

**United States Department of Labor
Employees' Compensation Appeals Board**

S.B., Appellant

and

**DEPARTMENT OF THE NAVY, MILITARY
SEALIFT COMMAND, FPO, AE, Employer**

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**Docket No. 12-1144
Issued: November 5, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 30, 2012 appellant filed a timely appeal of the December 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective June 7, 2011.

¹ 5 U.S.C. § 8101 *et seq.*

² As appellant indicated that he was appealing from the termination decision, the Board will not review the November 15, 2011 schedule award decision on this appeal. *See* 20 C.F.R. § 501.3.

FACTUAL HISTORY

On December 11, 2006 appellant, then a 28-year-old wiper, filed an occupational disease claim alleging that on September 14, 2005 he realized that his right shoulder condition was caused by his federal employment. He stopped work on September 20, 2006. On December 14, 2006 appellant underwent arthroscopic surgery with rotator cuff repair and subacromial decompression of the right shoulder which was performed by Dr. Mark A. Bewley, an attending Board-certified orthopedic surgeon. On January 23, 2007 OWCP accepted his claim for a sprain of the right shoulder and upper arm, with rotator cuff syndrome and allied disorders of the right shoulder. It authorized appellant's February 25, 2010 arthroscopic surgery with subacromial decompression, distal clavicle resection and rotator cuff repair of the right shoulder which was performed by Dr. Bewley. OWCP paid him appropriate temporary total disability compensation.

By letter dated May 26, 2010, OWCP requested that Dr. Bewley complete an accompanying work capacity evaluation (Form OWCP-5c) if appellant was able to return to work with restrictions.

In a June 1, 2010 response, Dr. Bewley advised that appellant had not reached maximum medical improvement but could perform his regular work duties with no limitations. In medical reports dated July 23 and September 15, 2010, he noted appellant's complaint of pain along the biceps and anterior arm. Dr. Bewley listed essentially normal findings on physical examination with the exception of limited flexion of the right shoulder. He advised that appellant had persistent biceps tendinitis of the right shoulder following the February 2010 rotator cuff repair. On July 23, 2010 Dr. Bewley noted that appellant would undergo physical therapy. The reports from a physical therapist addressed appellant's right shoulder medical treatment on August 30 and September 14, 2010.

On September 24, 2010 OWCP issued a notice of proposed termination of wage-loss compensation and medical benefits based on Dr. Bewley's medical opinion that appellant had no employment-related disability. Appellant was afforded 30 days to submit additional evidence in response to the proposed termination.

In a September 29, 2010 report, Dr. Bewley reviewed the results of a functional capacity evaluation (FCE) which appellant underwent on September 24, 2010.³ He noted that it showed significant inconsistency of effort. Dr. Bewley listed essentially normal findings on physical examination of the right shoulder with the exception of pain along the pectoralis major and biceps anteriorly. He found that appellant had persistent right shoulder anterior pain after a rotator cuff repair. Dr. Bewley was functionally self-limited due to the pain. He stated that appellant did not appear to have any obvious functional deficit, however, it limited his abilities in response to pain and discomfort. Dr. Bewley released appellant to return to modified-duty work with no lifting over 10 pounds and pushing or pulling over 18 pounds. In an accompanying October 7, 2010 Form OWCP-5c, he further restricted appellant from reaching and reaching above the shoulder. Appellant could bend, stoop, squat and kneel two and a half to five hours a day. In an April 8, 2011 report, Dr. Bewley released appellant to return to regular-duty work on

³ The September 24, 2010 FCE found that appellant could perform sedentary work. Appellant was able to lift 10 pounds, push 18 pounds and pull 19 pounds.

that date. He determined that appellant had 11 percent impairment of the right upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009).

In a June 7, 2011 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the medical evidence submitted established that he could return to work with no limitations.

By letter dated July 7, 2011, appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative.

In reports dated September 14, 2011, Dr. Bewley advised that there were no changes in appellant's status from his prior evaluation. He was best suited for a position that did not involve repetitive lifting and lifting or carrying more than 20 pounds. The restrictions were permanent to avoid any further injury.

A report from another physical therapist addressed the treatment of appellant's right shoulder on March 23, 2011.

Unsigned treatment notes dated September 14, 2005 to March 23, 2011 addressed the treatment of appellant's right shoulder and ability to return to work with a lifting restriction.

In a December 19, 2011 decision, an OWCP hearing representative affirmed the June 7, 2011 decision, finding that, although the medical evidence of record established that appellant had permanent impairment due to the accepted work injury, it did not establish that he had any ongoing disabling residuals that prevented him from returning to work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.⁶

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

ANALYSIS

OWCP accepted that appellant sustained a sprain of an unspecified site of the right shoulder and upper arm, and rotator cuff syndrome and allied disorders of the right shoulder while in the performance of duty. Appellant received monetary compensation after he stopped work. OWCP terminated his wage-loss compensation and medical benefits based on the medical opinion of Dr. Bewley, appellant's attending physician.

In a June 1, 2010 Form OWCP-5c, Dr. Bewley stated that appellant could perform his regular work duties with no restrictions. However, in subsequent reports dated July 23 through September 29, 2010 and an October 7, 2010 Form OWCP-5c, he found that appellant had persistent biceps tendinitis and anterior pain in the right shoulder following his February 2010 rotator cuff repair. Dr. Bewley listed limitations due to the ongoing right shoulder pain. Prior to the June 7, 2011 termination decision, he did not offer an affirmative opinion that all employment-related residuals had ceased. Rather, Dr. Bewley's treatment notes advised that appellant had work limitations due to residuals of the accepted right upper extremity condition. An April 18, 2011 treatment note marked a box that appellant could return to regular duty while noting he had 11 percent permanent impairment of his right arm. To be of probative value, a physician's opinion should be one of reasonable medical certainty.⁷ The Board finds that OWCP has failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits based on Dr. Bewley's reports of record. They do not establish that all residuals of the accepted condition had ceased.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 7, 2011.

⁷ See *Beverly R. Jones*, 55 ECAB 411 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 5, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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