

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

P.B., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. CORPS
OF ENGINEERS, Haddon Height, NJ, Employer**

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**Docket No. 12-1225
Issued: November 19, 2012**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 15, 2012 appellant, through his attorney, filed a timely appeal from the January 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation. 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.

ISSUE

The issue is OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 4, 2012 on the grounds that he did not have residuals of his December 7, 2004 work injury after that date.

FACTUAL HISTORY

OWCP accepted that on December 7, 2004 appellant, then a 63-year-old engineer, sustained an aggravation of a right shoulder strain when he lost his balance, tried to grab a desk

¹ 5 U.S.C. §§ 8101-8193.

and fell to the floor at work. He stopped work on December 7, 2004 and did not return. On February 17, 2005 appellant underwent right shoulder surgery including subacromial decompression, supraspinatus repair and debridement of the labrum. This surgery was authorized by OWCP.

In a June 6, 2006 report, Dr. I. Ahmad, a Board-certified orthopedic surgeon serving as an OWCP referral physician, diagnosed right shoulder sprain, surgical repair of the right shoulder and prior muscle dystrophy and degenerative changes. He stated that appellant had preexisting degenerative changes and muscle dystrophy without aggravation of this condition as a result of the December 7, 2004 work incident. Dr. Ahmad opined that appellant's accepted right shoulder strain condition had resolved.

In an August 16, 2006 report, Dr. Marc W. Urquhart, an attending Board-certified orthopedic surgeon, diagnosed right shoulder impingement, rotator cuff tear and peripheral neuropathy. He stated that appellant had pain and weakness bilaterally in his upper and lower extremities with unstable gait, unsteadiness and fear of walking and falling while walking. Dr. Urquhart noted that appellant continued to have residuals of his December 7, 2004 work injury.

OWCP found that there was a conflict in medical opinion between Dr. Ahmad and Dr. Urquhart as to whether appellant's condition continued to be causally related to the December 7, 2004 work injury and whether he remained disabled as a result of the injury. It referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. In an October 2, 2006 report, Dr. Fries indicated that appellant had recovered well from his accepted right shoulder injury with surgical repair and had reached maximum medical improvement with some weakness and loss of motion. He opined that appellant was disabled from employment due to his progressive muscular degenerative disorder but not as a result of the fall and shoulder injury. Dr. Fries opined that the work injury did not have any effect on appellant's progressive widespread muscle disease which included muscle weakness of both shoulders.

On August 22, 2007 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Fries. However, after further development of the evidence, it decided not to terminate appellant's compensation at that time.

On March 10, 2010 Dr. Urquhart advised that appellant had permanent loss of strength and motion of his right shoulder related to his December 7, 2004 work injury. He noted that the injury and underlying neurological condition rendered him totally disabled from work.

In a January 28, 2011 report, Dr. Stanley Askin, a Board-certified orthopedic surgeon and an OWCP referral physician, discussed appellant's medical history and reported examination findings. He noted that appellant had winging of both shoulder blades with visible atrophy of his right deltoid and indicated that he was weaker than normal in both arms but especially in his right deltoid, trapezius and triceps. In response to the question of whether appellant had residuals of his December 7, 2004 work injury, Dr. Askin stated: "The definition of a sprain is a partial tear of a ligament. If indeed [appellant's] condition was accepted as or limited to sprains of the shoulder, such have resolved." He also indicated that appellant's muscle wasting disorder

was “the main reason why he would be incapable of functioning which seems to me to be the sole reason why he cannot be expected to function in his former capacity.” Dr. Askin also indicated that appellant was substantially past the normal age of retirement. He posited that the fact that a rotator cuff was found after December 7, 2004 did not mean that it was due to the work injury because rotator cuff tears were common at appellant’s age. Dr. Askin indicated that appellant could perform sedentary work but noted that “any expectation for him to stand or walk or perhaps even function without wheelchair or power scooter would not be practically expected of [appellant] at this stage.” He further stated: “There is no treatment that is warranted or necessary. Once again, [appellant’s] most significant and limiting condition is the muscle wasting disease for which there is no apparent treatment. Other than addressing the muscle wasting disease, there is nothing imaginable that will make [him] more functional.”

On February 9, 2011 Dr. Urquhart examined appellant and opined that his right rotator cuff tear was related to the December 7, 2004 work injury. He noted that appellant had an underlying neurological condition, which exacerbated his weakness and concluded that he was totally disabled due to his right shoulder condition and his neurological condition.

In an April 21, 2011 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on the January 28, 2011 report of Dr. Askin. It provided appellant 30 days to challenge the proposed termination.

In an April 28, 2011 letter, appellant’s counsel argued that Dr. Askin’s January 28, 2011 report was not well reasoned with respect to the question of continuing work-related residuals. He asserted that the statement of accepted facts did not clearly indicate that appellant’s right shoulder surgery was approved by OWCP and opined that the evidence did not support that appellant had recovered from his work injury or that his disability was solely due to his preexisting condition.

OWCP requested that Dr. Askin provide a supplemental report clarifying whether appellant continued to have any residuals of the work injury of December 17, 2004 or the authorized right shoulder surgery of February 17, 2005.

In a May 25, 2011 report, Dr. Askin stated that appellant’s muscle wasting was a supervening problem that overwhelmed any potential lingering effect of the February 17, 2005 surgery. He stated that rotator cuff tears are “nearly ubiquitous” in individuals approaching retirement age. Dr. Askin indicated that there was no work-related reason that appellant would be limited in his employment, although his preexisting condition meant that he would have to use a wheelchair or scooter at work. In response to whether appellant had residuals of his December 7, 2004 work injury or only suffered from the preexisting muscle wasting condition or normal deterioration with age, appellant stated:

“In response, [appellant’s] muscle wasting condition, not to mention the fact that he is a number of years older, constitute a significant supervening processes which overwhelm any potential lingering effect of the accepted work injury. It is my considered opinion, again with the intention that my responses have been bound by the statement of accepted facts, that [appellant’s] most significant

limitations are those imposed by his neurologic condition (the muscle wasting disorder).”

In a June 20, 2011 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on the opinion of Dr. Askin. Appellant was allowed 30 days to provide additional evidence or information. Counsel again responded and asserted that the proposed termination was improper.

In an August 4, 2011 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective August 4, 2011 based on the opinion of Dr. Askin.

Appellant requested a hearing with an OWCP hearing representative. During the November 17, 2011 hearing, counsel continued to argue that appellant still had residuals of his December 7, 2004 work injury. He acknowledged that appellant did have a preexisting muscular disorder but opined that OWCP failed to show that the work injury did not contribute in any way to his current condition and disability.

In a January 30, 2012 decision, an OWCP hearing representative affirmed OWCP’s termination of appellant’s wage-loss compensation and medical benefits effective August 4, 2012.

LEGAL PRECEDENT

Once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS

OWCP accepted that on December 7, 2004 appellant sustained an aggravation of a right shoulder strain when he lost his balance, tried to grab a desk and fell to the floor at work. Appellant stopped work on December 7, 2004 and did not return. On February 17, 2005 he underwent right shoulder surgery including subacromial decompression, supraspinatus repair and debridement of the labrum. This surgery was authorized by OWCP.

In an August 4, 2011 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective August 4, 2011 based on the opinion of Dr. Askin, a Board-certified orthopedic surgeon who served as an OWCP referral physician. On January 30, 2012 an OWCP hearing representative affirmed this determination.

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The Board finds that the opinion of Dr. Askin is not sufficiently well rationalized to serve as a basis to terminate appellant's wage-loss compensation and medical benefits effective August 4, 2011.

In a January 28, 2011 report, Dr. Askin noted that appellant had winging of both shoulder blades with visible atrophy of his right deltoid and indicated that he was weaker than normal in both arms but especially in his right deltoid, trapezius and triceps. In response to the question of whether appellant had residuals of his December 7, 2004 work injury, Dr. Askin stated: "The definition of a sprain is a partial tear of a ligament. If indeed [appellant's] condition was accepted as or limited to sprains of the shoulder, such have resolved." He also indicated that appellant's muscle wasting disorder was "the main reason why he would be incapable of functioning which seems to me to be the sole reason why he cannot be expected to function in his former capacity." Dr. Askin further stated: "There is no treatment that is warranted or necessary. Once again, his most significant and limiting condition is the muscle wasting disease for which there is no apparent treatment."

OWCP properly found that the January 28, 2011 report of Dr. Askin was vague regarding the question of whether appellant continued to have residuals of his December 7, 2004 work injury. Dr. Askin seemed to question the acceptance of appellant's claim for aggravation of a right shoulder sprain and left open the possibility that at least some portion of appellant's medical condition and disability was related to the December 7, 2004 work injury. OWCP sent Dr. Askin a letter asking him to provide a supplemental report clarifying whether appellant continued to have any residuals of the work injury of December 7, 2004 or the authorized right shoulder surgery of February 17, 2005.

In a May 25, 2011 report, Dr. Askin responded to OWCP's request, but his comments were vague with respect to the question of whether appellant continued to have any residuals of the December 7, 2004 work injury. In response to a question regarding whether appellant had residuals of his December 7, 2004 work injury or only suffered from the preexisting muscle wasting condition or normal deterioration with age, he stated that his muscle wasting condition, not to mention the fact that he was a number of years older, constituted a significant supervening process which overwhelmed any potential lingering effect of the accepted work injury. He also stated: "[Appellant's] most significant limitations are those imposed by his neurologic condition (the muscle wasting disorder)." By indicating that appellant's "most significant limitations" were due to the preexisting muscle disorder, Dr. Askin continued to suggest that at least a portion of appellant's medical condition and disability were related to the December 7, 2004 work injury.

The record also contains evidence which suggests that appellant continued to have work-related residuals. On February 9, 2011 Dr. Urquhart, an attending Board-certified orthopedic surgeon, examined appellant and opined that his right rotator cuff tear was related to the December 7, 2004 work injury. He noted that appellant had an underlying neurological condition, which exacerbated his weakness and concluded that he was totally disabled due to his work-related right shoulder condition and his neurological condition.

For these reasons, OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 4, 2012.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 4, 2012 on the grounds that he did not have residuals of his December 7, 2004 work injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 19, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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