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

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| **B.J., Appellant**<br><br>**and**<br><br>**U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer** | ) | **Docket No. 13-1157**<br>**Issued: May 15, 2014** |

*Appearances:*
*Richard A. Daniels*, 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
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On April 12, 2013 appellant, through his attorney, filed a timely appeal from a February 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

### ***ISSUES***

The issues are: (1) whether appellant established total disability for the period September 2001 to May 2010 due to his accepted conditions; and (2) whether OWCP abused its discretion by denying appellant authorization for surgery.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant on April 24, 2013 to confirm his continuing desire for an oral argument in Washington, DC. No written confirmation was received within the time allotted; thus, the Board, in its discretion, has decided the appeal on the record.

## ***FACTUAL HISTORY***

The record reveals that appellant, then a 41-year-old mail processor, had a previously accepted traumatic injury claim for a June 27, 1997 injury.[3] OWCP accepted the claim for cervical strain and expanded the claim to include a herniated disc at C6-7. Appellant stopped work and underwent cervical surgery in September 2000. He returned to work in January 2001 and stopped work again in May 2001. On March 2, 2005 appellant was removed from employment.

Appellant filed multiple occupational disease claims alleging that he developed various bilateral upper extremity conditions, including bilateral carpal tunnel syndrome and thoracic outlet syndrome, as a result of continuous straining motions and overhead reaching, lifting, turning and twisting at work. He indicated that he first became aware of his condition on or about November 7, 2003.

In a November 7, 2003 nerve conduction velocity (NCV) and electromyography (EMG) study, Dr. Harvey B. Pats reported an abnormal NCV of the upper extremities that was consistent with rather significant brachial plexus neuropathies. He stated that the possibility of thoracic outlet syndrome could not be excluded. Dr. Pats opined that these conditions were most likely due to a traction injury related to the 1997 work injury. He reported that appellant's EMG was normal but explained that the study did not rule out the presence of compressive or traction neuropathies.

In reports dated from March 30, 2004 to March 2, 2006, Dr. George Pirpiris, an orthopedic surgeon, reviewed appellant's history and conducted an examination. He observed an abnormal thoracic outlet test with the arm abducted and pain and muscle weakness in the shoulder blade area and scapula. Dr. Pirpiris diagnosed thoracic outlet syndrome and explained that the findings of thoracic outlet could be a long time before they show up in injuries of this kind, sometimes maybe two or three years. He opined that the injuries appellant sustained were from the very beginning related to the June 27, 1997 employment injury. In a January 13, 2005 attending physician's report, Dr. Pirpiris checked "yes" that appellant's thoracic outlet syndrome was caused or aggravated by an employment activity. He indicated that appellant was totally disabled from December 2, 2004 to February 28, 2005.

In April 21 and June 17, 2004 and May 10, 2006 reports, Dr. Avraam Karas, a Board-certified cardiac and thoracic surgeon, described the June 1997 employment injury and noted that appellant underwent cervical fusion in September 2000 but continued to be symptomatic. He related appellant's complaints of severe tightness in his neck, mid-cervical pain radiating to the occipital area and severe pain in his left shoulder. Upon examination, Dr. Karas observed severe sensitivity on both sides of the pectoral muscles and extreme pain and sensitivity of the supraclavicular fossa. Adson's sign and Roos's tests were positive on both sides. Dr. Karas diagnosed cervical disc disease, status postcervical fusion, ulnar neuropathy bilaterally, bilateral carpal tunnel syndrome and severe bilateral thoracic outlet syndrome. He recommended appellant undergo another magnetic resonance imaging (MRI) scan and consider surgical treatment, such as transaxillary resection of the first rib. In a May 10, 2006 report, Dr. Karas

[3] File No. xxxxxx505.

explained that when appellant became symptomatic after the initial injury it was initially thought that it was due to the cervical disc disease, but the fact that his symptoms did not improve after the cervical fusion confirms the diagnosis of thoracic outlet syndrome. He concluded that appellant's bilateral thoracic outlet syndrome was a direct result of the June 22, 1997 occupational injury.

In reports dated January 7, 2007 to January 19, 2009, Dr. Constantine A. Misoul, a Board-certified orthopedic surgeon, examined appellant, reviewed his records and agreed with Dr. Karas's May 10, 2006 report. He noted that appellant worked as a mail processor for many years and underwent cervical fusion in September 2000. Upon examination of the cervical spine, Dr. Misoul observed tenderness anteriorly and posteriorly and lateral bending and rotation with stiffness and pain. Tinel's sign, Adson's, and Roos' maneuvers were positive. Dr. Misoul diagnosed bilateral thoracic outlet syndrome and persistent cervical radiculopathy. He opined that appellant had occupational bilateral thoracic outlet syndrome as a result of his years of work as a mail processor, which became symptomatic as a result of a particular June 27, 1997 incident. In a November 26, 2007 report, Dr. Misoul recommended that appellant be evaluated by Dr. Karas in order to discuss the possibility of surgery. In an April 7, 2008 report, he stated that appellant could not perform his regular work at the employing establishment due to his June 27, 1997 employment injury and work-related bilateral thoracic outlet syndrome.

On February 26, 2009 OWCP accepted appellant's claim for aggravation of thoracic outlet syndrome.

On February 26, 2009 OWCP also referred appellant's claim, along with a statement of accepted facts and medical records, to a district medical adviser to determine whether thoracic outlet surgery was medically necessary to treat the effects of appellant's employment injury.

In a February 26, 2009 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and district medical adviser, reviewed appellant's records and noted that he worked as a mail processor which required loading ledges, working on a machine, and keying in numbers on a computer. He reported that although the accepted condition was aggravation of thoracic outlet syndrome he did not believe that it was the correct diagnosis. Dr. Berman recommended that a new MRI scan and repeat EMG/NCV study be performed of the cervical spine. He concluded that based on the material at hand he could not recommend surgery because all previous studies were four to five years old.

On March 10, 2009 appellant filed a claim for disability compensation for the period November 7, 2003 to March 31, 2009.

By letter dated March 27, 2009, OWCP advised appellant that the medical evidence on file was insufficient to support that he was totally disabled from November 7, 2003 to March 31, 2009 as a result of his work-related conditions.

Appellant submitted additional reports by Dr. Pirpiris. In attending physician's reports dated from October 4, 2000 to June 1, 2007, Dr. Pirpiris related the June 27, 1997 work injury and noted diagnoses of cervical compressive disease and brachial neuropathy due to thoracic outlet syndrome. He stated that EMG findings were suggestive of abnormal conducting. Dr. Pirpiris checked "yes" that appellant's condition was caused or aggravated by the

employment activity. He reported that appellant was totally disabled from September 2001 to September 2007. Dr. Pirpiris noted that he recommended surgery for thoracic outlet syndrome release long ago because physical therapy did not help.

In a July 6, 2006 report, Dr. Pirpiris stated that, due to appellant's ongoing problems, he had not been released to return to work since his initial examination on September 6, 2001. He noted that he repeatedly tried to authorize the correction of thoracic outlet syndrome.

In an April 19, 2009 handwritten report, Dr. Pirpiris stated that appellant was under his care from September 6, 2001 to June 1, 2007. He noted that during this period appellant was not fit for his work and was excused from work through September 30, 2007.

In a March 31, 2009 EMG report, Dr. Mark A. Reischer, Board-certified in physical medicine and rehabilitation, noted that appellant was examined for neck and shoulder pain, upper extremity pain, tingling, numbness and weakness following a work-related accident. Upon physical examination, he observed symmetrically limited cervical motion and supraclavicular tenderness. Dr. Reischer reported that the results of the EMG and NCV were within normal limits. He concluded that the electrodiagnostic findings supported a diagnosis of right thoracic outlet syndrome with decreased amplitude at the ulnar and median anterior brachial cutaneous sensory evoked responses with no evidence of left-sided thoracic outlet syndrome.

On December 30, 2009 appellant requested to undergo revision of arm nerves, removal of rib, revision of neck muscle and exploration of artery surgeries.

OWCP referred appellant again to Dr. Berman, the district medical adviser, to determine whether the requested surgery was necessary to treat appellant's employment injuries. In a January 7, 2010 report, Dr. Berman stated that he reviewed appellant's medical records and noted that appellant's claim was accepted for cervical sprain and thoracic outlet syndrome. He related that he initially evaluated the claim on March 10, 2009 and had concluded that the thoracic outlet surgery was not medically needed for the effects of the work-related injury. Dr. Berman reported that there were no recent studies to justify the diagnosis of thoracic outlet syndrome. He opined that the diagnosis of thoracic outlet syndrome had not been established and that the diagnosis of thoracic outlet syndrome was incorrect. Dr. Berman stated that a November 7, 2009 neurological evaluation revealed bilateral ulnar nerve neuropathies and a vascular study showed some evidence of vascular compression, but concluded that there was no evidence that appellant had thoracic outlet syndrome and no objective basis to indicate surgery for thoracic outlet syndrome.

In a letter February 23, 2010, OWCP advised appellant that the medical adviser opined that there was no evidence that he had surgical indication for thoracic outlet syndrome and no evidence that he had thoracic outlet syndrome. It requested that he submit additional medical evidence supporting the necessity of the requested surgical procedures and a rationalized medical opinion from his treating physician which explained the causal relationship between appellant's thoracic outlet syndrome and factors of his employment.

In a letter dated April 22, 2010, OWCP further advised appellant that there was no medical evidence submitted to establish that he was disabled from work beginning November 7, 2003. It noted that under his previous traumatic injury claim he was taken out of

work until December 30, 2003 but was denied compensation for that claim. OWCP requested appellant to submit medical reports to support that he was unable to work during the claimed period as a result of his accepted conditions.

On May 5, 2010 OWCP referred appellant's case, along with a statement of accepted facts and the medical record, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant still had any residuals of his June 27, 1996 employment injury, whether the proposed surgical procedures were necessary to treat his accepted conditions and whether appellant was totally disabled beginning June 2001 as a result of his accepted work injuries.

In the statement of accepted facts dated May 5, 2010, OWCP stated that appellant had a previously accepted traumatic injury claim for cervical strain and herniated disc and a current occupational disease claim that was accepted for temporary aggravation of thoracic outlet syndrome.

In a May 21, 2010 report, Dr. Draper reviewed appellant's history and the statement of accepted facts. Examination of the cervical spine revealed that appellant had 40 degrees of turning the neck to the left and right and 20 degrees of right lateral flexion, left lateral flexion, forward flexion and extension of the cervical spine. Dr. Draper stated that throughout the range of motion and for most of the examination, appellant had exaggerated responses. Examination of the bilateral upper extremities revealed negative Tinel's sign over the median and ulnar nerve at the wrist and elbows bilaterally. Adson's test was also negative. Dr. Draper reported that appellant definitely did not have decreased sensation involving the right ring finger and the little finger for the hands bilaterally. He explained that there were absolutely no motor or sensory deficits in the upper extremities which would suggest or be compatible with thoracic outlet syndrome. Dr. Draper diagnosed herniated cervical disc C6-7 and status post cervical discectomy and fusion. He opined that the herniated cervical disc was related to the work injury but there was no evidence of carpal tunnel or thoracic outlet syndrome on either side. Dr. Draper concluded that there was no indication to perform further surgical procedures, particularly the removal of ribs, revision of neck muscles, and exploration of artery and veins, in order to treat thoracic outlet syndrome. He reported that total disability should cease and that appellant was capable of performing light duty with restrictions of no lifting more than 20 pounds occasionally and 10 pounds frequently.

In a September 21, 2010 letter, appellant's representative stated that appellant had been without wage-loss compensation since September 6, 2001. He opined that appellant was entitled to wage-loss compensation since that date and enclosed a Form CA-7 requesting disability compensation for the period September 6, 2001 to September 10, 2010.

In a decision dated December 23, 2010, OWCP denied authorization for appellant to undergo thoracic outlet surgery based on Dr. Draper and Dr. Berman's reports which established that the surgical procedures were not medically necessary.

In a letter dated December 28, 2010, appellant, through counsel, submitted a request for a hearing.

By decision dated March 18, 2011, an OWCP hearing representative vacated the December 23, 2010 OWCP decision and remanded the case for further development of the medical evidence. It determined that a conflict in medical opinion existed between OWCP's referral physicians, Drs. Draper and Berman, and appellant's physician, Dr. Karas, regarding whether surgery was medically necessary to treat appellant's accepted condition. OWCP remanded the case for referral to an impartial medical examiner.

On May 18, 2011 appellant submitted a claim for disability compensation for the period August 11, 2010 to May 14, 2011.

On May 11, 2011 OWCP referred appellant's case, along with the statement of accepted facts and the medical record, to Dr. Donald Burke Haskins, an orthopedic surgeon, for an impartial medical examination, to resolve the conflict in medical opinion between Dr. Karas, appellant's physician, and OWCP's referral physicians.

In a June 15, 2011 report, Dr. Haskins accurately described appellant's history and review of the records, including the May 5, 2010 statement of accepted facts (SOAF). He related appellant's current complaints of pain in his neck, arm and shoulders and difficulty lifting his arms above shoulder height. Examination of the cervical spine revealed a well-healed anterior cervical scar with no tenderness or deformity. Dr. Haskins observed that appellant was unable to rotate to the right or left. Examination of both shoulders revealed no atrophy or deformity, but appellant indicated an area of prominence in the left acromioclavicular region. Adson's test produced complaints of bilateral shoulder pain without loss of pulse. Speeds sign was negative. Spurling's sign, Belly test and lift-off tests could not be performed. Dr. Haskins diagnosed status post industrial-related accident with subsequent fusion at C6-7, multiple somatic complaints, and abnormal nerve conduction and vascular studies. He opined that the diagnosis of thoracic outlet syndrome was not established. Dr. Haskins explained that, while appellant had laboratory testing consistent with this finding, his current complaints and physical examination did not support the diagnosis of thoracic outlet syndrome. He stated that appellant's complaints were too diffuse and nonspecific and his physical findings were not consistent enough to support thoracic outlet syndrome. Dr. Haskins concluded that surgical intervention would not improve appellant's function or lessen his complaints. He also reported that the causes of thoracic outlet syndrome were many and not necessarily industry related. Dr. Haskins stated that in reviewing appellant's records he was unable to ascertain any specific time of "total disability" due to thoracic outlet syndrome.

In a decision dated July 19, 2011, OWCP denied appellant's claim for disability compensation for the period November 27, 2003 to May 14, 2011 finding that the medical evidence failed to establish that he was totally disabled during that period as a result of his employment injury. It found that the weight of the medical evidence rested with Dr. Haskins' June 15, 2011 impartial medical report.

In a separate decision dated July 19, 2011, OWCP denied authorization for appellant to undergo thoracic outlet surgery based on Dr. Haskins' June 15, 2011 impartial medical examiner report.

On July 19, 2011 OWCP also proposed to terminate appellant's medical benefits based on Dr. Haskins' June 15, 2011 impartial medical report. By decision dated August 23, 2011, it finalized the termination of medical benefits.

On July 26, 2011 appellant, through his representative, submitted a request for a hearing. In a September 7, 2011 letter, he disagreed with the July 19, 2011 decision denying his disability compensation claim and authorization for surgery and the August 23, 2011 decision terminating his medical benefits. Appellant's representative alleged that Dr. Draper's May 21, 2010 second opinion examination report established that appellant had been totally disabled and was unable to return to full duty. He stated that OWCP ignored the evidence and requested that Dr. Haskins provide an opinion on the issue of disability even though a conflict of medical opinion was not found regarding the issue of disability. Appellant's representative also contended that OWCP should not have based its decision on Dr. Haskins' opinion because he lacked the expertise and qualifications to provide an opinion on thoracic outlet syndrome. He pointed out that Dr. Haskins was not a thoracic surgeon and that his conclusions lacked rationale and sound reasoning. Appellant's representative noted that Dr. Haskins agreed that the laboratory tests supported a diagnosis of thoracic outlet syndrome, but he based his conclusions on the lack of physical findings. He further alleged that Dr. Karas's opinion should have been given the weight of medical evidence as he is a Board-certified thoracic surgeon. Appellant's representative concluded that the medical evidence clearly established that appellant was totally disabled since 2001 as a result of his accepted injuries, that surgery was medically necessary to treat the accepted conditions and that appellant continued to suffer from the residuals of his work-related injuries.

Appellant continued to submit reports by Dr. Misoul regarding his treatment for thoracic outlet syndrome.

In a decision dated October 25, 2011, an OWCP hearing representative vacated and remanded OWCP's July 19, 2011 decision. He found that the May 5, 2010 SOAF was inaccurate and that OWCP had failed to administratively combine the two relevant compensation files[4] before referring appellant to Dr. Haskins for an impartial medical examination. Accordingly, the opinion of Dr. Haskins lacked probative value and could not represent the weight of medical evidence. The hearing representative remanded the case for OWCP to combine the case files, amend the SOAF, and refer the combined medical records to Dr. Draper for another second opinion on the need for the proposed surgery, whether appellant had work-related thoracic outlet syndrome, and whether appellant was totally or partially disabled from work since June 2001.[5]

On November 2, 2011 OWCP combined File No. xxxxxx505 with the current File No. xxxxxx565.

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[4] File Nos. xxxxxx565 and xxxxxx505.

[5] OWCP's hearing representative further found that, because OWCP did not meet its burden of proof to terminate appellant's benefits, his medical benefits should be reinstated retroactive to the date of termination. Since appellant was not receiving wage-loss compensation, he found that there was no need to reinstate any wage-loss compensation benefits.

On April 10, 2012 OWCP referred appellant, along with an amended SOAF,[6] to Dr. Draper for a second opinion examination to determine whether appellant had any residuals of either the June 27, 1997 traumatic injury or occupational aggravation of thoracic outlet syndrome, whether the proposed surgical procedures were medically necessary and whether appellant had been totally disabled by either of the accepted injuries since he stopped work on May 15, 2001.

In an April 27, 2012 report, Dr. Draper noted that he reviewed the amended statement of accepted facts and appellant's medical records. He accurately described the June 27, 1997 employment injury for a cervical strain and noted that OWCP also accepted an occupational disease claim for temporary aggravation of thoracic outlet syndrome. Dr. Draper reviewed Dr. Haskins' June 15, 2011 report and his previous May 21, 2010 evaluation. Upon examination of the cervical spine, he observed range of motion 40 degrees to the left and right, 30 degrees of forward flexion, and 10 degrees of extension. Dr. Draper stated that throughout the examination appellant exhibited various pain behaviors which included grimacing and jumping when touched. He opined that these actions appeared to be in excess of examination findings. Examination of the left shoulder demonstrated forward flexion of 160 degrees and abduction 140 degrees. Yergason's sign, impingement test and Hawkins sign were negative. Dr. Draper diagnosed herniated disc at C6-7. He opined that based on careful evaluation appellant did not have thoracic outlet syndrome and did not need to undergo surgery. Dr. Draper also reported that although appellant continued to suffer residuals of his June 27, 1997 injury and was capable of performing modified duty. He believed that appellant's total disability ceased at the time of his last examination dated May 21, 2010.

On May 21, 2012 OWCP requested that Dr. Draper provide a supplemental report containing the medical rationale for his opinion that there was no medical evidence of thoracic outlet syndrome and also providing an opinion on whether any residuals of appellant's accepted cervical strain or aggravation of thoracic outlet syndrome prevented him from performing any of his job duties at the time he stopped work in May 2001.

In a June 7, 2012 supplemental report, Dr. Draper stated that he reviewed appellant's records, previous examination findings and additional materials. He stated that the examination findings in his report were not consistent with the diagnosis of thoracic outlet syndrome. Dr. Draper reported that this conclusion did not mean that appellant never had thoracic outlet syndrome, but that on the date that he examined appellant he did not find evidence of thoracic outlet syndrome. He further noted that appellant's accepted conditions of aggravation of thoracic outlet syndrome and herniated disc prevented appellant from performing his job duties.

In a decision dated June 3, 2012, OWCP denied appellant's claim for wage-loss compensation from November 7, 2003 to May 21, 2010 but found that he was entitled to wage-loss compensation effective May 21, 2010. It determined that according to Dr. Draper's May 21, 2010 report appellant was partially disabled as a result of his work-related herniated cervical disc, and thus, entitled to wage-loss compensation after this date.

[6] The amended SOAF described both of appellant's June 27, 1997 employment injury and occupational disease claims. It noted that his claim was accepted for aggravation of thoracic outlet syndrome.

In a separate decision, OWCP also denied authorization for surgery finding that Dr. Draper's April 27, 2012 report represented the weight of medical evidence in establishing that surgery was not necessary to treat his condition.

On July 13, 2012 appellant's representative submitted a request for a hearing, which was held on November 15, 2012. He related appellant's history of medical treatment and the timeline of the case. Appellant's representative noted that appellant had been treated by Dr. Karas, one of the most respected thoracic outlet surgeons in the country, who provided several well-reasoned medical reports regarding the medical necessary of surgery in order to treat appellant's thoracic outlet syndrome. He contended that Dr. Karas's reports should be granted the weight of medical evidence as his qualifications were above any other doctor concerning the diagnosis and treatment of thoracic outlet syndrome. Appellant's representative pointed out that Dr. Karas provided well-rationalized medical opinion explaining that appellant was totally disabled as a result of his accepted conditions and that surgery was medically necessary to treat his condition.

By decision dated February 5, 2013, an OWCP hearing representative affirmed the July 3, 2012 decision denying surgery for thoracic outlet syndrome and appellant's claim for wage-loss benefits beginning November 7, 2003. He found that the weight of the medical evidence rested with Dr. Draper's April 27, 2012 second opinion examination report. The hearing representative noted that appellant was now receiving wage-loss compensation under the cervical claim effective May 10, 2010 but found that there was no medical evidence to establish that he was entitled to earlier compensation as a result of either his cervical or thoracic outlet conditions.

## ***LEGAL PRECEDENT -- ISSUE 1***

Under FECA the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[7] For each period of disability claimed, the employee must establish that he or she was disabled for work as a result of the accepted employment injury. Disability is not synonymous with a physical impairment which may or may not result in incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of the injury has no disability as that term is used in FECA.[8]

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of reliable, probative and substantial medical opinion evidence.[9] Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.[10] Monetary compensation benefits are

[7] *See Prince E. Wallace,* 52 ECAB 357 (2001).

[8] *Cheryl L. Decavitch,* 50 ECAB 183 (2005); *William A. Archer,* 55 ECAB 674 (2004).

[9] *Amelia S. Jefferson,* 57 ECAB 183 (2005); *William A. Archer, id.*

[10] *Dean E. Pierce,* 40 ECAB 1249 (1989).

payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.[11] The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[12]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[13]

## ***ANALYSIS -- ISSUE 1***

OWCP accepted that appellant sustained a cervical condition as a result of a June 27, 1997 employment incident and an aggravation of thoracic outlet syndrome as a result of factors of his employment. He stopped work in May 2001 and did not return. Appellant filed various claims for disability compensation for the period September 6, 2001 to June 29, 2012.

Appellant was initially treated by Drs. Pirpiris, Karas and Misoul. They reviewed appellant's records and noted his previous June 27, 1997 employment injury. All three physicians conducted an examination and diagnosed thoracic outlet syndrome. They concluded that appellant's thoracic outlet syndrome was caused or aggravated by factors of his employment. Both Drs. Karas and Misoul explained that appellant had thoracic outlet syndrome as a result of his employment and his condition became symptomatic or was aggravated after the June 27, 1997 employment injury. In attending physician's reports dated from October 4, 2000 to June 1, 2007, Dr. Pirpiris noted that appellant was totally disabled from September 2001 to September 2007. In July 6, 2006 and April 19, 2009 reports, Dr. Pirpiris further stated that appellant had been under his care since September 6, 2001. He reported that appellant had not been released to return to work since his initial examination and that appellant was not fit for his work until September 30, 2007.

OWCP referred appellant to Dr. Draper for a second opinion examination to determine, among other issues, whether appellant was totally disabled beginning June 2001 as a result of his accepted work injuries. In a May 21, 2010 report, he reviewed appellant's history and conducted an examination. Dr. Draper diagnosed herniated cervical disc C6-7 and status post cervical discectomy and fusion. He opined that the herniated cervical disc was related to the work injury but there was no evidence of carpal tunnel or thoracic outlet syndrome on either side. He reported that total disability should cease and that appellant was capable of performing light duty with restrictions of no lifting more than 20 pounds occasionally and 10 pounds frequently. Following the October 25, 2011 hearing representative's decision vacating and remanding the case, OWCP again referred appellant's case to Dr. Draper for a second opinion examination. In an April 27, 2012 report, Dr. Draper stated that appellant's disability had ceased at the time of his last examination dated May 21, 2010.

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[11] *Laurie S. Swanson,* 53 ECAB 517, 520 (2002); *see also Debra A. Kirk-Littleton,* 41 ECAB 703 (1990).

[12] *Amelia S. Jefferson, supra* note 9.

[13] *Jimmy A. Hammons,* 51 ECAB 219 (1999).

Although Dr. Draper opined that appellant's total disability had ceased at the time of his May 21, 2010 evaluation and concluded that he was capable of performing light duty, the Board notes that he did not address when appellant's disability began (appellant claimed total disability beginning September 6, 2001). While OWCP undertook development of the disability issue, it did not receive a probative medical report completely addressing the issue of disability for the period beginning September 6, 2001. Dr. Draper merely stated that appellant was no longer disabled as of May 21, 2010, but he failed to explain when appellant's period of disability began.

While appellant has the burden to establish entitlement to disability compensation, OWCP shares responsibility in the development of the evidence. As it undertook development of the disability issue by referring him to Dr. Draper for an opinion on the period or periods of disability resulting from appellant's employment-related conditions, OWCP has the responsibility to obtain a report that resolves the issue presented in the case.[14] The Board notes that although Dr. Haskins' opined in his June 15, 2011 report that appellant did not have any periods of disability, the record reflects that his report lacked probative value as it was based on an inaccurate SOAF. Further development of the evidence is also warranted in light of the fact that Dr. Pirpiris noted that appellant was totally disabled from September 2001 to September 2007. The Board will therefore set aside OWCP's hearing representative's February 5, 2013 decision and remand the case for further development of the medical opinion evidence and an appropriate final decision on appellant's entitlement to disability compensation for the remaining September 6, 2001 to May 20, 2010 period.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8103(a) of FECA provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening in the amount of monthly compensation.[15] In interpreting the section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[16] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on the OWCP's authority is that of reasonableness.[17] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[18]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall

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[14] *See J.B.,* Docket No. 11-816 (issued October 24, 2011).

[15] 5 U.S.C. § 8103; *see Thomas W. Stevens,* 50 ECAB 288 (1999).

[16] *W.T.,* Docket No. 08-812 (issued April 3, 2009); *A.O.,* Docket No. 08-580 (issued January 28, 2009).

[17] *D.C.,* 58 ECAB 629 (2007); *Mira R. Adams,* 48 ECAB 504 (1997).

[18] *L.W.,* 59 ECAB 471 (2008); *P.P.,* 58 ECAB 673 (2007); *Daniel J. Perea,* 42 ECAB 214 (1990).

appoint a third physician who shall make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[19]

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[20] In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[21] Unless this procedure is carried out by OWCP the intent of section 8123(a) of FECA will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[22]

## ***ANALYSIS -- ISSUE 2***

By decision dated March 18, 2011, an OWCP hearing representative remanded the October 23, 2010 denial decision finding that a conflict in medical opinion existed between appellant's physician, Dr. Karas, who recommended that appellant undergo thoracic outlet syndrome surgery, and Dr. Draper, the second opinion examiner, who determined that surgery was not medically necessary to treat appellant's employment-related conditions. OWCP referred appellant to Dr. Haskins to resolve the conflict in medical opinion.

In a June 15, 2011 report, Dr. Haskins accurately described appellant's history and reviewed his records, including the statement of accepted facts. Upon examination of the cervical spine, he observed that appellant was unable to rotate to the right or left. Examination of both shoulders revealed no atrophy or deformity, but appellant indicated an area of prominence in the left acromioclavicular region. Adson's test produced complaints of bilateral shoulder pain without loss of pulse. Speeds sign was negative. Dr. Haskins diagnosed status post industrial-related accident with subsequent fusion at C6-7, multiple somatic complaints, and abnormal nerve conduction and vascular studies. He opined that the diagnosis of thoracic outlet syndrome was not established. Dr. Haskins explained that, while appellant had laboratory testing consistent with this finding, his current complaints and physical examination did not support the diagnosis of thoracic outlet syndrome. He stated that appellant's complaints were too diffuse and nonspecific and his physical findings were not consistent enough to support thoracic outlet syndrome. Dr. Haskins concluded that surgical intervention would not improve appellant's function or lessen his complaints. He also reported that the causes of thoracic outlet syndrome were many and not necessarily industry related.

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[19] 5 U.S.C. § 8123(a); *see also Charles S. Hamilton,* 52 ECAB 110 (2000).

[20] *Barry Neutuch,* 54 ECAB 313 (2003); *David W. Pickett,* 54 ECAB 272 (2002).

[21] *See Philip H. Conte,* 56 ECAB 213 (2004); *Guiseppe Aversa,* 55 ECAB 164 (2003).

[22] *Harold Travis,* 30 ECAB 1071 (1979).

In a decision dated July 19, 2011, OWCP again denied authorization for appellant to undergo thoracic outlet surgery based on Dr. Haskins' June 15, 2011 impartial medical examiner report.

By decision dated October 25, 2011, an OWCP hearing representative vacated and remanded OWCP's July 19, 2011 decision. He found that the May 5, 2010 SOAF was incorrect and that OWCP had failed to administratively combine the two relevant compensation files, File Nos. xxxxxx565 and xxxxxx505, before referring appellant to Dr. Haskins for an impartial medical examination. Accordingly the opinion of Dr. Haskins could not represent the weight of medical evidence. The hearing representative remanded the case for OWCP to combine the case files, amend the SOAF, and refer the combined medical records to Dr. Draper for another second opinion on the need for the proposed surgery, whether appellant had work-related thoracic outlet syndrome and whether appellant was totally or partially disabled from work since June 2001.

As previously stated, in situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate medical specialist.[23] In this case, OWCP referred appellant's case to Dr. Haskins to resolve a conflict in medical opinion as to whether thoracic outlet syndrome surgery was medically necessary to treat appellants accepted condition. Dr. Haskins' June 15, 2011 report was later found to lack probative value as it was based on an inaccurate history. Instead of referring the case back to Dr. Haskins to resolve the conflict based on an accurate history, OWCP referred the case for another second-opinion examination. Because a conflict in medical opinion still exists in this case, the Board finds that it is not in posture for a decision and will remand it back to OWCP. On remand, OWCP should request Dr. Haskins provide an opinion on whether thoracic outlet surgery is medically necessary to treat appellant's condition based on a complete case record and correct SOAF. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision.

[23] *Supra* note 22.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 5, 2013 decision of the Office of Workers' Compensation Programs is vacated and remanded for further proceedings consistent with this opinion.

Issued: May 15, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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