

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation for wage-loss and medical benefits effective August 7, 2009 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury; and (2) whether appellant had any continuing employment-related residuals or disability after August 7, 2009.

FACTUAL HISTORY

On August 29, 2007 appellant, then a 49-year-old nurse, filed a traumatic injury claim alleging that on that day she injured her shoulders and back in the performance of duty. OWCP accepted the claim for right shoulder and upper arm strain and paid appropriate compensation.

In a July 14, 2008 progress note, Dr. William F. Bell, a treating physician, related that appellant sustained a shoulder injury at work in August 2007. A physical examination revealed a bluish and somewhat dusky right hand which was cool to the touch, no hyperdrosis, full wrist range of motion, excellent strength with flexion and extension and no finger instability. Dr. Bell diagnosed shoulder hand syndrome with reflex sympathetic dystrophy.

Dr. Bell provided reports responding to an August 13, 2008 OWCP letter authorizing appellant's change in physicians to him. On August 29, 2008 he related that he was unaware of any significant x-ray or other imaging test findings. Dr. Bell diagnosed appellant's reflex sympathetic dystrophy or shoulder hand syndrome which he attributed to her shoulder injury as there were no other precipitating or exacerbating factors. In a September 12, 2008 letter, he related that he saw her almost a year after the August 2007 employment injury and had no specific information regarding the injury. In a September 25, 2008 follow-up letter, Dr. Bell related that appellant's injury occurred when she grabbed a falling patient with her right arm and referenced his July 14, 2008 progress notes for physical findings.

On November 17, 2008 OWCP referred appellant for a second opinion evaluation with Dr. Anil Agarwal, a Board-certified orthopedic surgeon, to determine the nature and extent of her disability. On December 3, 2008 Dr. Agarwal, based upon her employment injury history, physical requirements for her date-of-injury nurse position, review of medical records and physical examination, concluded that appellant sustained a temporary aggravation of her preexisting right shoulder conditions, which have healed. Appellant reported complaints of upper back, shoulder pain and occasional right hand/wrist pain. A physical examination revealed normal shoulder, wrist and elbow range of motion, no tenderness, no crepitus, normal strength and no effusion. X-ray interpretations taken by Dr. Agarwal showed no evidence of dislocation or fracture and mild osteoarthritic changes in the glenohumeral and acromioclavicular joints. Dr. Agarwal also found no loss of sensation, no atrophy and normal skin on physical examination. He concluded that appellant had no disability or residuals from her accepted right shoulder and upper arm strains. In support of his conclusions, Dr. Agarwal noted her physical examination revealed no objective neuromuscular deficits, a magnetic resonance imaging (MRI) scan revealed a partial thickness tear with preexisting glenohumeral joint arthritis and appellant returned to her normal full-time duties as a data entry clerk.

On March 19, 2009 OWCP received an undated supplemental report from Dr. Agarwal clarifying that he meant that appellant was capable of performing the duties of her nursing job with no restrictions.

On April 20, 2009 OWCP received February and March 2009 progress notes from Dr. John A. Hansen, a treating Board-certified occupational physician, in which he provided physical findings and diagnosed chronic regional right arm pain syndrome. On February 24, 2009 Dr. Hansen noted that appellant was currently off work at his request. In his February 28 and March 17, 2009 reports, he found she was capable of working with restrictions on no lifting more than 20 pounds. OWCP also received a July 22, 2008 report from Dr. Barry Hein, a Board-certified anesthesiologist, who noted the injury history, provided physical findings and diagnosed possible right arm chronic regional pain syndrome, type 1.

After reviewing OWCP's amended statement of accepted facts, in a second supplemental report, Dr. Agarwal reiterated his opinion that appellant was able to return to her date-of-injury position.

On June 4, 2009 OWCP issued a notice proposing to terminate her compensation benefits.

On June 29 and July 2, 2009 OWCP received additional progress notes from Dr. Hansen for the period August 26, 2008 to June 2, 2009 which provided physical findings and treatment for appellant's right upper extremity chronic regional pain syndrome.

By decision dated August 10, 2009, OWCP finalized the termination of appellant's compensation benefits effective August 7, 2009.

On September 1, 2009 appellant requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on November 23, 2009.

In October 6, 2009 progress notes, Dr. Hansen, provided physical findings, treatment provided and diagnosed chronic regional right arm pain syndrome.

By decision dated January 14, 2010, OWCP's hearing representative affirmed the termination of benefits.

On January 10, 2011 appellant requested reconsideration and presented argument and evidence in support of her request. She contended that Dr. Agarwal's report could not constitute the weight of the evidence in light of disciplinary action taken against him. In support of this argument, appellant submitted evidence regarding a complaint and disciplinary action filed against him and his November 24, 2010 agreement to a voluntary limitation of his medical license. The disciplinary action and complaint filed against Dr. Agarwal concerning his allowing an individual who was not a student or had a temporary educational permit to perform limited physical examinations. In the limitation of medical license agreement, he agreed to limit his medical license in *lieu* of a disciplinary action being initiated by the State of Nebraska Department of Health and Human Services Public Health Division. In this agreement, Dr. Agarwal noted that he had sustained two strokes and willingly agreed to not performing

surgical procedures. All other privileges except for performing surgical procedures were allowed.

Appellant also submitted an October 8, 2010 progress report from Dr. Beth E. Lapka, an examining Board-certified emergency medicine physician, who reported appellant had reflex sympathetic dystrophy due to a lifting injury. Dr. Lapka provided physical findings and noted appellant was treated for complaints of dizziness and near syncope.

By decision dated March 21, 2011, OWCP denied modification.

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.³ After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ OWCP'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 for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that on August 29, 2007 appellant sustained a right shoulder and upper arm strain and paid appropriate compensation and medical benefits. It terminated her compensation benefits effective August 7, 2009 finding that she no longer had any residuals or disability that were due to her work injury.

On November 17, 2008 OWCP referred appellant to Dr. Agarwal for a second opinion examination. It terminated her compensation based on its finding that his report constituted the weight of the medical evidence and established that she had no further employment-related disability. The Board has reviewed the opinion of Dr. Agarwal and finds that it has reliability, probative value and convincing quality with respect to the conclusions reached. On December 3, 2008 Dr. Agarwal discussed the history of injury and appellant's complaints of mild shoulder and upper back pain and occasional right hand/wrist pain. On examination he found no evidence

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *Kathryn E. Demarsh*, *supra* note 6; *James F. Weikel*, 54 ECAB 660 (2003).

of crepitus, no tenderness, no effusion, normal range of motion and normal skin. Dr. Agarwal determined that appellant's right shoulder and upper arm strain had resolved. He provided rationale for his opinion by explaining that x-ray interpretation he took showed no evidence of dislocation or fracture and mild osteoarthritic changes in the glenohumeral and acromioclavicular joints and normal findings examination. Dr. Agarwal opined that appellant had no work restrictions due to her employment injury and was capable of performing her date-of-injury job as a nurse. The Board finds that his report, which is reasoned and based on a properly factual and medical history, constitutes the weight of the evidence and establishes that appellant's right shoulder and upper arm strain have resolved.⁸

The remaining evidence submitted prior to OWCP's termination of compensation is insufficient to show that appellant remained disabled due to her work injury. Dr. Bell diagnosed reflex sympathetic dystrophy or shoulder hand syndrome which he attributed to appellant's shoulder injury. He concluded that she was capable of working with a 20-pound lifting restriction. Dr. Hein diagnosed possible right arm chronic regional pain syndrome, type 1. Where an employee claims that a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.⁹ Neither Dr. Hein nor Dr. Bell provided any rationale explaining how the conditions they diagnosed were caused by the accepted employment injury. Thus, they are insufficient to create a conflict in the medical opinion evidence with Dr. Agarwal's opinion.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.¹⁰

ANALYSIS -- ISSUE 2

Given the Board's finding that OWCP properly relied upon the opinion of Dr. Agarwal in terminating compensation, the burden of proof shifts to appellant to establish that she remains entitled to compensation after that date.¹¹

Following the termination of her benefits, appellant submitted evidence regarding disciplinary action taken against Dr. Agarwal by the State of Nebraska Department of Health and Human Services Public Health Division and medical reports from Drs. Lapka and Hansen.

In October 6, 2009 progress notes, Dr. Hansen diagnosed chronic regional right arm pain syndrome, which was not accepted by OWCP. Dr. Lapka, in an October 8, 2010 progress report,

⁸ See *K.E.*, Docket No. 08-1461 (issued December 17, 2008); *E.J.*, 59 ECAB 695 (2008).

⁹ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁰ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹¹ See *Manuel Gill*, 52 ECAB 282 (2001).

diagnosed reflex sympathetic dystrophy due to a lifting injury, which has not been accepted by OWCP. As noted above, it is appellant's burden of proof to establish that a specific condition is employment related with respect to accepted employment injury.¹² It is also her burden of proof to establish continuing residuals or disability after a proper termination.¹³ As neither Dr. Lapka nor Dr. Hansen addressed the relevant issue of whether appellant had any further employment-related disability due to the accepted conditions of right shoulder and upper arm strain, their opinions are of diminished probative value.

Appellant argued on reconsideration that Dr. Agarwal's opinion was of diminished probative value in view of the disciplinary action taken by the State of Nebraska Department of Health and Human Services Public Health Division and the complaint she filed against him and submitted supporting documentation. She asserted that these documents show that he did not personally conduct the physical examination of her and thus his opinion that she had no work-related disability after August 7, 2009 is not entitled to the weight of the evidence.

This case can be distinguished from that of *Geraldine Foster*.¹⁴ In *Geraldine Foster* appellant in that case asserted that the report of an impartial medical specialist selected by OWCP was not entitled to special weight. She submitted copies of state court decisions in which judges found that the physician had provided false testimony and engaged in other unprofessional conduct. The Board reversed the termination of appellant's compensation benefits, in part, because the evidence indicated that the physician was not an appropriate choice for an impartial medical specialist resolving a conflict of medical opinion in a claim under FECA.

The case at hand involves a state board rather than a court and a second opinion physician rather than an impartial medical examiner. As noted above the current case is dissimilar to *Foster* in that the State of Nebraska Department of Health and Human Services Public Health Division did not issue a disciplinary action finding any conduct of the physician to be inappropriate and unprofessional. The November 24, 2010 settlement agreement between Dr. Agarwal and the State of Nebraska Department of Health and Human Services Public Health Division states that the voluntary limitation on his medical license was made in *lieu* of the initiation of disciplinary action by the State of Nebraska. The settlement agreement with Dr. Agarwal states that he shall not perform surgical procedures, and that all other privileges are allowed.

Furthermore, the facts of the current case are similar to the Board's decision in *Jewell F. Milby*.¹⁵ Both the claimant in *Geraldine Foster* and the claimant in *Milby* asserted that the report of an impartial medical specialist selected by OWCP was not entitled to special weight. The claimant in *Milby* submitted documents from the Kentucky Board of Medical licensure documenting complaints by patients and a February 20, 1992 order of probation. The record also

¹² *Jaja K. Asaramo*, *supra* note 9.

¹³ *I.J.*, 59 ECAB 408 (2008); *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁴ 54 ECAB 435 (2003).

¹⁵ Docket No. 01-1763 (issued April 24, 2002).

contained evidence that the February 20, 1992 order of probation had been vacated and set aside. The Board found that as the record contained no evidence that the physician in question had been suspended from medical practice and his probation had been subsequently vacated and set aside, that the physician had been properly selected as an impartial medical specialist. Thus, the Board affirmed the termination of her compensation benefits and the finding that she had no continuing residuals due to her accepted employment injuries.

The Board finds that while appellant asserts that Dr. Agarwal did not perform a proper examination and assessment, there is insufficient evidence to establish this is a fact. In addition, the record contains no evidence that Dr. Agarwal had been suspended from medical practice, been put on probation or had any disciplinary action taken. Therefore Dr. Agarwal's report continues to constitute the weight of the evidence establishing that appellant's accepted conditions had resolved by August 7, 2009 with no residuals or disability.

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 properly terminated appellant's compensation effective August 7, 2009 on the grounds that her work-related injury ceased. The Board further finds that appellant did not meet her burden of proof to establish that she had any continuing residuals after August 7, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 21, 2011 is affirmed.

Issued: August 2, 2012
Washington, DC

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

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

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