

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

J.M., Appellant

and

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

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-1564
Issued: January 6, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2013 appellant, through her attorney, filed a timely appeal from a May 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her 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.²

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss and medical benefits effective May 15, 2012 on the grounds that her accepted bilateral carpal tunnel syndrome, bilateral hand and wrist tenosynovitis, bilateral knee contusion, bilateral knee sprain and left shoulder sprain with impingement had ceased without residuals.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the May 7, 2013 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, counsel contends that OWCP's decision was contrary to fact and law.

FACTUAL HISTORY

On January 11, 2002 appellant, then a 31-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging carpal tunnel in her right and left wrist due to factors of her federal employment. OWCP accepted her claim for bilateral carpal tunnel syndrome under OWCP File No. xxxxxx394. Appellant received wage-loss compensation for intermittent periods of disability commencing March 22, 2002. She returned to limited duty with restrictions in May 2002. OWCP later accepted a traumatic injury claim under OWCP File No. xxxxxx547 for bilateral knee contusion, bilateral knee sprain and left shoulder sprain with impingement due to a slip and fall on December 4, 2005. Appellant did not stop work and continued at limited duty.

On March 27, 2009 appellant, through her attorney, filed a claim for a schedule award. She submitted a November 20, 2007 report from Dr. Jeffrey Kirschman, a Board-certified family practitioner, who diagnosed bilateral carpal tunnel syndrome and opined that the condition was permanent and had not resolved.³

In an August 31, 2009 report, Dr. Kirschman diagnosed bilateral tenosynovitis of hand or wrist and opined that appellant's conditions were causally related to an industrial accident or exposure.

A July 26, 2010 electromyography and nerve conduction study revealed a normal right upper extremity. There was no definite evidence of a right median neuropathy (carpal tunnel syndrome), right ulnar neuropathy, right cervical radiculopathy or other peripheral nerve abnormality affecting the right upper extremity.

Appellant stopped work on September 10, 2010 due to the national reassessment program and received compensation for temporary total disability. She did not return to work.

OWCP referred appellant to Dr. William Bohl, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a December 22, 2010 report, Dr. Bohl conducted a physical examination and reviewed appellant's medical history. He concluded that her carpal tunnel syndrome had resolved and advised that appellant was capable of working with restrictions.

By letter dated February 10, 2011, OWCP notified appellant that it proposed to terminate her compensation benefits based on the weight of the medical evidence, as represented by Dr. Bohl.

Appellant submitted a June 15, 2010 report from Dr. Kirschman who reiterated his diagnoses and opinions.

³ Appellant also filed claims for compensation CA-7 forms for intermittent periods commencing January 25, 2010. By decision dated December 6, 2010, OWCP denied the claims on the basis that the evidence failed to establish that she was disabled for the periods claimed.

By decision dated March 16, 2011, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day.

On March 21, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. In a March 2, 2011 report, Dr. Kirschman reviewed Dr. Bohl's second opinion examination and disagreed with his findings. He stated that Dr. Bohl's December 22, 2010 report lacked probative value as it failed to consider appellant's bilateral tenosynovitis condition.

A hearing was held before an OWCP hearing representative on June 10, 2011. Counsel argued that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits.

By decision dated September 7, 2011, OWCP's hearing representative reversed the March 16, 2011 termination decision and reinstated appellant's compensation benefits to the date of termination. The hearing representative remanded the case for further development of the medical evidence, including a referral to second opinion physician with an updated statement of accepted facts.

By decision dated September 13, 2011, OWCP accepted bilateral tenosynovitis. It revised the statement of accepted facts and referred appellant back to Dr. Bohl to determine whether there was any evidence of disability or residuals due to her accepted conditions.

In a November 2, 2011 report, Dr. Bohl found no evidence of tenosynovitis and opined that appellant was capable of performing regular duty. He diagnosed bilateral medial epicondylitis and ulnar nerve neuropathy in both elbows, but found no evidence that this was a part of a work-related condition.

Appellant submitted an October 17, 2011 report from Dr. Sami Moufawad, a Board-certified pain medicine specialist, who diagnosed bilateral knee contusions, bilateral knee sprain and left shoulder sprain. Dr. Moufawad noted a history that she was injured at work on December 4, 2005 and had been off work since September 10, 2010. He found a positive impingement of the left shoulder and tenderness upon palpation. Dr. Moufawad indicated that a magnetic resonance imaging (MRI) scan of the left shoulder dated April 18, 2011 showed moderate osteoarthritis changes with mild inferior mass effect on the supraspinatus myotendinous junction and subacromial bursitis. He reviewed a December 12, 2008 MRI scan of the right knee which showed injury/strain of the medial head of gastrocnemius without evidence of tear and a small Baker's cyst. Dr. Moufawad noted that a December 12, 2008 MRI scan of the left knee appeared normal.

In a November 15, 2011 report, Dr. Kirschman reiterated his diagnoses and opinion on residual disability.

On January 5, 2012 OWCP doubled appellant's claims under File No. xxxxxx394 and File No xxxxxx547 to fully consider any continuing residuals.

OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 20, 2012 report, Dr. Ghanma conducted a physical

examination and reviewed appellant's medical treatment. He concluded that her accepted conditions had resolved and found that she was capable of working regular duty without restrictions. Dr. Ghanma stated that the diagnostic studies relating to appellant's left shoulder indicated that "the impingement, if any, [was] mild based on the result of the MRI scan study dated April 19, 2011" and "her current examination as far as the left shoulder [was] concerned in [his] opinion was unreliable."

Appellant submitted a January 18, 2012 report from Dr. Moufawad, who advised that she continued to have pain in the left shoulder and the knees. Dr. Moufawad reported that the pain in the shoulder was associated with some impingement and the knee pain was worse with prolonged walking and standing. Upon examination, he found tenderness over the medial aspect of the knees on both sides and an impingement of the left shoulder at around 120 degrees of forward flexion and in abduction. Dr. Moufawad diagnosed left shoulder sprain, left shoulder impingement, bilateral knee contusion and bilateral knee sprain.

By letter dated April 12, 2012, OWCP notified appellant that it proposed to terminate her compensation benefits based on the weight of the medical evidence, as represented by Dr. Ghanma.⁴

By decision dated May 16, 2012, OWCP terminated appellant's wage-loss and medical compensation benefits effective May 15, 2012.

On May 21, 2012 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. In an April 18, 2012 report, Dr. Moufawad diagnosed left shoulder tendinitis. He stated that appellant continued to have an impingement in the left shoulder and was limited with her functions and activities of daily living. Dr. Moufawad disagreed with releasing her to full duties and restricted her from lifting more than 10 to 15 pounds. Appellant also submitted an April 18, 2012 report from Nancy Holmes, a physician's assistant, who diagnosed carpal tunnel syndrome and tenosynovitis of the hands or wrists.

A hearing was held before an OWCP hearing representative on September 18, 2012. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In a November 5, 2012 report, Dr. Kirschman reviewed Dr. Ghanma's second opinion report and disagreed with his findings. He opined that Dr. Ghanma's examination was insufficient for diagnosing tenosynovitis and concluded that his January 20, 2012 report lacked probative value.

⁴ By decision dated March 12, 2012, OWCP found that appellant received an overpayment of compensation in the amount of \$7,380.47. Appellant was found at fault in creating the overpayment because she accepted payments that she knew or reasonably should have known were incorrect. Because she was at fault, she was not entitled to waiver of recovery of the overpayment. Consequently, OWCP ordered the amount of \$450.10 to be withheld from appellant's continuing compensation payments until the \$7,380.47 overpayment was repaid.

By decision dated December 4, 2012, OWCP's hearing representative affirmed the May 16, 2012 termination decision, finding that Dr. Ghanma represented the weight of the medical evidence.

On January 2, 2013 appellant, through her attorney, requested reconsideration and submitted a November 5, 2012 report from Dr. Kirschman who reiterated his diagnoses and opinions.

By decision dated May 7, 2013, OWCP denied modification of the December 4, 2012 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ 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.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ 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.⁹

Section 8123(a) of FECA provides in pertinent part: 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.¹⁰ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹¹

⁵ See *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ See *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ See *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ See *James F. Weikel*, 54 ECAB 660 (2003).

¹⁰ 5 U.S.C. § 8123(a). See *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ See *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

ANALYSIS

The Board finds that OWCP did not meet its burden to terminate appellant's compensation benefits. The Board finds an unresolved conflict in medical opinion between Dr. Ghanma and Dr. Moufawad.¹² For a conflict to arise the opposing physicians viewpoints must be of virtually equal weight and rationale.¹³ It is OWCP that bears the burden to justify modification or termination of benefits.¹⁴

OWCP based its decision to terminate appellant's benefits on a January 20, 2012 report by Dr. Ghanma, the second-opinion physician, who conducted a physical examination and reviewed her medical history. Dr. Ghanma concluded that her accepted conditions had resolved and opined that she was capable of working regular duty without restrictions. He indicated that the diagnostic studies relating to appellant's left shoulder indicated that "the impingement, if any, [was] mild based on the result of the MRI scan study dated April 19, 2011" and "her current examination as far as the left shoulder [was] concerned in [his] opinion was unreliable."

In an October 17, 2011 report, Dr. Moufawad, appellant's attending physician, diagnosed bilateral knee contusions, bilateral knee sprain and left shoulder sprain. He found a positive impingement of the left shoulder and tenderness upon palpation. Dr. Moufawad indicated that an MRI scan of the left shoulder dated April 18, 2011 that appellant brought with her showed moderate osteoarthritis changes with mild inferior mass effect on the supraspinatus myotendinous junction and subacromial bursitis. He reviewed a December 12, 2008 MRI scan of the right knee which showed injury/strain of the medial head of gastrocnemius without evidence of tear and a small Baker's cyst. Dr. Moufawad noted that a December 12, 2008 MRI scan of the left knee appeared normal. On January 18, 2012 he diagnosed left shoulder impingement. Upon examination, Dr. Moufawad found tenderness over the medial aspect of the knees on both sides and an impingement of the left shoulder at around 120 degrees of forward flexion and in abduction. On April 18, 2012 he diagnosed left shoulder tendinitis. Dr. Moufawad indicated that appellant continued to have an impingement in the left shoulder and was limited with her functions and activities of daily living. He disagreed with releasing her to full duties and restricted her from lifting more than 10 to 15 pounds.

Drs. Ghanma and Moufawad both reviewed MRI scans of appellant's left shoulder dated April 2011. However, their findings were significantly different. While Dr. Ghanma indicated that the MRI scan study showed that "the impingement, if any, [was] mild," Dr. Moufawad found that the MRI scan revealed moderate osteoarthritis changes with mild inferior mass effect on the supraspinatus myotendinous junction and subacromial bursitis. Dr. Ghanma concluded that appellant's employment-related conditions had resolved, whereas Dr. Moufawad diagnosed left shoulder impingement, left shoulder tendinitis, left shoulder sprain, bilateral knee contusions, bilateral knee sprain. His report did not explain his own findings that her "current examination

¹² FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination. See 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹³ See *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁴ See *Curtis Hall*, 45 ECAB 316 (1994).

as far as the left shoulder [was] concerned in [his] opinion was unreliable.” Furthermore, Dr. Ghanma failed to reconcile his opinion with the findings and opinion of Dr. Moufawad.

The Board finds that OWCP did not meet its burden of proof to terminate appellant’s wage-loss and medical benefits effective May 15, 2012. As of that date a conflict in medical opinion existed between Dr. Ghanma and Dr. Moufawad. Each physician had the opportunity to examine appellant and review the diagnostic studies of record. With respect to the existence and extent of any ongoing employment-related residuals, the Board finds that the relevant and probative medical evidence is in equipoise. It is well established that where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹⁵ The Board notes that the reports and treatment records of Dr. Moufawad were of record prior to the May 16, 2012 termination decision of OWCP. The Board finds that once OWCP received Dr. Moufawad’s reports, it should have submitted them to Dr. Ghanma and requested a supplemental report before issuing a final decision on appellant’s entitlement. As OWCP failed to base its decision on a resolution of the medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate appellant’s benefits. Accordingly, OWCP’s decision to terminate appellant’s compensation and medical benefits shall be reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant’s compensation benefits effective May 15, 2012 due to a conflict in medical opinion. Further development of the medical evidence is warranted.

¹⁵ See *supra* note 13; *H.S.*, Docket No. 10-1220 (issued May 24, 2011).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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