

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

T.D., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
AEROSPACE MAINTENANCE RECREATION)
CENTER, DAVIS-MONTHAN)
AIR FORCE BASE, AZ, Employer)

Docket No. 12-731
Issued: September 20, 2012

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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 14, 2012 appellant, through his attorney, filed a timely appeal from a January 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of his compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 properly terminated appellant's wage-loss and medical compensation benefits effective July 29, 2011 on the grounds that his accepted right elbow condition had ceased without residuals.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, then a 45-year-old aircraft mechanic, sustained right elbow epicondylitis in the performance of duty on August 7, 1997. It granted a schedule award for 30 percent permanent impairment of the right upper extremity.² Appellant was placed on the periodic rolls on December 9, 1997. He returned to light-duty work on January 8, 1998 and then stopped work on October 2, 1998. From June 19, 2000 to August 26, 2002, appellant was employed by the Veterans of Foreign Wars (VFW) Post 10188 in Tucson, Arizona. From May 21 to July 12, 2002, he worked as a hotel security officer in the private sector. Appellant has not worked since July 13, 2002.

In an April 25, 2006 report, Dr. Avelino O. Leal, a Board-certified occupational medicine physician, diagnosed chronic bilateral elbow pain and opined that appellant had reached maximum medical improvement.

In a January 6, 2009 report, Dr. Mary Green, a treating physician, diagnosed right and left lateral epicondylitis and opined that maximum medical improvement had been reached. She advised that appellant be restricted from pushing, pulling and lifting over two pounds.

On August 5, 2010 Dr. Leal opined that appellant was not capable of performing his usual job due to pain with constant use of both arms. He limited appellant from repetitive movements with wrists and elbows. On September 29, 2010 Dr. Leal reiterated his medical opinion and recommended that the restrictions apply for one year.

OWCP referred appellant for a second opinion evaluation to determine the nature and extent of his employment-related condition. In a February 1, 2011 report, Dr. Mark E. Frankel, a Board-certified orthopedic surgeon, conducted a physical examination and reviewed a statement of accepted facts, history of the injury and the medical evidence of record. He stated that appellant complained of pain in the right elbow and was right-handed. Appellant's joints were supple and moved through a full range of motion including both elbows. He had exquisite sensitivity touching the right lateral epicondyle, less with the touching of radiohumeral joint. Dr. Frankel stated that the tenderness was so exquisite that it was totally disproportionate to the light touch applied. He opined that appellant did not have any residuals from his elbow injuries which would cause disability. Dr. Frankel explained that, if appellant considered himself disabled, it would be from his back condition, herniated lumbar disc.

In a March 30, 2011 progress report, Dr. Leal reiterated his diagnosis of chronic bilateral lateral epicondylitis.

On May 12, 2011 Dr. Leal concurred with Dr. Frankel's assessment with regards to appellant's bilateral lateral epicondylitis.

By letter dated June 22, 2011, OWCP notified appellant that it proposed to terminate his compensation benefits based on the weight of the medical evidence, as represented by

² OWCP accepted left lateral epicondylitis and bilateral sensorineural hearing loss due to factors of appellant's federal employment under claim numbers xxxxxx884 and xxxxxx268, respectively. These accepted conditions are not at issue in this case.

Dr. Frankel. It allotted 30 days for him to submit additional evidence or argument in disagreement with the proposed action.

In a January 7, 1998 report, Dr. Carl W. Dasse, a Board-certified family medicine physician, opined that appellant was capable of working eight hours a day with permanent restrictions.

On July 8, 1998 Dr. Dasse indicated that appellant's left arm was bothering him more since he had been required to use it more in light of the fact that he had marked restriction on his right arm.

In an October 6, 1998 report, Dr. Dasse opined that appellant had reached maximum medical improvement and was permanently impaired from ever returning to a job as an aircraft mechanic.

By decision dated July 29, 2011, OWCP terminated appellant's wage-loss and medical benefits effective that same day. It found the weight of the evidence was represented by Dr. Frankel.

On August 10, 2011 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. He submitted an October 10, 2011 report by Dr. John W. Ellis, a Board-certified family practitioner. Appellant opined that he had a 2 percent impairment of the left upper extremity due to lateral epicondylitis, as part of a total 11 percent total permanent partial impairment of the left upper extremity due to other nonaccepted conditions.

On November 16, 2011 an oral hearing was held. An OWCP hearing representative took appellant's testimony and allotted 30 days for the submission of additional evidence.

By decision dated January 20, 2012, an OWCP hearing representative affirmed the July 29, 2011 termination decision, finding that Dr. Frankel represented the weight of the medical evidence.

LEGAL PRECEDENT

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 his or 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

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

⁴ See *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 See *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

ANALYSIS

OWCP accepted appellant's claim for right elbow epicondylitis. It terminated his compensation benefits effective July 29, 2011 on the grounds that the accepted employment-related condition had resolved without residuals based on the opinion of the second opinion examiner, Dr. Frankel. The issue to be determined is whether OWCP met its burden to terminate appellant's compensation benefits.

OWCP referred appellant to Dr. Frankel for a second opinion evaluation to determine the nature and extent of his employment-related condition. The Board finds that OWCP met its burden of proof to terminate appellant's medical and wage-loss compensation benefits based on the February 1, 2011 report of Dr. Frankel who reviewed appellant's medical history, examined him and found no objective evidence of ongoing residuals or disability due to the accepted right elbow epicondylitis. Dr. Frankel reviewed the statement of accepted facts and the medical record. He found no objective evidence of symptoms related to the accepted conditions. Dr. Frankel reported that appellant's joints were supple and moved through a full range of motion including both elbows. Appellant had exquisite sensitivity touching the right lateral epicondyle, which in Dr. Frankel's opinion was totally disproportionate to the light touch applied. Dr. Frankel opined that appellant did not have any residuals, from his elbow injuries which would create a disability. He explained that, if appellant considered himself disabled, it would be from his back condition, herniated lumbar disc.

The Board finds that Dr. Frankel's report represents the weight of the medical evidence at the time OWCP terminated benefits and that OWCP properly relied on his reports in terminating appellant's benefits. The Board finds that he had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Frankel is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Frankel addressed the medical records to make his own examination findings to reach a reasoned conclusion regarding appellant's condition.⁸ At the time benefits were terminated, he found no basis on which to attribute any residuals or continued disability to appellant's accepted condition. Dr. Frankel's opinion as set forth in his February 1, 2011 report is found to be probative evidence and reliable. The Board finds that his opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted condition.

On May 12, 2011 Dr. Leal, appellant's treating physician, stated that he concurred with Dr. Frankel's assessment with regards to the bilateral lateral epicondylitis. This report supports the Board's finding that OWCP properly terminated appellant's wage-loss and medical

⁷ See *James F. Weikel*, 54 ECAB 660 (2003).

⁸ See *Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

compensation benefits on the grounds that his accepted right elbow condition had ceased without residuals.

The reports by Drs. Dasse, Green and Ellis contain no opinion as to whether appellant continues to have residuals from the accepted right elbow condition. Thus, these reports are insufficient to show that the termination was improper. Accordingly, the Board finds that Dr. Frankel's opinion continues to constitute the weight of the medical evidence and supports OWCP's July 29, 2011 decision terminating appellant's compensation for wage-loss and medical benefits.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that counsel's argument is not substantiated.

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 wage-loss and medical compensation benefits effective July 29, 2011 on the grounds that his accepted right elbow condition had ceased without residuals.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2012
Washington, DC

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

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

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