

File Number:
HR12-D-H

RECEIVED JAN 14 2013

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

JAN - 7 2013

Date of Injury:
Employee:

Dear :

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 10/10/2012. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,



Carol E. Adams
Hearing Representative

PAUL FELSER
ESQ.
P O BOX 10267
SAVANNAH, GA 31412

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

U S. DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of _____, claimant; Employed by the _____; Case number _____.
A telephone hearing was held on October 10, 2012.

The issue for determination is whether the Office correctly denied authorization of right shoulder arthroscopy surgery and right arthroscopy rotator cuff repair.

The claimant was employed with the _____ as a _____.
_____ filed a traumatic claim of injury for date of injury of _____. The claim was accepted for contusion of the face, closed fracture of the scapula and right shoulder rotator cuff rupture.

The record showed that the claimant had not worked since June 10, 2010. The record also showed that the claimant on August 23, 2010 had surgery for partial subscapularis right shoulder cuff tear, subacromial decompression of the right shoulder and intraarticular extensive debridement of the right shoulder.

On April 13, 2012 the Office received a request for another shoulder arthroscopy. The Office determined that the evidence was insufficient to support authorization of the surgery. Therefore, by letter dated April 17, 2012, the Office advised the claimant of the information that was needed to support that surgery was needed for _____ work injury of _____.

No new medical evidence was received.

By decision dated May 22, 2012, the request for arthroscopic surgery and right rotator cuff repair was denied on the basis that the medical evidence was insufficient to support that the surgery was needed for the work injury. The Office explained that the request was specifically denied because the evidence was not sufficient to establish that the medical condition was causally related to the accepted work event. The Office further explained that the reason that the surgery was denied was that she failed to provide a medical report from _____ physician, which included a complete and accurate history of her injury with medical rationale as to how _____ current complete right rotator cuff tear was due to _____ work injury. The Office advised that the evidence showed _____ had not worked since June 10, 2010 and _____ had a previous successful right rotator cuff surgery in 2010. The Office also advised the claimant that videotape and pictures taken by postal service investigators showed _____ was lifting over _____ work restrictions when shopping and while picking up dependents.

The claimant disagreed with the decision and requested, through attorney, a hearing before an OWCP representative.

A hearing was held on October 10, 2012. The claimant was represented by Attorney Paul Felser. The claimant was provided 30 days to submit medical evidence to support request for additional surgery.

A copy of the hearing transcript was sent to the employer for review. The employer was afforded time to submit comments or evidence. No comments or evidence was received.

A review of the evidence has been undertaken.

On March 7, 2012 the claimant was seen by . The claimant reported pain in right shoulder. The doctor ordered an MRI of the right shoulder with contrast.

On March 27, 2012 the claimant had an MRI, which showed that the claimant had a full-thickness tear of the supraspinatus tendon.

On April 2, 2012 the claimant was again seen by Dr. . The doctor reviewed the MRI and diagnosed the claimant with a recurrent full-thickness tear of the right shoulder rotator cuff. The doctor stated, "This tear is from original work-related injury."

On May 23, 2012 the claimant was seen for follow up by Dr. . The doctor noted in his report that the claimant had reported pain for the last three years. He also provided a history of the claimant's treatment and the surgery performed in 2010 on the right shoulder. In addition, he discussed the claimant's work status. The doctor again indicated the current tear was from her original work-related injury.

The Board has stated, with respect to consequential injuries, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though non employment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.¹ The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.² A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty

¹ S.S., 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

² *Charles W. Downey*, 54 ECAB 421 (2003); Larson, *The Law of Workers' Compensation* § 10.01 (December 2000).

and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.³

Post hearing a letter dated November 29, 2012 was received from Dr. [redacted] in which the doctor provided the following information:

I have reviewed the investigational video dated 10-27-2011 and 10-28-2011 regarding the above patient. I have received your request for my opinion regarding [redacted] work related condition and the pertinence of this video.

In review, [redacted] was involved in a work related motor vehicle collision on [redacted] ultimately underwent right shoulder arthroscopic rotator cuff repair by Dr. [redacted] August 23, 2010. FCE was obtained. [redacted] was placed on work restrictions. She saw Dr. [redacted] in Jesup for a second opinion in June 2011.

This video was subsequently recorded in October 2011. The video recording appears to be [redacted]. In the majority of the video [redacted] is seen walking with arm at [redacted] side. [redacted] also is seen lifting grocery bags from the buggy into the trunk of [redacted] car at waist level and below. [redacted] is seen forward elevating [redacted] arm while sitting in [redacted] car and appears to be manipulating the sun visor up and down.

First, I see no appreciable motion (abduction) of [redacted] shoulder in which the torn supraspinatus rotator cuff tendon would be placed under any strain. [redacted] torn supraspinatus is one of a few muscles that aids in lifting the arm away from the side of her body to shoulder level and above. This motion is considered shoulder abduction. With [redacted] side arm lifting of a grocery bag/milk/etc., from buggy level/waist level to an inferior position below into [redacted] trunk [redacted] is not using torn supraspinatus tendon.

I noticed a statement on the video that claims [redacted] stated: [redacted] could not lift milk. I doubt [redacted] could lift milk from a refrigerator (shoulder level or such with arm outstretched) without considerable pain and weakness, but [redacted] would be able to lift anything less than twenty pounds or so with [redacted] arm at [redacted] side/waist level. In my opinion, that statement was likely taken out of context based upon a misunderstanding of shoulder biomechanics.

Secondly, I see no repetitive overhead lifting with or without weight demonstrated in the video. Likewise, there is no fall demonstrated in the video. These would be types of activities/trauma which would be sufficient to cause a new injury.

[redacted] current injury is a continuation of the work injury on [redacted] and subsequent surgical procedure. In layman's terms this is not a new injury or new

³ See *Downey*, note 2.

tear. Rather it is incomplete healing from prior repair as documented on the MRI Arthrogram. This tear is from original work-related injury.

I see no convincing evidence in the October 2011 video that would depict any activity which would strain the torn supraspinatus tendon, much less cause a new injury. I see no convincing evidence in the video that would suggest was using arm in a manner that would be contrary to what is customarily assigned as shoulder limitations from an FCE standpoint.

In Larson, *The Law of Workers' Compensation* § 13.11 states: "When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results" and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

After reviewing the evidence, I find, although the decision at the time of issuance was correct, that the new medical report from Dr. is sufficient to support that the claimant's need for surgery is due to work injury. Therefore, the decision of the Office is reversed.

In accordance with the above findings, the decision of the Office dated May 22, 2012 is **reversed**. On return of the case record the Office should send a letter to the claimant authorizing surgery.

Date: JAN - 7 2013

Washington, D.C.



Carol E. Adams
Hearing Representative
for
Director, Office of Workers'
Compensation Programs