

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

N.S., Appellant)

and)

**DEPARTMENT OF THE AIR FORCE, AIR
NATIONAL GUARD, McGUIRE AIR FORCE
BASE, NJ, Employer**)

**Docket No. 10-303
Issued: October 14, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 13, 2009 appellant filed a timely appeal of an August 14, 2009 decision of the Office of Workers' Compensation Programs affirming the termination of his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective January 7, 2009.

FACTUAL HISTORY

On February 13, 2007 appellant, then a 50-year-old electronic integrated systems mechanic, filed a traumatic injury claim alleging that on February 9, 2007 he strained his shoulder while lifting a navigation unit up a ladder. He stopped work on August 21, 2007 to

undergo surgery. Appellant returned to light duty on October 15, 2007. The Office accepted his claim for right shoulder sprain. It paid compensation benefits.

Initial reports from Dr. John Salvo, a Board-certified orthopedic surgeon, diagnosed right shoulder impingement, possible partial cuff tear and possible superior labral tear from anterior to posterior (SLAP). He recommended right shoulder arthroscopy and SLAP repair, which he performed on August 21, 2007. In an August 30, 2007 attending physician's report, Dr. Salvo diagnosed SLAP tear and adhesive capsulitis. He noted that appellant was totally disabled from August 21 to November 21, 2007. Dr. Salvo advised that appellant could resume regular work on November 21, 2007 but would decide if light duty was appropriate two months after the date of surgery. In an October 11, 2007 work capacity evaluation, he indicated that appellant was not able to perform his usual job. Dr. Salvo advised that appellant could perform desk work but no use of the right upper extremity until November 21, 2007, then restricted duty.

On February 6, 2008 the Office referred appellant, with a statement of accepted facts, to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion.¹ In a May 8, 2009 report, Dr. Stark summarized appellant's history of injury and noted his complaint of right shoulder discomfort. His examination revealed that appellant was able to walk with a normal reciprocating heel/toe gait. Appellant's spine revealed no tenderness over the spinous process of the cervical, thoracic or lumbosacral vertebrae. There was also no tenderness over the paracervical, paradorsal or paralumbar muscles. Dr. Stark noted that the range of motion of the cervical and lumbosacral spines was preserved and that there was no sensory or motor deficit to the extremities. He found that the right shoulder had well-healed arthroscopic scars with some tenderness over the lateral portal. Dr. Stark noted that appellant's shoulder range of motion was preserved except for the last 10 degrees of abduction and forward flexion. He also noted that internal rotation was reduced by about 20 degrees compared to the left shoulder. Dr. Stark indicated that impingement and apprehension tests were negative bilaterally. He reviewed appellant's medical records and diagnostic tests. Dr. Stark opined that there were no objective findings to indicate that shoulder impingement still existed. He further opined that appellant's condition had resolved and there was no medical evidence that appellant suffered from any other injury except a shoulder injury. Dr. Stark advised that appellant was not disabled by his work-related injury and he could return to his preinjury position with no restrictions. He indicated that no further medical treatment or testing was necessary. In a work capacity evaluation of the same date, Dr. Stark indicated that appellant could perform his usual job.

In a May 30, 2008 report, Dr. Salvo noted that appellant was doing very well and had a little trouble reaching up in the back. He diagnosed status post right shoulder SLAP repair. Dr. Salvo indicated that appellant was cleared for full activity with no restrictions. He advised that appellant return for a follow up in six months.

On June 3, 2008 appellant noted that he was filing a schedule award claim and submitted Form CA-7 claiming a schedule award on July 28, 2008.

¹ Appellant did not attend his scheduled appointment as he was in Ohio training for a new position. On May 2, 2008 the Office referred him for a rescheduled appointment with Dr. Stark.

In support of his schedule award claim, appellant submitted a March 17, 2008 report of Dr. David Weiss, an osteopath specializing in family medicine, who provided a history of injury and noted appellant's complaint of right shoulder pain and stiffness and right arm weakness. He also noted appellant's report of exacerbated pain at work, difficulty with household chores and self care and difficulty with overhead reaching and lifting with the right arm. Upon examination, Dr. Weiss found that the right shoulder revealed well-healed portal arthroscopy scars. He found anterior cuff tenderness and reported right shoulder range of motion measurements. Dr. Weiss noted reviewing the medical records consisting of a February 20, 2007 magnetic resonance imaging (MRI) scan and Dr. Salvo's reports and physical therapy notes. He diagnosed post-traumatic acromioclavicular arthropathy with right shoulder impingement, glenoid labral tear (SLAP lesion) to the right shoulder, chronic post-traumatic rotator cuff tendinopathy of the right shoulder, status post subacromial decompression to the right shoulder and status post repair of the glenoid labral tear of the right shoulder. Dr. Weiss opined that the February 9, 2007 work injury caused the subjective and objective findings on examination. Based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), appellant had 1 percent impairment for reduced right shoulder flexion, 10 percent impairment for right shoulder resection arthroplasty, and 3 percent pain-related impairment for a total of 14 percent right arm impairment. Dr. Weiss noted that appellant reached maximum medical improvement on March 17, 2008.²

In a June 26, 2008 decision, the Office terminated appellant's compensation benefits effective that day finding the weight of the medical evidence supported no disability or need for continued medical treatment due to the accepted injury as it had resolved. Appellant requested an oral hearing on July 2, 2008.

In an October 15, 2008 decision, an Office hearing representative reversed the June 26, 2008 decision finding that the Office failed to issue a pretermination notice advising appellant that his compensation benefits were being terminated.

On November 20, 2008 the Office issued a notice of proposed termination of appellant's compensation benefits finding that the weight of the medical evidence demonstrated that he had no continued injury-related disability.

In a December 3, 2008 statement, appellant objected to the proposed termination asserting that Drs. Salvo and Weiss noted that appellant still suffered from residuals of his work injury. He further asserted that their opinions created a conflict with the second opinion physician and that appellant should be referred to a referee examination. Appellant requested an additional 30 days to submit medical evidence establishing that appellant suffered from residuals of his work injury.

In a January 7, 2009 decision, the Office terminated appellant's compensation benefits effective that day finding that the Office did not receive any evidence sufficient to alter its

² On January 12, 2009 an Office medical adviser reviewed Dr. Weiss' report and concurred that appellant had 14 percent right arm impairment. In a May 28, 2009 decision, the Office issued appellant a schedule award for 14 percent impairment of the right arm. It paid him compensation for 43.68 weeks from March 17, 2008 to January 16, 2009. Appellant has not appealed this decision.

recommendation to terminate compensation benefits. It also noted that Dr. Stark's report represented the weight of the medical evidence, and therefore, there was no conflict in medical opinion.

On January 13, 2009 appellant requested an oral hearing that was held on May 29, 2009. He requested that the Office reverse its decision denying compensation benefits as appellant required continued medical treatment.

In an August 14, 2009 decision, an Office hearing representative affirmed the January 7, 2009 decision finding that the Office properly accorded the weight of the medical evidence to Dr. Stark.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his 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.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁶

ANALYSIS

The record reflects that appellant sustained an injury on February 9, 2007 to his right shoulder. The Office accepted his claim for right shoulder sprain and authorized right shoulder surgery. It terminated appellant's compensation benefits effective January 7, 2009 based on the report from Dr. Stark.

In a May 8, 2009 report, Dr. Stark noted the history of appellant's February 9, 2007 work injury and advised there were no objective findings to support that appellant's right shoulder impingement condition persisted. He supports his opinion by noting that his examination revealed that the range of motion of the cervical and lumbosacral spines was preserved with no sensory or motor deficit to the extremities. Dr. Stark also noted that appellant's right shoulder had well-healed arthroscopic scars with some tenderness over the lateral portal and that the range of motion was generally preserved with some noted limitations. He further explained that

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁶ *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

impingement tests were negative bilaterally. After reviewing appellant's record and conducting his own examination, Dr. Stark determined that appellant's work-related right shoulder condition had resolved without residuals and without continued disability due to the work injury. He stated that there were no objective findings to indicate that the accepted condition still existed. Dr. Stark further determined that appellant could perform his preinjury position without restrictions.

The Board finds that Dr. Stark's report represents the weight of the medical evidence and that the Office properly relied on his reports in terminating appellant's benefits. Dr. Stark's opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Moreover, he analyzed this information in addition to his own examination findings to reach a reasoned conclusion regarding appellant's condition.⁷ Dr. Stark found no basis on which to attribute any residuals or continued disability to his employment injury.

Although the record contains other medical reports, none are sufficient to create a conflict or overcome Dr. Stark's report. Dr. Weiss' March 17, 2008 report rated appellant's permanent impairment for schedule award purposes. He noted appellant's report of exacerbated pain at work, difficulty with household chores and self-care and difficulty with overhead reaching and lifting with the right arm. Dr. Weiss' examination revealed limited range of motion of appellant's right shoulder. He diagnosed post-traumatic acromioclavicular arthropathy with right shoulder impingement, glenoid labral tear (SLAP lesion) to the right shoulder, chronic post-traumatic rotator cuff tendinopathy of the right shoulder, status post subacromial decompression to the right shoulder and status post repair of the glenoid labral tear of the right shoulder. Dr. Weiss broadly opined that the February 9, 2007 work injury caused the subjective and objective findings on examination, but this is not relevant to the issue presently on appeal. He did not provide any medical rationale explaining how these diagnosed conditions were the result of appellant's work-related injury.⁸ Moreover, Dr. Weiss' report did not address whether further treatment was required or discuss whether any work-related condition caused any disability for work.

Additionally, Dr. Salvo in his May 30, 2008 report, supported full activity with no restrictions.

There is no other medical evidence contemporaneous with the termination of appellant's compensation benefits which supports that he had any continuing employment-related condition. Consequently, the weight of the medical evidence rests with Dr. Stark and establishes that appellant had no residuals due to his accepted right shoulder condition.

⁷ See *Naomi Lilly*, 10 ECAB 560 (1959) (the opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into the weight of an evaluation).

⁸ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

On appeal, appellant asserts that he is entitled to additional medical treatment as the evidence does not establish that he recovered from residuals of his work injury. He asserts that an impairment rating from Dr. Weiss and an Office medical adviser support that he still has residuals of his work injury. As noted, the reports of Dr. Weiss and the Office medical adviser only addressed appellant's right shoulder condition as it pertained to calculating an impairment rating for schedule award purposes. The physicians did not address the issue regarding whether appellant's right shoulder condition had resolved or whether he had any continued disability from work or residuals requiring continuing medical treatment.⁹ Therefore these reports are of limited probative value regarding whether appellant has continuing residuals of the work injury that require medical treatment.¹⁰ Appellant also asserts that Dr. Stark's report was contradictory as he noted loss of range of motion of the right shoulder but opined that appellant's condition had resolved. As noted, Dr. Stark's opinion that appellant's right shoulder had resolved was supported by objective findings. Although he noted some motion limitations, Dr. Stark did not indicate that this caused any disability or need for continuing medical treatment.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective January 7, 2009.

⁹ See *Lyle E. Dayberry*, 49 ECAB 369 (1998) (disability is not synonymous with physical impairment which may or may not result in an incapacity to earn wages).

¹⁰ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury). See also *B.S.*, 61 ECAB ____ (Docket No. 09-195, issued October 9, 2009) (a termination of compensation based on a finding that a claimant no longer had residuals of any employment-related condition did not preclude consideration of a schedule award for accepted conditions).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 14, 2009 is affirmed.

Issued: October 14, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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