



appellant's compensations benefits.<sup>2</sup> The Board also set aside decisions dated October 31 and December 4, 2006 and June 13, 2007 denying her request for expansion of her claim to include a cervical condition and authorization for treatment for her cervical condition due to an unresolved conflict in the medical opinion evidence. The Board found an unresolved conflict in medical opinion between Dr. Mark A.P. Filippone,<sup>3</sup> a Board-certified physiatrist, and Dr. A.R. Sayed Bakhaty,<sup>4</sup> a physician, for appellant and Dr. Zohar Stark,<sup>5</sup> a second opinion Board-certified orthopedic surgeon, as to whether appellant's ongoing residuals and disability were due to her accepted right shoulder contusion and labral tear and whether her diagnosed cervical disc disease was caused or contributed to by the May 22, 2001 employment injury. In the second appeal on September 8, 2010, the Board reversed OWCP's decisions dated July 30, 2008 and February 19, 2009 with respect to the termination of appellant's benefits.<sup>6</sup> The Board found the evidence of record to contain inadequate documentation pertaining to the selection of Dr. Robert Dennis, a Board-certified orthopedic surgeon, as the impartial medical specialist. The Board also found that the case was not in posture for a decision as to whether appellant's claim should be expanded to include a cervical condition and authorization for treatment of her cervical condition due to an unresolved conflict in the medical opinion evidence. The history of the case from the prior decisions is hereby incorporated by reference.<sup>7</sup>

On remand, OWCP placed appellant on the periodic rolls for temporary total disability following her election to receive benefits under FECA.

On March 24, 2011 Dr. Bakhaty reported that appellant continued to complain of right shoulder and neck pain. Diagnoses included: post-traumatic tension headache; post-traumatic cervical radiculopathy; post-traumatic cervical facet joint pain syndrome; status post right shoulder surgery with partial improvement followed by a recurrence of pain; status post-traumatic cervical disc herniation with some improvement after fusion surgery followed by a

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<sup>2</sup> Docket No. 07-2311 (issued April 22, 2008).

<sup>3</sup> Dr. Filippone diagnosed right shoulder pain, right cervical paraspinal pain and C5-6 cervical radiculopathy which he attributed to her employment injury.

<sup>4</sup> Dr. Bakhaty diagnosed right-sided C5-6 radiculopathy, C5-6 post-traumatic disc bulge, post-traumatic myofascial syndrome, post-traumatic right shoulder tendinitis with persistent complaints following surgery, which he attributed to her employment injury.

<sup>5</sup> Dr. Stark concluded that appellant had no disability attributable to the May 22, 2001 employment injury. He attributed her ongoing symptoms to her cervical spine degenerative disc disease, which was not caused or aggravated by the employment injury.

<sup>6</sup> Docket No. 09-1361 (issued September 8, 2010).

<sup>7</sup> On May 22, 2001 appellant, then a 31-year-old corrections officer, filed a traumatic injury claim alleging that she injured her right shoulder on that date while shooting a shotgun. OWCP accepted the claim for right shoulder contusion and labral tear and authorized right shoulder arthroscopic surgery, which occurred on October 20, 2005. Appellant was reassigned to a secretarial position effective November 12, 2001. OWCP accepted her June 8 and September 8, 2005 recurrence claims. Appellant was released to full-duty work on January 6, 2006 by Dr. Lawrence I. Barr, a treating osteopath. On October 10, 2006 OWCP placed appellant on the periodic rolls for temporary total disability.

recurrence of her symptoms; and status post work-related May 22, 2001 injury with persistent chronic complaints of acute exacerbation following right shoulder and neck fusion surgeries.

On April 15, 2011 OWCP referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, and Dr. Saeid Alemo-Hammad, a Board-certified neurological surgeon, for second opinion evaluations as to whether her claim should be expanded to include a cervical condition, whether she had any disability due to her accepted conditions and whether her accepted conditions had resolved.

In a May 13, 2011 report, Dr. Askin, based upon a review of the medical evidence, statement of accepted facts, medical history and physical examination, diagnosed right shoulder contusion and right shoulder labral tear. He related that appellant was involved in an automobile accident on April 2, 2011. Right shoulder range of motion included 150 degrees abduction and 160 degrees forward flexion. Dr. Askin reported scapulothoracic motion was without winging and crepitus; a negative Neer/Hawkins test; 45 degrees bilateral cervical rotation; and 15 degrees cervical extension. He concluded that appellant no longer had any residuals or disability due to the accepted conditions of right shoulder contusion and labral tear. In support of this conclusion, Dr. Askin noted the lack of any objective test results or clinical findings. He also opined that appellant's claim should not be expanded to include a spinal condition.

In a May 16, 2011 report, Dr. Alemo-Hammad, based upon a review of the medical evidence and history, statement of accepted facts and physical examination, diagnosed bilateral C2-3 cephalgia, status post C4-5 and C5-6 anterior cervical discectomy and fusion, symptomatic cervical facet joint arthropathy, symptomatic Arnold-Chiari malformation and status post right shoulder arthroscopy and treatment for supraspinatus and biceps tendinitis and right shoulder labral tear. He opined that appellant's cervical condition was unrelated to the accepted May 22, 2001 employment injury based on the lack of any supporting study. Dr. Alemo-Hammad also opined that appellant no longer had any residuals or disability due to her employment-related cervical condition as it had resolved.

On May 26, 2011 OWCP issued a notice proposing to terminate appellant's compensation benefits based on the second opinion reports from Drs. Askin and Alemo-Hammad who found that appellant no longer had any residuals or disability due to her accepted employment injury.

By decision dated June 27, 2011, OWCP finalized the termination of appellant's compensation benefits effective July 3, 2011.

In a June 30, 2011 letter, appellant's counsel requested an oral hearing before an OWCP hearing representative, which was held on October 11, 2011.

On July 12, 2011 OWCP received a June 23, 2011 report from Dr. Filippone who provided physical findings and opined that appellant's cervical radiculopathy should be included as an accepted condition due to her May 22, 2001 employment injury.

By decision dated November 23, 2011, the hearing representative vacated the termination of benefits as he found an unresolved conflict in the medical opinion evidence on the issues of

whether appellant continued to have residuals and disability due to her accepted May 22, 2001 employment injuries and whether the claim should be expanded to include a cervical condition.

On January 25, 2012 OWCP referred appellant to Dr. Stuart L. Trager, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Filippone and Bakhaty, for appellant and Drs. Askin<sup>8</sup> and Alemo-Hammad on the issues of whether appellant had any continuing disability due to her accepted employment injury and her diagnosis.

In a February 22, 2012 report, Dr. Trager, based upon a review of the medical evidence, statement of accepted facts and physical examination, opined that appellant's cervical condition was unrelated to her accepted May 22, 2001 employment injury and her accepted right shoulder injury had resolved with no residuals. Physical findings included bilateral shoulder flexion to 140 degrees, right shoulder 120 degrees abduction, negative impingement sign and severely limited cervical range of motion. Dr. Trager stated that he believed that it was not possible to establish that appellant's cervical condition was related to the employment injury. In support of this conclusion, he noted that at the time of the injury there were no initial findings or complaints regarding her neck. As there were no neck complaints or findings made immediately following appellant's employment injury, Dr. Trager concluded that the evidence of record was insufficient to establish that she sustained a neck condition as a result of the employment injury. In support of this conclusion, he noted the lack of any symptoms or findings following her injury and the comprehensive work-up from Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, negating any neck condition. Dr. Trager further opined that appellant's shoulder injury had resolved based on her release to full-duty work in 2006 based on a finding of full range of motion in her shoulder. Lastly, he opined that she had no disability or residuals from her accepted right shoulder conditions which would preclude her from working.

By decision dated March 8, 2012, OWCP terminated appellant's compensation benefits effective that day.

On March 15, 2012 appellant's counsel requested an oral hearing before an OWCP hearing representative, which was held on June 6, 2012.

In a March 30, 2012 report, Dr. Filippone provided physical findings and reiterated his opinion that appellant's cervical condition was a result of her accepted May 22, 2001 employment injury. He also opined that her benefits should not be terminated as she continued to have residuals and disability as a result of her accepted May 22, 2001 employment injury.

By decision dated August 6, 2012, the hearing representative affirmed the March 8, 2012 termination decision.

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<sup>8</sup> OWCP incorrectly identified one of the second opinion physicians creating the conflict as St. Stark.

## LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>9</sup> It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>10</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>11</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>12</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>13</sup>

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>14</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>15</sup>

## ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective March 8, 2012. The accepted conditions are right shoulder condition and labral tear. OWCP properly determined that a conflict in medical evidence had been created between the opinions of appellant's treating physician, Dr. Filippone and Dr. Bakhaty and Dr. Askin and Dr. Alemo-Hammad, OWCP referral physicians, regarding whether appellant had residuals of the accepted conditions, pursuant to 5 U.S.C. § 8123(a). It referred appellant to Dr. Trager, Board-certified in orthopedic surgery, for an impartial medical evaluation.

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<sup>9</sup> *S.F.*, 59 ECAB 642 (2008); *I.J.*, 59 ECAB 408 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

<sup>10</sup> *I.J.*, *id.*; *J.M.*, 58 ECAB 478 (2007); *Elsie L. Price*, 54 ECAB 734 (2003); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>11</sup> *See T.P.*, 58 ECAB 524 (2007); *J.M.*, *id.*; *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>12</sup> *T.P.*, *id.*; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>13</sup> *T.P.*, *supra* note 11; *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *James F. Weikel*, 54 ECAB 660 (2003); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>14</sup> 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>15</sup> *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

OWCP accepted that appellant's May 22, 2001 employment incident caused a right shoulder condition and labral tear. Appellant's compensation benefits were terminated effective March 8, 2012 based upon the opinion of the impartial medical specialist, Dr. Trager. On August 6, 2012 an OWCP hearing representative affirmed the March 8, 2012 decision terminating her compensation and the determination that her cervical condition was unrelated to the accepted May 22, 2001 employment injury. The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation.

Dr. Trager conducted an impartial medical examination on February 22, 2012 as well as reviewing appellant's history of injury and medical history. He diagnosed a right shoulder condition and labral tear based on appellant's employment injury and medical history. Dr. Trager concluded that there was no objective evidence supporting any disability due to her accepted right shoulder condition particularly as she had been released to full duty by her physician. Moreover, he noted that appellant had a full range of motion in her right shoulder and that any employment-related disability or residuals had resolved.

The Board finds that Dr. Trager's report is entitled to the special weight of the medical evidence. Dr. Trager provided a detailed report reviewing the medical records and physical examination findings. He explained why he determined that appellant's right shoulder conditions had resolved based on her release to full-duty work in 2006 by her then treating physician. Dr. Trager opined that she was not disabled from working due to right shoulder conditions as the accepted employment injury had resolved. As his report is based on a proper factual history and provided findings and medical reasoning, supporting his conclusions, the Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits.

On appeal, counsel asserts that Dr. Trager's opinion was insufficiently rationalized to represent the weight of the medical evidence. As found above, Dr. Trager's opinion was entitled to the special weight of the medical evidence of an impartial medical examiner as it was detailed, well rationalized and based on a complete factual and medical history.

Counsel also argued that the statement of accepted facts was flawed as it failed to accurately describe the physical requirements of appellant's position or note her cervical and shoulder surgeries. The Board finds that the statement of accepted facts was not incomplete and properly identified appellant's accepted conditions, surgery related to her accepted shoulder injury, her date-of-injury position and work history. In the February 22, 2012 report, Dr. Trager acknowledged her employment and medical history and noted the medical reports he reviewed. The Board further finds that appellant was not deprived of due process. OWCP provided a pretermination notice to appellant before terminating her compensation in its June 27, 2011 decision. An OWCP hearing representative found a conflict in the medical opinion evidence on November 23, 2011 and instructed appellant to be placed back on the periodic rolls. Appellant was on notice regarding the possibility that her benefits would be terminated based on the referral for an impartial medical examination.

## LEGAL PRECEDENT -- ISSUE 2

A claimant seeking benefits under FECA<sup>16</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,<sup>17</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>18</sup>

The evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>19</sup> The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.<sup>20</sup>

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>21</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>22</sup>

## ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that she has any additional medical conditions causally related to her accepted injury. OWCP accepted that she sustained a right shoulder contusion and labral tear as a result of the accepted employment related May 22, 2001 shooting a gun. Appellant contends that she also sustained a cervical condition as a result of the accepted employment injury. The Board finds that appellant failed to establish that her claim should be expanded to include a cervical condition

As noted above, OWCP properly determined that a conflict in medical evidence had been created between the opinions of appellant's treating physician, Dr. Filippone and Dr. Bakhaty

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<sup>16</sup> 5 U.S.C. §§ 8101-8103.

<sup>17</sup> *C.B.*, Docket No. 08-2268 (issued May 22, 2009); *J.P.*, 59 ECAB 178 (2007); *Amelia S. Jefferson*, 57 ECAB 183 (2005)

<sup>18</sup> *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *G.T.*, 59 ECAB 447 (2008); *Frankie A. Farinacci*, 56 ECAB 723 (2005); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>19</sup> *W.D.*, Docket No. 09-658 (issued October 22, 2009); *T.H.*, 59 ECAB 388 (2008); *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Thomas L. Agee*, 56 ECAB 465 (2005).

<sup>20</sup> *D.U.*, Docket No. 10-144 (issued July 27, 2010); *D.G.*, 59 ECAB 734 (2008); *Donald W. Wenzel*, 56 ECAB 390 (2005).

<sup>21</sup> *Supra* note 13.

<sup>22</sup> *Supra* note 14.

and Dr. Askin and Dr. Alemo-Hammad, OWCP referral physicians, regarding whether appellant's claim should be expanded to include a neck condition. It referred appellant to Dr. Trager, Board-certified in orthopedic surgery, for an impartial medical evaluation.

Dr. Trager's extensive review of the medical records led him to opine that her neck condition was unrelated to the accepted employment injury. He concluded, based upon his physical examination and a review of the objective and medical evidence, including an extensive workup performed by Dr. Cohen, that appellant's neck condition was not attributable to the accepted May 22, 2001 employment injury. Dr. Trager also noted the lack of any neck complaints or findings immediately following the injury as additional support for his conclusion that her neck condition was unrelated to the accepted May 22, 2001 employment injury.

The Board finds that Dr. Trager's report was entitled to the special weight of the medical evidence. Dr. Trager provided a detailed report reviewing the medical records and physical examination findings. He provided reasoning as to why he found appellant's cervical condition to be unrelated to the accepted May 22, 2001 employment injury. Dr. Trager's report is sufficient to carry the weight of an independent medical specialist. It is based on a proper factual history, provided findings and medical reasoning, supporting his conclusions. As such, the Board finds that appellant failed to meet her burden of proof to establish that her claim should be expanded to include a neck condition.

After Dr. Trager's examination appellant submitted a March 30, 2012 report from Dr. Filippone, who reiterated his opinion that appellant's cervical condition was a result of her accepted May 22, 2001 employment injury and that her benefits should not be terminated. Dr. Filippone was on one side of the conflict that Dr. Trager resolved and this report is insufficient to overcome that of Dr. Trager or to create a new medical conflict.<sup>23</sup> Consequently, the medical evidence submitted after Dr. Trager's report is insufficient to overcome his report or to create another conflict in the medical evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective March 2012. The Board further finds that she failed to establish that she sustained cervical condition causally related to the May 22, 2001 employment injury.

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<sup>23</sup> See *S.J.*, Docket No. 09-1794 (issued September 20, 2010) (submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict). See also *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 6, 2012 is affirmed.

Issued: July 24, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board