

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

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**T.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland Heights, OH, Employer**

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**Docket No. 11-1154  
Issued: December 16, 2011**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 13, 2011 appellant, through her attorney, filed a timely appeal from a January 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 effective September 29, 2010 on the grounds that she had no residuals of an October 24, 1996 employment injury; and (2) whether appellant established that she had any continuing employment-related disability or residuals after that date.

On appeal, her attorney asserts that the decision is contrary to fact and law.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On October 24, 1996 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim alleging that she injured her right shoulder that day while lifting boxes. OWCP accepted the claim for right trapezius strain and right shoulder impingement. On November 11, 1998 appellant underwent right shoulder arthroscopic surgery. She returned to modified duty on May 12, 1999 and came under the care of Dr. Antony M. George, a general practitioner.<sup>2</sup>

On February 20, 2007 appellant began a limited-duty position for four hours daily. She sustained a recurrence of disability on May 19, 2009 and returned to modified employment for six hours a day on June 24, 2009. Appellant stopped all work on July 21, 2009 and was placed on the periodic compensation rolls. On September 29, 2009 Dr. Reuben Gobezie, a Board-certified orthopedic surgeon, performed a second right shoulder arthroscopic procedure consisting of subacromial decompression with acromioplasty, extensive debridement and distal clavicle resection. Appellant did not return to work.

In an October 7, 2009 report, Allyson Brinda, a physician's assistant and associate of Dr. Gobezie, described appellant's postoperative recovery. On December 10, 2009 the employing establishment notified OWCP that appellant's disability retirement had been approved, effective December 4, 2009 and that her limited-duty job remained available. Dr. George submitted additional reports in which he noted her complaints of right shoulder pain and soreness. He provided examination findings.

In February 2010, OWCP referred appellant to Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a March 8, 2010 report, Dr. Ghanma reviewed the medical record, appellant's report of the history of injury and medical treatment. He listed appellant's complaint of constant neck and shoulder pain with stiffness and weakness in the right arm. Dr. Ghanma provided findings on physical examination of the right shoulder, noting no swelling or discoloration, no crepitation with range of motion, no evidence of impingement or instability, no abnormality of the acromioclavicular (AC) joint, the subacromial bursa, the biceps groove or the head of the humerus and no evidence of atrophy. He provided shoulder range of motion measurements that demonstrated a decrease on the right when compared to the left. Dr. Ghanma advised that appellant had no additional diagnosis caused by the employment injury and that her cervical problems were due to degenerative changes in the cervical spine and were not a result of the October 24, 1996 employment injury. He indicated that there were no residuals of the right trapezius strain or right shoulder impingement causally related to the employment injury and no residuals of the two shoulder procedures other than that a portion of the clavicle was removed but that this did not cause symptoms on a clinical basis.

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<sup>2</sup> On February 19, 2002 appellant was granted a schedule award for a three percent impairment of the right upper extremity and on November 7, 2003 was granted a schedule award for an additional three percent. Following an appeal to the Board, by order dated August 13, 2003, the Board remanded the case to OWCP for reconstruction and proper assemblage of the case record. Docket No. 02-1554 By decision dated May 7, 2004, an OWCP hearing representative set aside the November 7, 2003 decision and remanded the case to OWCP for a second-opinion evaluation regarding the degree of right upper extremity impairment. On September 10, 2004 appellant was granted a schedule award for a five percent impairment, for a total impairment of eight percent. On January 26, 2007 she filed for an additional schedule award.

Dr. Ghanma observed that the difference in range of motion related to lack of full effort on appellant's part. He concluded that she was not disabled from any type of employment and could return to full-time duties as a letter carrier without restrictions and that she needed no further therapy or treatment.

In a March 3, 2010 report, Ms. Brinda advised that appellant was doing well following the September 2009 surgery. By letter dated March 26, 2010, Dr. George advised that appellant continued to have loss of range of motion and strength in all direction with pain and spasms throughout the muscles of the shoulder girdle. He opined that she would never be able to return to a position that required repetitive or forceful use of the right shoulder.

OWCP found a conflict in medical opinion between Dr. George and Dr. Ghanma regarding whether appellant had ongoing residuals of her employment injury and whether she was disabled for employment. On May 10, 2010 appellant was referred to Dr. Ralph Kovach, Board-certified in orthopedic surgery, for an impartial evaluation. In a May 24, 2010 report, Dr. Kovach described the October 24, 1996 employment injury and her subsequent treatment. He noted appellant's complaint of constant pain in the right trapezius musculature with some arm pain. Examination of the AC joint revealed no crepitation and no tenderness and there was no crepitation on movement of the shoulder. Dr. Kovach provided right shoulder range of motion findings, advised that appellant had no atrophy in the arms, no instability in the shoulder and negative impingement signs. Reflexes in the upper extremities were normal and there were no sensory changes. Dr. Kovach advised that careful evaluation of the trapezius revealed no wasting and muscle spasm was not present. Trigger points were extensively searched for and none were found. Dr. Kovach noted that shoulder strength testing was 3/5 in all directions but that appellant made minimal effort in the evaluation. He advised that there was no additional diagnosis caused by the October 24, 1996 employment injury and that appellant had no residuals of a right trapezius strain or right shoulder impingement or residuals of the 1998 and 2009 arthroscopic procedures and that she was not totally disabled from any type of employment and could return to the letter carrier position without physical restrictions. Dr. Kovach noted that she had postoperative range of motion that was not expected to improve but that she needed no further therapy or treatment and was at maximum medical improvement.

On August 27, 2010 OWCP proposed to terminate appellant's compensation benefits finding that the medical evidence established that her work-related conditions had resolved.

Appellant disagreed with the proposed termination and submitted September 13, 2010 reports, in which Dr. George provided examination findings and noted that he had reviewed other medical reports that had significant inconsistencies with his physical findings. Dr. George found that she could not return to work until she had a functional capacity evaluation to assess her work ability. He stated that Dr. Gobezie also reported that appellant had a prolonged recovery from surgery and should only be released upon appropriate guidelines.

By decision dated September 30, 2010, OWCP finalized the termination of benefits effective September 29, 2010. It found that the weight of the medical evidence rested with the opinion of Dr. Kovach who performed the referee examination.

On October 4, 2010 appellant requested reconsideration and submitted additional treatment notes dated October 11 to December 6, 2010, in which Dr. George reported her complaint of continued shoulder discomfort, right worse than left. Dr. George advised that she had limited shoulder range of motion and diagnosed right shoulder strain, status post supraspinatus, rotator cuff surgery.

In a merit decision dated January 25, 2011, OWCP denied modification of the September 30, 2010 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>3</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

Section 8123(a) of FECA provides that 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>5</sup> When 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.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective September 29, 2010. The accepted conditions in this case are right trapezius strain and right shoulder impingement caused by an October 24, 1996 employment injury. OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. George, an attending physician, and Dr. Ghanma, an OWCP referral physician, regarding whether appellant continued to suffer residuals of the employment injury and as to the extent of any disability. It then properly referred her to Dr. Kovach, Board-certified in orthopedic surgery, for an impartial evaluation.

In a thorough May 24, 2010 report, Dr. Kovach described the October 24, 1996 employment injury and appellant's subsequent treatment. He noted her complaint of constant pain in the right trapezius musculature with some arm pain. On examination of the AC joint, Dr. Kovach advised that there was no crepitation or tenderness and no crepitation on movement of the shoulder. He provided right shoulder range of motion findings, advised that appellant had

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<sup>3</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

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

<sup>5</sup> 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>6</sup> *Manuel Gill*, 52 ECAB 282 (2001).

no atrophy in the arms, no instability in the shoulder and negative impingement signs. Reflexes in the upper extremities were normal and there were no sensory changes. There was no trapezius wasting, muscle spasm or trigger points. Dr. Kovach noted that appellant made minimal effort in the strength testing and advised that there was no additional diagnosis caused by the October 24, 1996 employment injury. He indicated that she had no residuals of a right trapezius strain, right shoulder impingement or of the 1998 and 2009 arthroscopic procedures and that she was not totally disabled from any type of employment and could return to the letter carrier position without physical restrictions. Dr. Kovach concluded that appellant needed no further therapy or treatment and was at maximum medical improvement.

The Board finds that, as Dr. Kovach provided a comprehensive, well-rationalized opinion in which he clearly advised that any residuals of appellant's accepted conditions had resolved his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.<sup>7</sup>

The medical evidence appellant subsequently submitted is insufficient to overcome the weight accorded Dr. Kovach as an impartial medical specialist. In a number of reports, Dr. George essentially reiterated his findings and conclusion that she continued to be disabled from the employment injury.<sup>8</sup> The Board has long held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.<sup>9</sup> Dr. George had been on one side of the conflict resolved by Dr. Kovach.

The Board therefore concludes that Dr. Kovach's opinion that residuals of appellant's accepted conditions had ceased is entitled to the special weight accorded an impartial medical examiner<sup>10</sup> and the additional reports from Dr. George are insufficient to overcome the weight accorded him as an impartial medical specialist regarding whether she had residuals of her accepted right upper extremity conditions. OWCP therefore properly terminated her compensation benefits effective September 29, 2010.

### **LEGAL PRECEDENT -- ISSUE 2**

As OWCP met its burden of proof to terminate appellant's compensation benefits effective September 29, 2010, the burden shifted to her to establish that she had any continuing disability causally related to her accepted right upper extremity injury.<sup>11</sup> To establish a causal relationship between the condition, as well as any attendant disability claimed and the

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<sup>7</sup> See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

<sup>8</sup> The Board notes that Dr. George referenced Dr. Gobezie. The only medical report of record from Dr. Gobezie is the September 29, 2009 operative report. The reports from Ms. Brinda do not constitute competent medical evidence as a physician's assistant is not considered a physician under FECA. *Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>9</sup> *I.J.*, 59 ECAB 408 (2008).

<sup>10</sup> See *Sharyn D. Bannick*, *supra* note 7.

<sup>11</sup> See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>12</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>13</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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 by the claimant.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant submitted insufficient medical evidence with her October 4, 2010 reconsideration request to establish that she continued to be disabled after September 29, 2010 due to the October 24, 1996 employment injury.

As discussed above, Dr. Kovach provided a comprehensive report in which he outlined examination findings and provided a rationalized explanation for his opinion that appellant's accepted conditions of right trapezius strain and right shoulder impingement had resolved and that she could return to her previous letter carrier duties.

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>15</sup>

In reports dated October 11 to December 6, 2010, Dr. George again reported appellant's complaint of continued shoulder discomfort and advised that she had limited shoulder range of motion. The Board finds these reports of diminished probative value because they do not contain sound medical reasoning establishing that she was totally disabled after September 29, 2010 due to the accepted conditions caused by the October 24, 1996 employment injury.<sup>16</sup> Dr. George did not explain why the 1996 employment injury caused continuing disabling residuals, especially considering that appellant had two corrective surgical procedures and, as stated earlier, he had been on one side of the conflict in medical evidence resolved by Dr. Kovach. The reports submitted on reconsideration are therefore entitled to little probative value and are insufficient to

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<sup>12</sup> *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>13</sup> *Id.*

<sup>14</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>15</sup> 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>16</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

meet an employee's burden of proof to establish that she continues to have work-related disability due to the accepted conditions.<sup>17</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective September 29, 2010 on the grounds that she had no residuals of an accepted condition and that she did not establish that she had any continuing employment-related disability or condition after that date causally related to the October 24, 1996 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> S.S., 59 ECAB 315 (2008).