



## **FACTUAL HISTORY**

On September 24, 2005 appellant, then a 48-year-old transportation security screener sustained an injury when his elbow popped while moving a bag to a table. OWCP initially accepted that appellant sustained right elbow and forearm sprains/strains on September 24, 2005 and it later accepted that he sustained a right shoulder superior glenoid labrum lesion, right shoulder/upper arm sprain and right lateral epicondylitis on that date. Under a separate claim file, it accepted that appellant sustained right shoulder adhesive capsulitis as a consequence of his September 24, 2005 injury.

On January 10, 2008 appellant underwent arthroscopic surgery of his right shoulder in the form of an anterior capsulorrhaphy, Bankart repair, biceps tendonesis and rotator cuff repair. He stopped work on March 2, 2007 and was terminated from the employing establishment on April 7, 2007 for reasons unrelated to the work injury. Appellant continued to receive wage-loss compensation and medical benefits.

In an August 20, 2008 report, Dr. Graeme French, an attending Board-certified orthopedic surgeon, found that appellant's right upper extremity had reached 90 percent resolution and he removed all lifting restrictions.

In an October 14, 2008 report, Dr. George R. Harper, a Board-certified orthopedic surgeon serving as OWCP's referral physician, determined that appellant had permanent work restrictions, but the record does not contain a complete Form OWCP-5c (work capacity evaluation) from this period. He noted that he preferred that appellant's work capacity be based on a functional capacity evaluation.

Dr. Harper later reviewed a November 18, 2008 functional capacity evaluation and, in a February 26, 2009 Form OWCP-5c, he indicated that appellant could work eight hours per day. He noted that appellant had permanent restrictions of sitting, walking and standing for four hours per day; reaching for two hours per day; no reaching above the right shoulder; twisting, bending and stooping for two hours per day; repetitive movement of the right elbow for two hours per day (no more than five pounds); pushing, pulling and lifting with the right arm for two hours per day, and operating a motor vehicle no more than four hours per day.

The November 18, 2008 functional capacity evaluation indicated that appellant refused to perform leg, back or floor static strength tests or power, back or barrier lifts for fear of pain or reinjury. Appellant exhibited symptom/disability exaggeration behavior and poor effort on validity criteria, suggesting a voluntary effort to demonstrate a greater level of disability than was actually present. Given the poor effort during testing, OWCP asked Dr. Harper to review the November 18, 2008 functional capacity evaluation again and to readdress appellant's work restrictions.

In a July 14, 2009 Form OWCP-5c, Dr. Harper indicated that, based on the accepted conditions to appellant's right upper extremity, he could work eight hours per day with limitations from reaching (including reaching above the shoulder), operating a motor vehicle and climbing. Repetitive movements of the elbow were limited to four hours per day (up to 5

pounds); pushing and pulling was limited to four hours per day (up to 5 pounds) and lifting was limited to four hours per day (up to 10 pounds).

On May 9, 2009 Dr. French opined that appellant's medical conditions had reached maximum medical improvement. He found that, based on the residual loss of function of appellant's arm and back (a nonwork-related condition), he could not work eight hours per day. Appellant was limited to reaching three hours per day (without reaching above the shoulder); pushing and pulling up to 30 pounds (for one hour per day); lifting up to 40 pounds (for one hour per day) and climbing for one hour per day. OWCP asked Dr. French to provide limitations based only on appellant's right upper extremity conditions and on September 5, 2009 he relayed that appellant could not work eight hours per day and could not perform repetitive grip work. Dr. French had limitations of occasional reaching; no reaching above the shoulder; pushing up to 40 pounds; pulling and lifting up to 30 pounds and no climbing on ladders. No restrictions were provided for repetitive wrist or elbow movement or for operating a motor vehicle.

Based on the conflicting medical opinions of Dr. French and Dr. Harper, OWCP referred appellant for an impartial medical examination with Dr. Robert C. Colburn, a Board-certified orthopedic surgeon. In a November 4, 2009 report, Dr. Colburn reviewed the evidence of record and reported examination findings of appellant, finding that he had permanent limitations regarding his right upper extremity. In a November 9, 2009 Form OWCP-5c, he indicated that appellant was limited in the number of hours he could perform certain activities, but he did not indicate whether appellant could work eight hours per day in a modified position. OWCP asked Dr. Colburn to clarify his report but a January 20, 2010 Form OWCP-5c did not provide the requested clarification.

Given Dr. Colburn's failure to clarify his opinion, appellant was referred to Dr. Lance C. Brigham, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 16, 2010 report, Dr. Brigham reviewed the evidence of record and reported the findings of his examination of appellant. He indicated that appellant complained of constant pain over the lateral deltoid in his right shoulder and intermittent pain and numbness over the right lateral epicondylar area which increased with activity. Dr. Brigham noted that, upon examination, there was no pain on palpation of the right or left medial or lateral epicondyle. He diagnosed lateral epicondylitis on a more-probable-than-not-basis due to the September 24, 2005 work injury. Dr. Brigham found that appellant had "very few physical limitations" but stated that "restrictions have already been placed on his use of the right shoulder." He found that appellant had no physical restrictions for nonwork-related conditions and indicated that he demonstrated a very high degree of pain disability, marked pain behavior and complaints of pain disability.

Dr. Brigham completed a Form OWCP-5c on April 16, 2010. He indicated that appellant was not capable of performing his date-of-injury job, but noted that he could work eight hours per day with permanent restrictions of no reaching (including no reaching above the shoulder), no climbing and no lifting more than 20 pounds. On May 5, 2010 OWCP sought clarification from Dr. Brigham, requesting that he provide an opinion on appellant's physical limitations and work capacity irrespective of any prior limitations set. In a May 17, 2010 letter, Dr. Brigham stated, "Regarding his right shoulder and 'irrespective of any prior limitation set,' [appellant] would have no restrictions that would prevent him from 'performing his usual job.'"

In a July 2, 2010 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation based on the opinion of Brigham, the impartial medical specialist who found that he could perform his regular work for the employing establishment. It provided appellant 30 days to submit evidence and argument challenging the proposed termination action.

In a July 8, 2010 letter, appellant argued that the opinion of Dr. Brigham was not sufficiently well rationalized to justify termination of his wage-loss compensation. He asserted that Dr. Brigham did not explain why he changed his opinion on his level of disability. Appellant submitted a May 18, 2010 report in which Dr. William Weigel, an attending Board-certified neurologist, described his application of steroid injections in the low back. He also submitted a number of medical records which had already been submitted to OWCP.

In an August 9, 2010 decision, OWCP terminated appellant's wage-loss compensation effective August 10, 2010 on the grounds that he had no disability due to his employment injuries after that date. It found that the weight of the medical evidence rested with the opinion of Dr. Brigham.

### **LEGAL PRECEDENT**

Under FECA,<sup>2</sup> once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</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>6</sup> In situations 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.<sup>7</sup>

### **ANALYSIS**

In the present case, OWCP properly determined that there was a conflict in the medical opinion between Dr. French, an attending Board-certified orthopedic surgeon, and Dr. Harper, a

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>4</sup> *Id.*

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

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Board-certified orthopedic surgeon acting as OWCP's referral physician, regarding the extent of appellant's wage loss due to his accepted employment injuries.<sup>8</sup> In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Brigham, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>9</sup>

The Board finds that the opinion of Dr. Brigham is not sufficiently well rationalized to represent the weight of the medical opinion and to resolve the conflict in the medical opinion regarding whether appellant continues to have wage loss due to his accepted employment injuries.<sup>10</sup>

In an April 16, 2010 report, Dr. Brigham indicated that appellant complained of constant pain over the lateral deltoid in his right shoulder and intermittent pain and numbness over the right lateral epicondylar area which increased with activity. Although he found that appellant had "very few physical limitations," he diagnosed lateral epicondylitis on a more-probable-than-not-basis due to the September 24, 2005 work injury. Dr. Brigham did not explain why this continuing work-related condition would not cause some level of disability from work, nor did he explain why appellant's multiple work-related right shoulder conditions had improved to the extent that they no longer caused him to sustain wage loss.

Dr. Brigham stated in his April 16, 2010 report that appellant had no physical restrictions due to nonwork-related conditions. In a Form OWCP-5c completed on April 16, 2010, he indicated that appellant was not capable of performing his date-of-injury job, but noted that he could work eight hours per day with permanent restrictions of no reaching (including no reaching above the shoulder), no climbing and no lifting more than 20 pounds. Therefore, Dr. Brigham ostensibly provided an opinion that appellant's inability to perform his regular work was due to his accepted employment injuries. On May 5, 2010 OWCP sought clarification from him, requesting that he provide an opinion on appellant's physical limitations and work capacity irrespective of any prior limitations set. In a May 17, 2010 letter, Dr. Brigham stated, "Regarding his right shoulder and 'irrespective of any prior limitation set,' [appellant] would have no restrictions that would prevent him from 'performing his usual job.'" However, he did not provide any explanation for this sudden change in his opinion on appellant's ability to work. Dr. Brigham did not provide adequate medical rationale for his new opinion that appellant's accepted employment injuries no longer caused him to sustain wage loss.

For these reasons, OWCP did not meet its burden or proof to terminate appellant's wage-loss compensation effective August 10, 2010.

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<sup>8</sup> In reports from mid 2009, Dr. French and Dr. Harper recommended different degrees of work restrictions. OWCP initially accepted that appellant sustained right elbow and forearm sprains/strains on September 24, 2005 and it later accepted that he sustained a right shoulder superior glenoid labrum lesion, right shoulder/upper arm sprain and right lateral epicondylitis on that date. It also accepted that he sustained a consequential injury in the form of right shoulder adhesive capsulitis.

<sup>9</sup> See *supra* note 5 and accompanying text.

<sup>10</sup> See *supra* note 6.

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective August 10, 2010 on the grounds that he had no disability due to his employment injuries after that date.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 9, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 5, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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