

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Petoskey, MI, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-946
Issued: December 23, 2014**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 14, 2014 appellant, through his attorney, filed a timely appeal from a December 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits on April 27, 2012; and (2) whether appellant established that he had disability caused by residuals of his accepted right shoulder condition after April 27, 2012.

FACTUAL HISTORY

Appellant, a 39-year-old part-time flexible clerk, has an accepted occupational disease claim for a right shoulder tendinitis condition causally related to his employment. He became

¹ 5 U.S.C. § 8101 *et seq.*

aware of his condition on October 12, 1984.² OWCP accepted the claim for aggravation of right shoulder calcifying tendinitis. Appellant stopped work as of March 1, 1985 and was placed on the periodic rolls in receipt of compensation for total disability.³

The record reflects that appellant returned to work based on a June 13, 1986 limited-duty job offer but was unsuccessful due to his service-connected disability. He subsequently stopped work on July 24, 1987 and was referred for vocational rehabilitation. Appellant found work earning \$85.00 a week in self-employment transporting juvenile offenders for local courts. He subsequently received compensation based on his actual earnings; but no formal wage-earning capacity determination was issued. In January 1992, appellant notified OWCP that he no longer had any earnings from self-employment. He was returned to the periodic rolls.

Appellant was referred to vocational rehabilitation for job placement assistance that was unsuccessful. Based on his physical limitations, the rehabilitation specialist determined that he had the capacity to earn \$5.44 an hour as a bookkeeper. In an August 11, 1993 decision, OWCP reduced appellant's monetary compensation finding that he had the capacity to earn hourly wages of \$5.44 as a bookkeeper.⁴

The record contains progress notes from Dr. Nancy Erickson, an osteopath and attending physician. On September 6, 2011 she stated that appellant had been a patient since March 2003. Dr. Erickson noted that he presented with pain in the neck that radiated up to the forehead on the left side and also had bilateral shoulder pain. Appellant had a cervical epidural on August 10, 2011. Dr. Erickson diagnosed cervical radiculopathy and noted that he had disabling chronic pain secondary to that diagnosis.

In order to determine appellant's current condition and whether he had residuals of his accepted right shoulder condition, OWCP referred him for a second opinion examination to Dr. Brad K. Cohen, Board-certified in orthopedic surgery.

In an October 26, 2011 report, Dr. Cohen reviewed appellant's history of employment and the claim accepted for aggravation of right shoulder calcifying tendinitis. He reviewed appellant's medical treatment and history of surgery, noting appellant first injured his right shoulder in 1967 while in Viet Nam. Appellant stated that he continued to have symptoms of right shoulder pain. In addition, Dr. Erickson was treating him for cervical and lumbar degenerative disc disease with radiculopathy and had undergone cervical epidurals. On examination, cervical motion was limited in all planes with discomfort. There was no atrophy on review of both upper extremities; sensation was subjectively diminished in the left radial and medial nerve distribution, medial and lateral forearm, but otherwise grossly intact in the ulnar nerve distribution. Sensation was grossly intact throughout the right upper extremity in the

² The record reflects that appellant has a right shoulder service-connected disability for traumatic bursitis based on service in Viet Nam. He also has a service-connected 30 percent disability for a psychoneurotic reaction, anxiety type.

³ On September 9, 1985 appellant underwent a right arthroscopic procedure with debridement of a torn subscapularis tendon and partial synovectomy with debridement of the rotator cuff. He subsequently received schedule awards totaling 32-percent impairment of his right upper extremity.

⁴ There was no appeal sought from the 1993 wage-earning capacity determination.

radial, medial and ulnar nerve distribution, medial, and lateral forearm. There was intact motor function. There was some tenderness to palpation at the right shoulder in the anterolateral soft tissue adjacent to the acromion. There was positive impingement signs on the right much greater than the left, mild pain and minimal weakness with rotator cuff tendon testing, and good strength present with external rotation from the abducted position. Full pain-free finger, hand, wrist, and elbow motion was present.

Dr. Cohen obtained x-rays of the right shoulder which revealed no fracture, dislocation, or other bony lesions. The glenohumeral joint was well preserved. Mild greater tuberosity sclerosis was noted with no soft tissue calcifications and mild acromioclavicular joint degenerative changes. A right shoulder arthrogram obtained in 1985 showed no evidence of a rotator cuff tear while a 2007 magnetic resonance imaging (MRI) scan noted tendinopathy of the infraspinatus and supraspinatus tendons with irregularity and a low-grade partial tear along the bursal surface of the supraspinatus near the insertion. The subscapularis and minor tendons were unremarkable and the biceps tendon in normal position and appearance. A 2010 study noted biceps tenosynovitis without a tear and acromioclavicular joint hypertrophy.

Dr. Cohen advised that the accepted aggravation of right shoulder tendinitis had resolved. He found no objective evidence of a permanent worsening of appellant's right shoulder condition as a result of the accepted work injury. There was no rotator cuff tear present in the right shoulder. Dr. Cohen stated that the accepted aggravation of appellant's preexisting right shoulder condition resolved within one year of his surgery. Appellant's ongoing symptoms were secondary to the preexisting condition and radicular pain from his cervical spine. To address appellant's work capacity, Dr. Cohen ordered a functional capacity evaluation to determine if appellant could return to work at his date-of-injury job as a part-time flexible clerk. He noted that the physical requirements of appellant's date-of-injury position, as a part-time flexible clerk, required that he work 10-hour shifts, from 2 to 6 days per week, lifting up to 70 pounds, unloading trucks, pushing, pulling, and carrying heavy loads. Appellant was required to lift trays of letters weighing up to 16 pounds and bags of mail up to 70 pounds, lifting his right arm above the shoulder about one third of the time.

In a November 10, 2011 addendum report, Dr. Cohen reviewed the results of a November 7, 2011 functional capacity test. He stated that the study was negative for pain behavior; but maximum effort was not given. Appellant did not demonstrate maximal effort during testing which was necessary for overall consistency. For this reason, his test did not provide an accurate indication of his physical capabilities. Dr. Cohen noted that appellant's condition was accepted for aggravation of right shoulder calcifying tendinitis. He reiterated that appellant's accepted condition had resolved within a year from surgery. Appellant was currently capable of functioning at a sedentary level, and did not meet the job requirements for his date-of-injury position as a part-time flexible clerk.

On March 21, 2012 OWCP issued a notice of proposed termination of compensation. It found that the weight of the medical opinion was represented by Dr. Cohen and established that the accepted aggravation of appellant's right shoulder condition had resolved within one year of surgery. Further, Dr. Cohen found that the ongoing shoulder condition was related to his preexisting service-connected disability and cervical degenerative disease with radiculopathy.

By decision dated April 27, 2012, OWCP terminated appellant's compensation, finding that Dr. Cohen's second opinion represented the weight of the medical evidence.

On May 4, 2012 appellant requested an oral hearing, which was held on September 18, 2012.

In a July 27, 2012 report, Dr. Erickson opined that appellant had not made a full recovery from the 1984 work-related right shoulder injury, which led to arthroscopic surgery and debridement in 1985. Since that time, appellant had not returned to full duty and had not fully recovered. Dr. Erickson examined appellant on April 9, 2012 at which time he demonstrated decreased range of motion of the right shoulder and a loss of motor function. An MRI scan of July 10, 2010, showed calcification tendinitis of the right shoulder. Dr. Erickson advised that appellant was not able to perform his date-of-injury job, had continuing range of motion deficits with weakness and a supportive MRI scan, and had not made a full recovery from the 1984 work injury.

In a November 26, 2012 report, Dr. Erickson related that appellant was experiencing pain in his head, neck, and right shoulder. She advised that medication and rest reduced the pain somewhat. Dr. Erickson recommended that appellant undergo a course of physical therapy. She diagnosed cervical and lumbar radiculopathy and prescribed a cervical epidural steroid injection.

By decision dated December 6, 2012, an OWCP hearing representative set aside the April 27, 2012 decision. He found that, the April 27, 2012 decision was proper at the time it was issued; however, Dr. Erickson's July 27, 2012 report created a conflict in the medical opinion with Dr. Cohen as to whether appellant had residuals of his accepted right shoulder condition or disability. The hearing representative remanded the case for referral of appellant to an impartial medical examiner.

In a December 21, 2012 report, Dr. Erickson stated that on examination appellant was experiencing bilateral shoulder, lower back, and neck pain. She advised that he had been prescribed medication and had undergone physical therapy to partially ameliorate his symptoms.

Appellant was referred to Dr. Stephen J. Jacobs, a Board-certified orthopedic surgeon, for a referee medical examination. In a March 18, 2013 report, Dr. Jacobs reviewed the history of injury and medical treatment. He noted that appellant had problems with his right shoulder since the 1960's. While appellant sustained an injury at work on October 12, 1984, this was at most a partial tear of the superior aspect of the subscapularis. Currently, there was no evidence of tearing of the infraspinatus or supraspinatus tendons and the labrum was intact. Dr. Jacobs stated that an arthroscopic debridement, which appellant underwent in 1985, would not be expected to produce the severe disability of which he continued to complain.

Examination of the right shoulder showed the absence of edema, no erythema and no deformity; however, appellant was tender everywhere the physician touched his shoulder, including the acromioclavicular joint and anterior shoulder girdle, laterally and posterolaterally. The right shoulder had a negative impingement sign and negative apprehension sign. On range of motion testing with resistance, appellant demonstrated normal strength, albeit with complaint of pain.

Dr. Jacobs advised that despite the passage of 28 years since his right shoulder surgery, the x-ray of appellant's right shoulder was essentially identical to that of the left shoulder, save for the slightly narrowed acromiohumeral distance shown on film. He opined that this was likely due, more than anything else, to limited use and subsequent atrophy in terms of the strength of the supraspinatus and infraspinatus, *i.e.* the strength of the rotator cuff muscles. Based on the diagnostic studies, Dr. Jacobs agreed with Dr. Cohen that there was no objective evidence of a permanent worsening of appellant's right shoulder as a result of the 1984 work injury, other than the limited use over 28 years which resulted in some internal atrophy. He agreed with Dr. Cohen that appellant's accepted aggravation of the right shoulder resolved within one year of his 1985 surgery. Dr. Jacobs concluded that appellant's ongoing symptoms were due to a combination of his preexisting right shoulder condition in addition to referred radicular pain from the cervical spine. He stated that one could not discount appellant's emotional state and other multiple nonrelated health problems, including his headaches, cervical radiculopathy, and lumbar radiculopathy.

By decision dated April 25, 2013, OWCP found that appellant was not entitled to compensation after April 27, 2012, the date his benefits were terminated. The weight of the medical evidence as represented by Dr. Jacobs established that the accepted aggravation of right shoulder calcifying tendinitis had resolved.

On April 30, 2013 appellant, through his attorney, requested an oral hearing, which was held on October 25, 2013.

By decision dated December 18, 2013, an OWCP hearing representative affirmed the April 25, 2013 decision.⁵ The hearing representative found that appellant's benefits were properly terminated as of April 27, 2013 and he failed to establish continuing residuals of his accepted right shoulder condition.

LEGAL PRECEDENT – ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the accepted condition has resolved in order to justify termination or modification of compensation benefits.⁶ The burden of proof on OWCP includes the necessity of furnishing rationalized medical opinion evidence which is based upon a proper factual and medical history.⁷

In assessing medical evidence, the weight of a physician's opinion is determined by its reliability, the opportunity for and thoroughness of the examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, and the care

⁵ The hearing representative incorrectly stated that appellant's compensation benefits were terminated on April 25, 2013. In this case, compensation benefits were terminated on April 27, 2012 and appellant received benefits through May 5, 2012. In the April 25, 2013 decision, OWCP determined that he had not established continuing disability after April 27, 2012.

⁶ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁷ *J.M.*, 58 ECAB 478 (2007).

manifested in the medical rationale expressed to support the physician's opinion on causal relationship.⁸

ANALYSIS – ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's compensation based upon the reports of Dr. Cohen, the second opinion physician.

OWCP referred appellant to Dr. Cohen for a second opinion evaluation to determine appellant's current condition, after Dr. Erickson, his attending physician, submitted reports which addressed treatment of his cervical degenerative disease, rather than the accepted aggravation of appellant's right shoulder calcifying tendinitis condition. In reports dated October 26 and November 10, 2011, Dr. Cohen provided a thorough review of appellant's prior history of right shoulder injury while in Viet Nam, the employment-related condition arising in 1984, medical treatment, and diagnostic studies. He noted that the claim was accepted for an aggravation of calcifying tendinitis in the right shoulder for which appellant underwent surgery on September 9, 1985. Dr. Cohen provided findings on physical examination and compared diagnostic tests obtained in 1987, 2007 and 2010. He found that the accepted aggravation of appellant's right shoulder condition resolved within one year of surgery in 1985. Dr. Cohen found no objective evidence of a permanent worsening of appellant's right shoulder as a result of the accepted employment injury. He attributed appellant's ongoing complaints as secondary to the preexisting service-connected shoulder condition and to radicular pain associated with appellant's cervical degenerative disc disease. Dr. Cohen referred appellant for a functional capacity evaluation, which he noted did not demonstrate maximal effort. He reiterated that appellant's employment-related aggravation ceased following one year surgery and that appellant's current level of functioning was due to his preexisting right shoulder and cervical conditions.

The Board finds that the reports of Dr. Cohen represent the weight of medical opinion and support the termination of appellant's benefits as of April 27, 2012. As noted, Dr. Cohen provided a comprehensive review of appellant's medical history, including the service-connected injury to his right arm while in Viet Nam. He addressed the medical reports of record and compared the diagnostic tests, which he explained did not support a permanent aggravation of appellant's preexisting right shoulder condition. Further, Dr. Cohen referred appellant for additional functional capacity testing, which he noted did not support maximal effort. He attributed appellant's ongoing right shoulder condition to the preexisting service-connected injury in the 1960's and cervical disc disease; Dr. Cohen found that the aggravation in 1984 had resolved after one year following surgery on September 9, 1985.

LEGAL PRECEDENT -- ISSUE 2

Whether OWCP met its burden of proof to terminate compensation benefits, the burden of proof shifted to the claimant to establish that any subsequent disability is causally related to the accepted employment injury.⁹

⁸ See *Michael E. Mina*, 57 ECAB 379 (2006); *Anna C. Leanza*, 48 ECAB 115 (1996).

⁹ See *Darlene R. Kennedy*, 57 ECAB 414 (2006).

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence; the opinion of such physician is given special weight if sufficiently well rationalized and based on a proper factual and legal background.¹⁰

ANALYSIS -- ISSUE 2

After terminating appellant's benefits based upon Dr. Cohen's reports, appellant submitted additional evidence from Dr. Erickson. OWCP determined that a conflict in medical opinion arose between Dr. Erickson and Dr. Cohen to whether appellant had continuing residuals and disability after April 27, 2012 causally related to her accepted right shoulder aggravation. Appellant was referred by OWCP to Dr. Jacobs for an impartial medical evaluation.

In a March 18, 2013 report, Dr. Jacobs reviewed the history of appellant's right shoulder injury while in Viet Nam, the employment injury of 1984 and surgery performed in 1985. He noted that appellant was also treated for his cervical spine, for which he had several epidural injections which provided little relief. Dr. Jacobs set forth findings on physical examination of the cervical spine and upper extremities, including findings on range of motion. He noted that, as to the right shoulder, appellant was tender everywhere examined. There was negative impingement testing. Dr. Jacobs reviewed diagnostic studies of record and noted that an October 9, 2010 cervical MRI scan showed a congenital fusion at C5-6. At C3-4 there was a disc bulge with osteophytic ridging on the left. At C4-5, there was some disc bulging with annular tearing, right greater than left. Dr. Jacobs obtained x-rays of the right shoulder, which revealed a nicely maintained acromioclavicular joint, with little difference in the right acromioclavicular joint when compared to the left. The glenohumeral joint was well maintained while the subacromial space was somewhat narrowed on the right when compared to the left. Dr. Jacobs provided a lengthy review of appellant's treatment records, noting multiple cervical epidural injections by Dr. Erickson from 2003 to 2011. He also reviewed the reports of Dr. Cohen and the functional capacity evaluation. Dr. Jacobs stated that he agreed with Dr. Cohen that appellant's continued right shoulder symptoms were a combination of his preexisting injury while in military service as well as radicular pain associated with the cervical spine. He stated that there was no objective evidence that the 1984 work injury caused a permanent worsening of appellant's right shoulder condition. Dr. Jacobs found that the residuals related to appellant's 1984 injury had resolved within one year of surgery in 1985. He noted that there were other orthopedic conditions involving the cervical and lumbar spine, which prevented appellant from performing the full duties of his date-of-injury job.

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹¹

The Board finds that the weight of medical opinion as to appellant's right shoulder condition after April 27, 2012 is represented by the report of Dr. Jacobs, the impartial medical specialist. He provided a report which thoroughly reviewed appellant's history of injury while in

¹⁰ See *Phillip H. Conte*, 56 ECAB 213 (2004).

¹¹ 5 U.S.C. § 8123.

the military in the 1960's and in civilian service in 1984. Dr. Jacobs set forth an extensive review of appellant's medical history, treatment and diagnostic testing. Based on his physical examination, Dr. Jacobs determined that appellant's ongoing right shoulder symptoms related to the preexisting service-connected injury and cervical degenerative disc disease. He found that residuals related to appellant's 1984 injury resolved one year following surgery in 1985.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate compensation benefits as of April 27, 2012 based on the medical reports of Dr. Cohen, a second opinion specialist. Appellant did not meet his burden of proof to establish based on the weight of medical opinion as represented by Dr. Jacobs, the impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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