

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

D.K., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Fort Dix, NJ, Employer**

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**Docket No. 07-2311
Issued: April 22, 2008**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2007 appellant, through counsel, filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated October 31, December 4 and 21, 2006 and June 13, 2007. The Office terminated appellant's compensation benefits and denied her cervical condition and treatment as causally related to her accepted injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective December 23, 2006 for her accepted right shoulder condition; and (2) whether appellant met her burden of proof to establish her cervical condition and associated medical treatment were caused by her accepted injury.

FACTUAL HISTORY

On May 22, 2001 appellant, then a 31-year-old corrections officer, sustained injury to her right shoulder after firing a shotgun. The Office accepted her claim for right shoulder contusion

and labral tear. It authorized right shoulder arthroscopic surgery, which was performed on October 20, 2005. Appellant was reassigned to a secretarial position effective November 12, 2001. The Office accepted her June 8 and September 12, 2005 claims for a recurrence of disability. Appellant was released to fully-duty work on January 6, 2006 by Dr. Lawrence I. Barr, a treating osteopath. On October 10, 2006 the Office placed appellant on the periodic rolls in receipt of compensation for total disability.

On February 28, 2006 Dr. Mark A.P. Filippone, Board-certified in physical medicine and rehabilitation, reviewed diagnostic testing of the upper extremities. He noted that motor, sensory and late reflex studies of both upper extremities were normal and essentially symmetrical. Dr. Filippone found no evidence of carpal tunnel syndrome, ulnar neuropathy or entrapment about the shoulder. However, the study was indicative of partial denervation, mild and incomplete, of the C5-6 nerve roots. On physical examination, appellant exhibited guarding, pain and spasm in the right upper trapezius around the right shoulder and lower cervical paraspinous musculature. Dr. Filippone requested authorization to perform a cervical magnetic resonance imaging (MRI) scan to rule out a herniated disc. He opined that the noted abnormalities were related to appellant's May 22, 2001 employment injury.

On March 17, 2006 Dr. Filippone noted that he first examined appellant on October 17, 2005. Appellant underwent surgery on October 20, 2005; however, he did not have any diagnostic studies or surgical reports to review. Dr. Filippone conducted diagnostic tests of her bilateral upper extremities which showed evidence of a right C5-6 cervical radiculopathy. On examination, appellant complained of right shoulder and cervical pain. Given her history of injury, Dr. Filippone opined that her cervical condition was casually related to her injury of May 22, 2001. An April 24, 2006 MRI scan revealed mild degenerative disease and a large anterior C5-6 osteophyte. On May 3, 2006 Dr. Filippone noted that appellant continued to experience right shoulder and cervical pain. He limited her typewriting work activity to four hours of an eight-hour day. Dr. Filippone opined that appellant's abnormalities, except for a congenital Arnold Chiari malformation, were directly the result of her employment injury.

On May 22, 2006 appellant's counsel requested the Office to acceptance her claim for right C5-6 cervical radiculopathy based upon the reports of Dr. Filippone.

On June 19, 2006 Dr. A.R. Sayed Bakhaty, a specialist in pain management, reviewed a history of injury and noted that appellant experienced intermittent right shoulder and neck pain since her May 2001 employment injury. Cervical range of motion revealed 30 degrees extension and flexion, 20 degrees right lateral rotation and 10 degrees left lateral rotation. There was tenderness to percussion at C5-6 and localized tenderness "over the lower facet areas at C6-7 and C7-1 and more evidence on the right than the left side." Dr. Bakhaty also reported tenderness at the acromioclavicular (AC) joint and scapulohumeral junction producing a limited range of motion. He diagnosed C5-6 right sided radiculopathy, C5-6 post-traumatic disc bulge, post-traumatic myofascial syndrome, post-traumatic chronic right shoulder tendinitis with persistent complaints following surgery.

In a June 15, 2006 report, Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, diagnosed persistent cervical radiculopathy. He noted that appellant sustained an injury on May 22, 2001 involving her right shoulder and neck. Dr. Cohen recommended further

diagnostic testing. On August 25, 2006 Dr. Filippone stated that appellant continued to have persistent right shoulder and neck pain. On September 6, 2006 Dr. Bakhaty reiterated his diagnoses and recommended that appellant undergo a cervical epidural and facet nerve block and right suprascapular nerve block.

The Office referred appellant for examination by Dr. Zohar Stark, a Board-certified orthopedic surgeon, for an opinion as to the medical treatment recommended by Dr. Bakhaty. On October 5, 2006 Dr. Stark reviewed the history of injury and medical treatment culminating in surgery in 2005. He noted the diagnostic studies obtained of the right shoulder and cervical regions, noting that appellant's complaint of neck pain radiating to her right elbow and increasing with motion. Dr. Stark found no tenderness over the cervical spinous process with tenderness over the trapezius and supraspinatus muscles on the right without spasm. There was no sensory or motor deficit to either upper extremity. Dr. Stark noted a healed arthroscopic scar over the anterior and posterior aspects of the shoulder with tenderness to palpation. Impingement and apprehension tests were negative. Dr. Stark noted that the mechanism of injury was firing a shotgun and he reviewed the diagnostic reports of record. He diagnosed disc disease with C5-6 radiculopathy on the right, stating that there was no causal relationship between this diagnosis and the accepted injury. Dr. Stark advised that, at the time of injury in 2001, appellant sustained a contusion of the right shoulder. The diagnostic studies revealed degenerative disease with narrowing of the right C5-6 foramina and radiculopathy to the right side. Dr. Stark attributed appellant's ongoing symptoms to degenerative disc disease of the cervical spine, which was not caused or aggravated by the employment injury. He advised that the medical procedures recommended by Dr. Bakhaty were for treatment of appellant's cervical condition and should not be accepted. Dr. Stark opined that appellant could perform her regular duties without restriction and had no ongoing disability attributable to the May 22, 2001 injury.

By decision dated October 31, 2006, the Office denied appellant's cervical condition and recommended medical treatment as causally related to the accepted employment injury. The Office found that Dr. Stark's opinion represented the weight of medical evidence.

On November 7, 2006 the Office issued a proposed notice of termination of compensation benefits based upon Dr. Stark's finding that appellant had no ongoing residuals or disability due to the May 22, 2001 employment injury.

In a November 7, 2006 letter, appellant's attorney requested an oral hearing before an Office hearing representative on the denial of her cervical condition. In a November 8, 2006 note, Dr. Bakhaty diagnosed cervical radiculopathy, right shoulder arthralgia with tendinitis and persistent pain to upper back and right shoulder and neck myofascial pain syndrome due to the May 22, 2001 employment injury. He noted that appellant was scheduled for a cervical epidural and facet nerve block on December 4, 2006.

By decision dated December 4, 2006, the Office denied authorization for treatment of her cervical condition.

On December 8, 2006 counsel for appellant requested an oral hearing before an Office hearing representative. Counsel also objected to the Office's proposal to terminate her compensation benefits based on the report of Dr. Stark.

In a decision dated December 21, 2006, the Office terminated appellant's compensation benefits effective December 23, 2006.

Thereafter, appellant submitted additional evidence. On December 20, 2006 Dr. Filippone reviewed the report of Dr. Stark and disagreed with his stated conclusions. He referred to the diagnostic studies, noting that while it was uncertain whether appellant had ever complained of cervical symptoms to her prior physicians, her cervical condition was consistent with a traumatic injury from having the shoulder jolted back and the neck twisted during a shot gun blast. Dr. Filippone stated that all of appellant's "abnormalities are the direct and sole result of the work-related injuries sustained by the patient on May 22, 2001."

On January 31, 2007 appellant requested reconsideration of the December 21, 2006 decision. She contended that a conflict in medical opinion existed which required referral to an impartial medical examiner.

The record was referred to an Office medical adviser for review. On February 20, 2006 he opined that there was no evidence of direct cervical trauma at the time of the employment injury. He attributed the conditions diagnosed by Dr. Bakhaty to degenerative cervical disease, appellant did not report any acute onset of neck or radicular symptoms when injured.

By decision dated March 30, 2007, the Office denied modification of the termination decision.

In a June 13, 2007 decision, an Office hearing representative found that appellant did not establish that her cervical condition was causally related to her May 22, 2001 injury.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.¹ After it has determined that an employee has disability causally related to 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.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁴

¹ *Paul L. Stewart*, 54 ECAB 824 (2003); *Mary A. Lowe*, 52 ECAB 223 (2001).

² *Elsie L. Price*, 54 ECAB 734 (2003); *Manuel Gill*, 52 ECAB 282 (2001).

³ *See Gewin D. Hawkins*, 52 ECAB 242 (2001); *Del K. Rykert*, 40 ECAB 284 (1988).

⁴ *James F. Weikel*, 54 ECAB 660 (2003).

Section 8123(a) of the Federal Employees' Compensation Act 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.⁵ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁶

ANALYSIS -- ISSUE 1 and 2

On May 22, 2001 appellant sustained a right shoulder contusion and labral tear after firing a shotgun. She underwent arthroscopic surgery for right shoulder repair in 2005. The issue on appeal is whether the Office properly terminated her compensation benefits, finding that she had no ongoing residuals or disability causally related to her accepted injury.

The Board finds that a conflict in medical opinion exists between appellant's attending physicians and the Office's second opinion specialist as to whether the residuals and disability due to her accepted right shoulder condition have ceased. Dr. Filippone obtained diagnostic studies of appellant's upper extremities, noting on examination that she exhibited pain and spasm in the trapezius muscles around the right shoulder and lower cervical muscles. He attributed appellant's right shoulder condition and cervical disc disease to the impact to her shoulder from the accepted shotgun blast. Dr. Filippone advised that she had physical limitations due to her accepted right shoulder condition. Dr. Bakhaty noted appellant's complaints of right shoulder and cervical pain which he, too, attributed to the accepted injury. He noted tenderness in the region of the AC joint and limitation on range of motion in the right shoulder and neck. Dr. Bakhaty attributed appellant's right shoulder and cervical complaints to the surgery performed in 2005, for which he made recommendations concerning further treatment. Dr. Stark examined appellant and found that her ongoing condition and complaints were attributable to degenerative disease of the cervical spine which was not related to the accepted injury. He found no sensory or motor deficit to either upper extremity and noted some residual tenderness in the area of the arthroscopic shoulder surgery. Dr. Stark described the medical record as revealing injury to the right shoulder due to the shotgun blast but opined that her cervical degenerative disease was not traumatic in origin. He found that appellant's ongoing complaints were related to disease in the region of C5-6 with radiculopathy to her right side. Dr. Stark found that the medical procedures recommended by Dr. Bakhaty were not related to the injury to her right shoulder in 2001.

The Board finds that a conflict in medical opinion arose between Dr. Filippone and Dr. Bakhaty, for appellant, with Dr. Stark, the second opinion examiner. The physicians expressed disagreement as to appellant's ongoing residuals and disability were due to her accepted right shoulder condition and whether her diagnosed cervical disc disease was caused or contributed to by the May 22, 2001 employment injury. As the conflict arose prior to the

⁵ 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321. See *R.C.*, 58 ECAB ____ (Docket No. 06-1676, issued December 26, 2006); *Darlene R. Kennedy*, 57 ECAB ____ (Docket No. 05-1284, issued February 10, 2006); *Elaine Sneed*, 56 ECAB 373 (2005).

⁶ *M.S.*, 58 ECAB ____ (Docket No. 06-797, issued January 31, 2007); *Fred Reese*, 56 ECAB 568 (2005).

December 21, 2006 decision terminating her compensation, the Board concludes that the Office did not meet its burden of proof in establishing that appellant's right shoulder condition resolved without further residuals or disability. For this reason, the Board also finds that the case is not in posture for decision on the issue of whether appellant's cervical condition and radiculopathy or need for medical treatment is causally related to her accepted injury. The medical evidence of record necessitates referral to an impartial medical specialist to resolve the conflict of medical opinion.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits effective December 23, 2006. The case is not in posture for decision on whether her cervical condition and need for medical treatment is due to her May 22, 2001 employment injury due to the conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2007 and December 21, 2006 decisions of the Office of Workers' Compensation Programs be reversed. The December 6 and June 13, 2006 decisions are set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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