFarland proposed to remove the antibiotic beads inserted in April 2008. He also recommended an iliac crest bone graft and a reverse prosthesis. However, Dr. McFarland did not specifically relate this procedure to the injury appellant sustained at work on June 11, 2001. When he initially examined him in October 2007, he made no mention of the history of appellant's June 11, 2001 employment injury. Instead, Dr. McFarland referenced a 1991 work-related injury when appellant fell six stories. He also did not explain whether the proposed surgery was a consequence of the April 1, 2008 Office-approved surgery. There is no evidence of record to suggest that the proposed surgery stemmed from any complications associated with the April 1, 2008 surgical procedure.

Dr. Berman reviewed the case file in October 2008. He advised against surgery because of the high risk of recurrent infection and the limited mobility that would arise from the new shoulder joint. The Office followed Dr. Berman's recommendation and referred appellant to Dr. Smith, who found that the proposed surgery was unrelated to the injury appellant sustained at work on June 11, 2001. Dr. Smith explained that there was no evidence of an open injury to the shoulder at the time of the June 11, 2001 injury that might account for the introduction of bacteria to the bloodstream and had appellant developed an infection in 2001, it was highly unlikely that such an infection would have gone unnoticed until 2006.

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[10] 5 U.S.C. § 8103(a)(2006); 20 C.F.R. § 10.310(a)(2009).

[11] *Joseph E. Hofmann*, 57 ECAB 456, 460 (2006).

[12] *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[13] *Debra S. King*, 44 ECAB 203, 209 (1992).

[14] *Joseph E. Hofmann*, *supra* note 11.

[15] *Id.* at 460-61.

The Office found a conflict in medical opinion between Dr. McFarland and Dr. Smith. Dr. Smulyan, who the Office designated as an impartial medical examiner, agreed with Dr. Smith that appellant's left shoulder septic condition was unrelated to the June 11, 2001 injury. He explained that because there was no evidence of any acute infection after the June 11, 2001 injury, there was no causal relationship between the June 11, 2001 injury and appellant's subsequent need for further extensive treatment of the left shoulder. As such, there was no causal relationship between the latest proposed surgery and appellant's accepted injury of June 11, 2001.[16] Dr. Smulyan's August 26, 2009 opinion is sufficient justification for the Office's decision to deny authorization for further left shoulder surgery.

Accordingly, the Board finds that the Office properly exercised its discretion.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[17] Having determined that an employee has a disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has either ceased or that it is no longer related to the employment.[18] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[19] 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.[20]

ANALYSIS -- ISSUE 2

Dr. McFarland, Dr. Smith and Dr. Smulyan all agreed that appellant had an ongoing left shoulder condition that severely restricted his use of the left upper extremity. The Office accepted appellant's claim for left shoulder strain. While it authorized removal of his infected left shoulder prosthesis, it did not formally accept a left shoulder septic condition as being causally related to the June 11, 2001 employment injury.

Although Dr. McFarland sought authorization for surgery to address appellant's current left shoulder complaints, he did not specifically attribute the ongoing complaints to the June 11, 2001 employment injury. It is noteworthy that Dr. McFarland reviewed Dr. Smith's November 14, 2008 report and, except for noting his agreement with the reported work restrictions, Dr. McFarland essentially remained silent. Dr. McFarland did not specifically express disagreement with Dr. Smith's opinion regarding the lack of a causal relationship between appellant's current left shoulder septic condition and the June 11, 2001 employment

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[16] *Cleopatra McDougal-Saddler,* 47 ECAB 480 (1996).

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

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

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

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

injury. Dr. Smith also noted with regards to appellant's accepted condition of left shoulder strain, that he had reached maximum medical improvement and required no further treatment.

Dr. Smulyan similarly found no causal relationship between the June 11, 2001 employment injury and appellant's left shoulder septic arthritis. He noted that "while [appellant] continues to experience significant difficulty because of having had septic arthritis in his left shoulder, the injury of June 11, 2001, which was a sprain of the shoulder has resolved and has caused no residuals." As discussed *supra*, there was no true conflict in medical opinion between Dr. Smith and Dr. McFarland, thus relegating Dr. Smulyan's August 26, 2009 report to "second opinion" status.

The record demonstrates that appellant no longer suffers from residuals of his accepted June 11, 2001 employment injury. Appellant's left shoulder strain has resolved, and there is no indication that his current left shoulder condition is due to complications from the Office-approved April 1, 2008 surgery. As such, the Office properly terminated entitlement to wage-loss compensation and medical benefits effective November 2, 2009.

LEGAL PRECEDENT -- ISSUE 3

The Office has the discretion to reopen a case for review on the merits.[21] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[22] When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application without reopening the case for a review on the merits.[23]

ANALYSIS -- ISSUE 3

Appellant requested reconsideration utilizing the appeal request form that accompanied the November 2, 2009 decision. His November 23, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Therefore, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[24] Appellant also failed to satisfy the third requirement under section 10.606(b)(2).[25] He did not submit any relevant and pertinent new evidence with his November 23, 2009 request for reconsideration. Although

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[21] 5 U.S.C. § 8128(a).

[22] 20 C.F.R. § 10.606(b)(2).

[23] *Id*. at § 10.608(b).

[24] *Id*. at § 10.606(b)(2)(i) and (ii).

[25] *Supra* note 24.

Dr. McFarland's November 20, 2009 report was not previously of record, his latest report did not specifically address the relevant issue of whether appellant had any ongoing residuals attributable to his June 11, 2001 employment injury. He indicated that appellant had recently undergone a fairly extensive operation due to significant deficits in his shoulder "from a work-related accident." When he first examined appellant on October 17, 2007, Dr. McFarland only referenced a 1991 work-related accident where appellant reportedly fell six floors. Because his most recent report did not specifically mention appellant's June 11, 2001 employment injury, it is unclear which "work-related accident" Dr. McFarland is referring to. Absent reference to the June 11, 2001 employment injury, Dr. McFarland's report is not relevant to the issue on reconsideration. Consequently, appellant is not entitled to a review of the merits of his claim.[26]

CONCLUSION

The Office properly denied appellant's request for additional surgery for his left shoulder condition. It also properly terminated his wage-loss compensation and medical benefits effective November 2, 2009. The Board further finds that the Office properly denied appellant's November 23, 2009 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the December 23, November 2 and September 14 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 11, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[26] *Supra* note 23.