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

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| **B.H., Appellant** | ) | |
| **and** | ) | **Docket No. 10-2372** |
| | ) | **Issued: September 30, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Burlington, NC, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On September 27, 2010 appellant filed a timely appeal from a September 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 OWCP met its burden of proof to terminate appellant's compensation benefits effective September 26, 2010.

### ***FACTUAL HISTORY***

On November 11, 2003 appellant, then a 57-year-old rural carrier, filed an occupational disease claim alleging that casing and delivering mail caused a left shoulder rotator cuff tear and impingement. OWCP accepted left shoulder impingement. Appellant stopped work on

[1] 5 U.S.C. §§ 8101-8193.

March 22, 2004. On March 25, 2004 she underwent arthroscopic subacromial decompression surgery. Appellant developed an infection in her shoulder and on April 20, 2004 underwent incision and drainage of the left acromioclavicular joint. OWCP accepted the additional condition of staphylococcus and osteomyelitis infections of the left shoulder, secondary to the shoulder surgery on March 25, 2004. Appellant did not return to work and was placed on the periodic compensation rolls.

In a March 22, 2005 report, Dr. William A. Somers, a Board-certified orthopedic surgeon and OWCP referral physician, noted the history of employment injury and infection and a 15-year history of rheumatoid arthritis. He advised that appellant's arthritis had been treated with medication prior to the work-related infection but had to be discontinued at that time. Dr. Somers stated that the medication could not be restarted and, because of this, her rheumatoid arthritis became significantly more active, involving the hands, elbows, shoulders, hip, knees and feet. He diagnosed status post subacromial decompression, left shoulder; status post infection, left acromioclavicular joint and subacromial space, postoperative and rheumatoid arthritis, active. Dr. Somers advised that appellant remained totally disabled, stating that, although the shoulder surgery itself and ensuing complication did not render her totally disabled, the fact that appellant could no longer keep her rheumatoid arthritis under control rendered her disabled and that, as long as it was not controllable, she could not return to work.[2]

Appellant relocated to Alabama in October 2005. In reports dated June 12, 2006 to August 8, 2007, Dr. Christopher D. Adams, Board-certified in internal medicine and rheumatology, diagnosed seropositive rheumatoid arthritis, leukopenia and left shoulder impingement who advised that the injury-related condition remained present due to persistent inflammation and that appellant could not use her hands for anything meaningful or gainful and her progressive, destructive arthritis rendered her totally disabled.

In February 2008, OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 3, 2008 report, Dr. Doman noted the accepted employment-related condition and his review of the medical records. He reported that appellant had severe nonwork-related rheumatoid arthritis that affected multiple joints through her body including the shoulders, hands, elbows and lower extremities and that she used a cane for ambulation. Dr. Doman diagnosed rheumatoid arthritis that was not medically connected to her work injury by direct cause, aggravation, precipitation or acceleration. He advised that she had reached maximum medical improvement in December 2005 and that any limitations to work were caused by her underlying rheumatoid arthritis.

OWCP determined that a conflict in medical evidence arose between the opinions of Dr. Adams and Dr. Doman regarding whether appellant's work-related left shoulder condition had resolved. It referred her to Dr. Paul Goldhagen, Board-certified in orthopedic surgery, for an

[2] In reports dated April 6 and May 12, 2006, Dr. Joseph I. Hoffman, Jr., a Board-certified orthopedic surgeon, who provided a second opinion evaluation for OWCP, advised that a functional capacity evaluation performed indicated that appellant could perform restricted duty for three to four hours daily. The employing establishment offered her a modified position that she refused.

impartial evaluation. Dr. Goldhagen was provided a set of questions that included whether a diagnosed condition was medically connected to the work related by direct cause or aggravation.

In a July 2, 2008 report, Dr. Goldhagen noted the history of employment-related injury and appellant's complaints regarding her arthritic condition. He provided physical examination findings and diagnosed subacromial impingement, osteomyelitis and rheumatoid arthritis, which were medically related to the work injury by either direct cause or aggravation. Dr. Goldhagen explained that appellant was incapacitated by rheumatoid arthritis and that, although this condition preexisted her work-related shoulder injury, because she had to be off her arthritis medications for fear of recurrence of the infection, the work-related condition permanently aggravated or exacerbated the preexisting arthritic condition. He advised that this caused permanent impairment because the arthritic condition progressed to the point that it was seemingly refractory to any medication. Dr. Goldhagen noted that a functional capacity evaluation was performed the day of his examination and that this indicated that appellant could perform sedentary duty for four hours a day. In answer to specific OWCP questions, him that appellant's disability was due to the rheumatoid arthritis which was permanently aggravated and exacerbated by her employment injury. Dr. Goldhagen stated that her prognosis was poor.

On September 26, 2008 Dr. Adams advised that appellant had persistent active synovitis that rendered complete recovery of her rotator cuff injury impossible. He advised that she was totally disabled.

In March 2009, OWCP determined that a conflict in medical opinion was created between the opinions of Dr. Adams and Dr. Goldhagen on the question of whether appellant was capable of work in any capacity. It referred appellant to Dr. C. Thomas Hopkins, Jr., a Board-certified orthopedic surgeon. In an August 6, 2009 report, Dr. Hopkins noted his review of the medical record, the history of employment injury, her diagnosis of rheumatoid arthritis, dating back to 1990 and her complaints of pain in multiple joints. He provided physical examination findings, limited to the shoulder. Dr. Hopkins stated that, while appellant had multiple complaints, these were due to the rheumatoid arthritis and unrelated to work. He advised that the work-related condition could have caused a temporary aggravation of her underlying rheumatoid arthritis but this would have resolved in January 2006. Dr. Hopkins advised that, while appellant had permanent restrictions and could work for six hours daily, the restrictions were due to rheumatoid arthritis and not the work-related condition.

On August 3, 2010 OWCP proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as characterized by Dr. Hopkins' opinion, established that her employment-related condition had resolved.[3] Appellant disagreed with the proposed termination, asserting that the progression in her rheumatoid arthritis was due to the fact that she was prevented from taking medication after the work-related infection and that when she resumed taking medication, none worked. She stated that she continued to have employment-related residuals and significant deformities of the hands, arms, feet and legs.

[3] The copy of the August 3, 2010 notice found in the case record is incomplete and refers to Dr. Goldhagen as an attending physician.

By decision dated September 9, 2010, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Hopkins and terminated appellant's compensation benefits, effective September 26, 2010.

## ***LEGAL PRECEDENT***

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.[4] 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.[5]

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.[6] 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.[7]

## ***ANALYSIS***

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective September 26, 2010. The accepted conditions in this case are left shoulder impingement and staphylococcus and osteomyelitis infections that occurred following corrective arthroscopic surgery on the left shoulder. OWCP determined that a conflict in medical evidence had been created between appellant's attending rheumatologist, Dr. Adams, and OWCP's referral orthopedist, Dr. Doman, regarding whether her employment-related conditions had resolved. It referred appellant to Dr. Goldhagen, also an orthopedic surgeon, for an impartial evaluation.

By report dated July 2, 2008, Dr. Goldhagen noted the history of employment-related injury and appellant's complaints regarding her arthritic condition. He provided physical examination findings and diagnosed subacromial impingement, osteomyelitis and rheumatoid arthritis, all of which were medically related to the work injury by either direct cause or aggravation. Dr. Goldhagen advised that appellant was incapacitated by rheumatoid arthritis. He explained that, although this condition preexisted her work-related shoulder injury, because she had to be off her rheumatoid arthritis medications for fear of recurrence of the infection, the work-related condition permanently aggravated or exacerbated the preexisting arthritic condition. Dr. Goldhagen noted that the rheumatoid arthritis was presently refractory to medication. He advised that a functional capacity evaluation, performed the day of his examination, indicated

[4] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[5] *Id.*

[6] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[7] *Manuel Gill*, 52 ECAB 282 (2001).

that appellant could work sedentary duty for four hours a day. In answer to specific OWCP questions, Dr. Goldhagen stated that appellant's disability was due to the rheumatoid arthritis that was permanently aggravated and exacerbated by her employment injury.

The Board finds Dr. Goldhagen clearly advised that appellant had work-related residuals because her underlying rheumatoid arthritis was permanently aggravated/exacerbated by the employment injury and ensuing surgery and infection. Dr. Goldhagen's opinion is sufficient to support permanent aggravation of rheumatoid arthritis as employment related. OWCP should have accepted a permanent aggravation as found by the impartial medical specialist.

Following Dr. Goldhagen's comprehensive impartial evaluation, OWCP determined that a new conflict arose between Dr. Adams and Dr. Goldhagen regarding appellant's work capacity. It referred her to Dr. Hopkins for an impartial evaluation on this issue. Instead of relying on Dr. Goldhagen's opinion regarding appellant's work-related condition and that her rheumatoid arthritis was permanently aggravated by the employment injury, OWCP terminated appellant's compensation benefits, based on Dr. Hopkins' opinion that appellant's work-related condition had ceased. As noted, it should have accepted permanent aggravation or rheumatoid arthritis prior to referral to Dr. Hopkins and incorporated this condition into its statement of accepted facts. In an August 6, 2009 report, Dr. Hopkins found that appellant could work six hours a day. He, however, also addressed the issues of causal relation pertaining to residuals of the employment injury, advising that appellant's left shoulder condition had ceased and that her arthritis was not employment related. The termination of benefits was based on this opinion. The Board notes that the issue certified to Dr. Hopkins concerned appellant's work capacity. Dr. Hopkins exceeded the basis on which the referral was made. The Board will reverse the termination of benefits based on Dr. Hopkin's medical report.

The Board notes that the copy of the August 3, 2010 notice of proposed termination of record is not complete and incorrectly referred to Dr. Goldhagen as an attending physician rather than as a physician selected by OWCP to provide an impartial evaluation.[8]

## ***CONCLUSION***

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective September 26, 2010.

[8] *Supra* note 3.

## ***ORDER***

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

Issued: September 30, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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