

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

R.G., Appellant

and

**GENERAL SERVICES ADMINISTRATION,
Kansas City, MO, Employer**

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**Docket No. 09-2118
Issued: August 9, 2010**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2009 appellant, through his attorney, filed a timely appeal of a May 21, 2009 merit decision of the Office of Workers' Compensation Programs terminating his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective October 29, 2008; and (2) whether appellant met his burden of proof to establish continuing disability on or after October 29, 2008.

FACTUAL HISTORY

On November 17, 2005 appellant, then a 47-year-old warehouse worker, injured his left arm while lifting freight off a pallet.¹ The Office accepted his claim for derangement of the left

¹ In claim number xxxxxx500 appellant alleged a left shoulder injury on September 27, 2004. The Office accepted this claim for left shoulder separation and impingement.

shoulder joint on February 6, 2006 and left ulnar neuropathy at the elbow. Appellant's attending physician, Dr. Mark J. Reiner, an osteopath, performed an ulnar nerve decompression and transposition at the elbow on February 24, 2006. The Office placed appellant on the periodic rolls on April 11, 2006. Dr. Reiner performed left shoulder arthroscopic surgery for a glenoid labrale tear on July 26, 2006. On September 26, 2006 he advised that appellant could not yet return to work. On October 24 through December 28, 2006 Dr. Reiner stated that appellant was not improving adequately and recommended additional testing. He reiterated that appellant was totally disabled.

The Office referred appellant for a second opinion evaluation on October 19, 2006. Dr. Zohar Stark, a Board-certified orthopedic surgeon, completed a report on November 16, 2006 and found that appellant had objective findings of derangement of the left shoulder and elbow ulnar neuropathy.² He opined that appellant had not received proper medical treatment and recommended additional physical therapy. Dr. Stark found that appellant could perform light-duty work with no use of his left upper extremity.

On March 1, 2007 Dr. Reiner stated that he disagreed with Dr. Stark's assessment of appellant's residual disability and found that appellant continued to have left upper extremity symptoms. He recommended additional diagnostic studies and stated that appellant was unable to work. Appellant underwent an electromyography (EMG) and nerve conduction study on April 19, 2007 which demonstrated slightly delayed left ulnar sensory nerve latency and conduction velocity indicative of left cubital tunnel syndrome. Dr. Reiner reiterated that appellant was totally disabled.

The Office found a conflict of medical opinion between Dr. Reiner and Dr. Stark and referred appellant to Dr. Roy Friedenthal, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated August 29, 2007, Dr. Friedenthal reviewed the history of injury and medical treatment. He found that appellant's employment-related injury had resolved without residuals. Dr. Friedenthal noted that appellant had complaints of pain and severe grimacing findings suggestive of symptom magnification. He stated that appellant had normal range of motion of the left shoulder and no objective neurological deficit. There was good rotator cuff strength and function with no upper arm atrophy. Dr. Friedenthal diagnosed a strain of the left upper extremity and shoulder girdle and noted that appellant might have a nonemployment-related disease of the cervical spine. He opined that appellant could return to his regular duties insofar as alleged work injuries were concerned.

The Office proposed to terminate appellant's compensation benefits by letter dated September 25, 2007. He submitted a report from Dr. Reiner dated September 18, 2007 which stated that he continued to exhibit symptoms of his accepted conditions and requested additional testing to address possible progression or new neuropathy. Appellant's attorney objected to the proposed termination on the grounds that Dr. Friedenthal did not rely on the statement of accepted facts. An October 4, 2007 EMG established left C8-T1 radiculopathy.

² Dr. Stark advised that appellant is right hand dominant.

The Office provided Dr. Friedenthal with a more detailed statement of accepted facts on October 25, 2007 and requested a supplemental report. Dr. Reiner completed a report on October 22, 2007 and noted appellant's history of injury and reviewed his treatment of appellant. He opined that appellant's current condition was the result of his accepted employment injury which resulted in injury to his left shoulder girdle, left elbow and arm. Dr. Friedenthal responded on November 15, 2007 and reviewed the statement of accepted facts. He stated that it was his opinion that appellant had recovered from his ulnar nerve injury. Dr. Friedenthal also opined that his left shoulder condition was improved following surgery.

By decision dated December 5, 2007, the Office terminated appellant's compensation benefits and medical benefits effective that date. Appellant, through his attorney, requested an oral hearing on December 10, 2007. He testified at the oral hearing on March 26, 2008. Appellant also submitted a report dated March 25, 2008 from Dr. Reiner finding satisfactory movement to the cervical spine and right shoulder, elbow, hand and wrist with tenderness in the left shoulder. He also demonstrated paresthesias to the left arm with weakness. Dr. Reiner opined that appellant was unable to work. By decision dated June 12, 2008, the Branch of Hearings and Review found that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits. The hearing representative found that Dr. Friedenthal's report went beyond the scope of the conflict of medical opinion which was limited to the extent of appellant's disability for work. Both Dr. Reiner and Dr. Stark had supported continuing medical residuals. The hearing representative found that Dr. Friedenthal was not an impartial medical specialist on the issue of medical residuals. She found that Dr. Friedenthal was a second opinion physician on the issue of whether appellant had any medical residuals as a result of his accepted employment injury and that his report created a second conflict with those of Dr. Reiner on that issue.

Dr. Reiner completed a report on July 31, 2008 and found weakness in appellant's left arm with tenderness in the shoulder as well as crepitus and clicking. He diagnosed chronic permanent problems in the left arm and shoulder and stated that appellant could not return to his date-of-injury position.

The record contains screen capture indicating that on June 27, 2008 the Office employed the Physicians' Directory System (PDS) and that the first physician selected was Dr. Larry Rosenberg, a Board-certified orthopedic surgeon, who was bypassed because his schedule was full until November 2008. The Office then utilized the PDS to schedule an appointment for appellant with Dr. Gregory Maslow, a Board-certified orthopedic surgeon, on August 12, 2008. It referred appellant and a new statement of accepted facts³ and a position description to Dr. Maslow for an impartial medical examination. Dr. Maslow completed a report on August 12, 2008 noting appellant's history of injury and reviewing the medical reports. He found full range of motion of the cervical spine, with no positive findings, but a great deal of pain reported during physical examination. Appellant's left upper extremity examination did not demonstrate brachial plexitis, Tinel's sign or tenderness. He complained of severe pain on attempted elevation of the shoulder and limited range of motion due to pain. Dr. Maslow found

³ The statement of accepted facts lists appellant's accepted claims and indicates that xxxxxx500, xxxxxx853 and xxxxxx412 have been combined. The Board requested the complete record from the Office and the Office stated that xxxxxx412 was not in fact combined with the other two upper extremity claims.

on clinical examination no Tinel's sign, no evidence of distal ulnar nerve dysfunction, no intrinsic atrophy or intrinsic weakness and normal pinch grip. There was also no sensory deficit to light touch on the hand. Dr. Maslow found a normal neurological examination of the left upper extremity. He opined that on November 17, 2005 appellant sustained a sprain of the left elbow and shoulder. Dr. Maslow stated that appellant exhibited excessive pain behavior and opined that appellant did not have any objective evidence that he was permanently disabled from his date-of-injury position. He stated that the November 17, 2005 injury did not result in current disability at the elbow or shoulder. Dr. Maslow stated that appellant did not require additional treatment or medication for his left elbow or shoulder. He stated, "It is my opinion that this patient is capable of normal work in the warehouse without restriction imposed by the injury accepted to have occurred at the shoulder on November 17, 2005."

Dr. Reiner completed an additional note on September 9, 2008 and repeated his findings of tenderness in the left shoulder with clicking, popping and weakness. He again stated that appellant was unable to work with chronic permanent problems in his left shoulder and arm.

In a letter dated September 24, 2008, the Office proposed to terminate appellant's compensation and medical benefits on the grounds that Dr. Maslow's report was entitled to the weight of the medical evidence and established no continuing disability or medical residuals due to the accepted employment injuries. Appellant's attorney responded on October 6, 2008 and disagreed with the proposed termination on the grounds that Dr. Maslow did not demonstrate full understanding of the duties of appellant's date-of-injury position and that he failed to recognize proof of residual disability.

On October 7, 2008 Dr. Reiner found pain, soreness and weakness in appellant's left upper extremity. He disagreed with Dr. Maslow and stated that appellant was not able to return to full duty. Dr. Reiner stated that appellant had tenderness and soreness in the left shoulder girdle with crepitus and clicking as well as weakness in the shoulder girdle musculature. He found grip strength weakness and paresthesias in the hands.

By decision dated October 29, 2008, the Office terminated appellant's medical and wage-loss benefits effective that date relying on Dr. Maslow's report. Appellant, through his attorney, requested an oral hearing on November 4, 2008. He submitted reports from Dr. Reiner dated November 4, December 2 and 30, 2008 describing appellant's persistent pain in the cervical spine radiating into the left shoulder and arm. Dr. Reiner continued to find tenderness and stiffness in the cervical spine and tenderness and soreness in the left shoulder with crepitus, clicking and stiffness as well as weakness. He recommended additional physical therapy and diagnosed chronic permanent problems to his left upper extremity. Appellant also submitted physical therapy notes. He testified at the oral hearing on March 18, 2009 and stated that he experienced pain shooting down his left elbow into his left hand. Appellant asserted that he was unable to perform his date-of-injury position due to the heavy lifting required. His attorney listed his perceived defects in Dr. Maslow's report.

By decision dated May 21, 2009, the hearing representative affirmed the Office's termination decision based on Dr. Maslow's report. He found that Dr. Maslow was properly selected in accordance with the PDS and that his report was based on a complete and accurate factual and medical background and that the report reflected a thorough examination and

contained rationalized medical opinion that appellant had recovered from his work-related injuries.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁷

Section 8123(a) of the Federal Employees' Compensation Act,⁸ provides, "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."

In situations where there are 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 on a proper factual background, must be given special weight.⁹

ANALYSIS -- ISSUE 1

The Board finds that there was a conflict of medical opinion evidence between Dr. Reiner, an osteopath and Dr. Stark, a Board-certified orthopedic surgeon, regarding the extent of appellant's disability for work. Dr. Reiner found that appellant was totally disabled and Dr. Stark opined that appellant could perform light-duty work with restrictions due to his accepted left upper extremity conditions of derangement of the left shoulder joint and ulnar neuropathy at the elbow. The Office properly referred appellant to Dr. Friedenthal, a Board-certified orthopedic surgeon, to resolve this conflict. Dr. Friedenthal completed a report on August 29, 2007 which included appellant's history of injury and a detailed physical examination. He opined that appellant could return to his regular work duties. Dr. Friedenthal also found that appellant's employment-injuries had resolved without residuals. The Board notes that, as found by the hearing representative, a second conflict was created between Drs. Reiner

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *Id.*

⁸ 5 U.S.C. §§ 8101-8193, 8123(a).

⁹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

and Friedenthal on the issue of appellant's continuing medical residuals. Due to this second conflict, the Office referred appellant to Dr. Maslow, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his August 12, 2008 report, Dr. Maslow provided a detailed report reviewing the statement of accepted facts and appellant's position description. Dr. Maslow noted the medical history and listed relevant medical reports. He undertook a physical examination of appellant's cervical spine and upper extremities. Dr. Maslow noted that appellant reported many pain complaints during the examination. He did not make any objective findings supporting appellant's continuing disability or medical residuals. Dr. Maslow reported that his left shoulder was stable without atrophy, spasm or droop. He found that appellant's elbow did not exhibit Tinel's sign, ulnar nerve dysfunction, atrophy or weakness. Dr. Maslow stated that appellant had normal pinch grip and no sensory deficit in the left hand. He concluded that appellant's left upper extremity was neurologically normal. Dr. Maslow opined that there were no objective physical findings to support appellant's complaints of pain and that he could return to his date-of-injury position. He stated that appellant did not require additional medical treatment or medication due to his accepted conditions.

The Board finds that Dr. Maslow's report constitutes the weight of the medical opinion evidence and is sufficiently detailed and rationalized to meet the Office's burden of proof to terminate appellant's compensation and medical benefits. This report was based on the June 25, 2008 statement of accepted facts and position description provided by the Office. The report included a review of the medical treatment as well as an extensive and detailed physical examination. Dr. Maslow recorded no objective signs of disability or medical residuals in the left upper extremity. Based on the normal examination, he opined that appellant had no need for additional treatment or for medical restrictions preventing him from returning to his regular-duty work. As Dr. Maslow was properly selected to serve as the impartial medical examiner as a result of a conflict of medical opinion evidence and as his report was based on a proper history and was detailed and well reasoned, the Board finds that the Office properly terminated appellant's medical and wage-loss benefits effective October 29, 2008.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had disability causally related to his accepted employment injury.¹⁰ To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified

¹⁰ *George Servetas*, 43 ECAB 424, 430 (1992).

by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹¹

ANALYSIS -- ISSUE 2

Following the Office's October 29, 2008 decision terminating appellant's compensation benefits, he submitted additional reports from Dr. Reiner addressing his continuing disability for work and his ongoing work-related conditions. On November 4, December 2 and 30, 2008 Dr. Reiner found that appellant had pain in the cervical spine radiating to the left shoulder and arm. He also found tenderness, soreness and weakness in the left shoulder with crepitus, clicking and stiffness. Dr. Reiner prescribed medication and recommended additional physical therapy.

Dr. Reiner did not provide the results of any specific physical testing in support of findings of continuing residuals and disability. He did not provide a detailed diagnosis of appellant's ongoing condition, instead stating that appellant had "chronic permanent problems to his left upper extremity." As Dr. Reiner did not provide any specific physical findings as a result of diagnostic or clinical examination, he has not established appellant's continuing disability or medical residuals. Dr. Reiner did not provide any medical reasoning explaining why or how appellant's current complaints were related to his accepted employment injuries. Furthermore, as Dr. Reiner was on one side of the conflict that Dr. Maslow resolved, the additional report from Dr. Reiner is insufficient to overcome the weight accorded Dr. Maslow's report as the impartial medical specialist or to create a new conflict with it.¹²

On appeal appellant's attorney alleged that the Office failed to meet its burden of proof to terminate appellant's compensation benefits as Dr. Maslow's report was not sufficiently detailed and rationalized to constitute the weight of the evidence. He alleged this report did not include a proper factual background, did not contain medical rationale and did not meet the Office's burden of proof to terminate appellant's compensation benefits and that a supplemental report was required.¹³ As noted previously, the Board found that Dr. Maslow's report was based on the statement of accepted facts and appellant's position description. It included detailed physical findings which were all negative. The lack of objective findings in support of appellant's continuing left upper extremity conditions, provides strong medical reasoning for the conclusion that appellant's conditions had resolved with no medical residuals or physical limitations for work. For these reasons, the Board has found that Dr. Maslow's report represents the weight of the medical opinion evidence.

¹¹ *James Mack*, 43 ECAB 321 (1991).

¹² *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

¹³ While appellant's attorney discussed the PDS in his brief to the Board, he did not present any argument addressing the usage of this system in the selection of Dr. Maslow. The hearing representative addressed this aspect of appellant's claim in his May 21, 2009 decision and the record did not suggest any error in Dr. Maslow's selection as the impartial medical specialist.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits effective October 29, 2008. The Board further finds that appellant has not established any ongoing condition or disability for work after October 29, 2008 as a result of his accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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