

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

J.E., Appellant

and

**U.S. POSTAL SERVICE, PHILADELPHIA
BULK MAIL CENTER, Philadelphia, PA,
Employer**

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**Docket No. 14-586
Issued: September 2, 2014**

Appearances:
Thomas R. Uliase, 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 January 23, 2014 appellant, through his attorney, filed a timely appeal from an October 21, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for disability compensation and a November 4, 2013 merit decision terminating his compensation. 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.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's authorization for medical benefits effective March 19, 2013; and (2) whether appellant sustained intermittent periods of disability from September 25, 2010 to April 6, 2012 due to his accepted work injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated March 20, 2012, the Board set aside an April 13, 2011 OWCP decision denying appellant's traumatic injury claim.² The Board found that he established the occurrence of the August 10, 2010 work incident and remanded the case for further development of the medical evidence to determine whether he had sustained an injury as a result of the accepted event. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

In a report dated October 8, 2010, Dr. Charles M. Bolno, an attending orthopedic surgeon, discussed appellant's August 10, 2010 employment incident and noted that he had received treatment on that date at the emergency room. He opined that appellant had not recovered from a prior neck injury when he returned to work on August 10, 2010. Dr. Bolno diagnosed an acute glenoid tear of the left shoulder, subacromial impingement of both shoulders, left shoulder post-traumatic arthritis, acute traumatic cervical radiculopathy, acute traumatic cervical strain and sprain and bilateral acute traumatic carpal tunnel syndrome. He listed work restrictions.³

In a report dated February 3, 2011, Dr. Bolno stated:

“The extensive nature of the work that [appellant] was performing at the time o[f] his injury and the excessive amount of weight that he was lifting and pushing related to the containers of mail not only aggravated a preexisting condition that result[ed] in a fusion of his cervical spine but caused a new cervical radiculopathy in his neck with an acute labral tear in his shoulder. There is no doubt that the repetitive nature of his work resulted in his carpal tunnel syndrome and ulnar nerve compression. There is no doubt that [appellant's] injuries prevent him from performing his duties at this time.... There is no doubt that the numbness and parasthesias in the left arm are a direct result of the work-related injury on August 10, 2010 and the resulting weakness and severe pain in the left shoulder is related to the heavy lifting and pushing that he was doing on August 10, 2010 resulting in a tear of the glenoid labrum. These injuries prevent [appellant] from performing his duties now as they have since the initial injury.”

In a report dated August 2, 2012, Dr. Bolno asserted that appellant was totally disabled as a result of injuries to his bilateral shoulders and cervical spine at work on August 10, 2010. He diagnosed bilateral rotator cuff injuries and acute cervical radiculopathy as a result of the August 10, 2010 employment incident.

² Docket No. 11-1657 (issued March 20, 2012). On August 11, 2010 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that on August 10, 2010 he felt tingling and pain in his shoulder and neck when he pulled a container off a truck.

³ Dr. Bolno submitted a similar report on October 25, 2010.

On August 28, 2012 OWCP referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 14, 2012, Dr. Smith diagnosed a soft tissue neck strain due to the August 10, 2010 work incident. He discussed appellant's history of a prior cervical fusion at C6-7 in 2006 and surgery on his left shoulder in 2002. Dr. Smith found no evidence of an aggravation of the preexisting neck arthritis and stated, "I would conclude that his soft tissue injury from the work incident of August 10, 2010 has resolved without residual." He attributed appellant's current symptoms to the prior neck surgery.

Based on Dr. Smith's report, on September 24, 2012, OWCP accepted appellant's claim for resolved neck sprain.

On October 18, 2012 appellant filed claims for compensation for intermittent dates beginning September 25, 2010.

In a report dated October 25, 2012, Dr. Bolno discussed appellant's history of experiencing pain on August 10, 2010 after pushing mail containers out of a trailer. He diagnosed acute traumatic cervical sprain and radiculopathy, acute traumatic bilateral carpal tunnel syndrome, an acute traumatic glenoid tear of the left shoulder, subacromial impingement syndrome and strains of the bilateral shoulders and post-traumatic left shoulder arthritis. Dr. Bolno questioned whether Dr. Smith reviewed the abnormal findings on magnetic resonance imaging (MRI) scan study of the cervical spine and noted that an electromyogram (EMG) showed carpal tunnel syndrome. He found that appellant was totally disabled.

On November 6, 2012 OWCP requested that Dr. Bolno review Dr. Smith's report and indicate whether he concurred with his conclusions. On November 16, 2012 Dr. Bolno found that appellant was totally disabled due to bilateral cuff injuries and cervical radiculopathy sustained on August 10, 2010.

OWCP determined that a conflict existed between Dr. Smith and Dr. Bolno regarding whether appellant had any continuing disability due to his accepted work injury. On November 29, 2012 it referred appellant to Dr. Joseph A Jelen, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination.⁴

On December 18, 2012 Dr. Jelen reviewed the history of the August 10, 2010 work injury and medical reports of record, including the results of MRI scan studies of the shoulder and cervical spine. On examination, he found normal sensation and motion with a negative Tinel's sign and straight leg raise. Dr. Jelen diagnosed resolved cervical strain and a resolved transient soft tissue stretch. He found normal range of motion of the neck with only "occasional paresthesias," which he advised may result from a preexisting condition. Dr. Jelen found that appellant had no limitations or residuals of his accepted work injury based on the physical examination findings. He related that the September 7, 2010 cervical MRI scan study showed "mostly degenerative changes and findings consistent with his previous cervical fusion" and that

⁴ The record contains a November 29, 2012 MEO23, Appointment Schedule Notification, referring appellant to Dr. Jelen for an impartial medical examination and a screen shot showing the selection of Dr. Jelen.

an MRI scan study of the left shoulder dated September 3, 2010 showed increased anterior labrum signal but no tear.

By letter dated January 15, 2013, OWCP advised appellant of its proposed termination of his compensation and authorization for medical benefits.

By letter dated January 28, 2013, OWCP informed Dr. Bolno that it had only accepted cervical strain due to the August 10, 2010 work injury. It noted that he had been treating appellant for cervical radiculopathy, ulnar compression neuropathy and carpal tunnel syndrome prior to his August 10, 2010 work injury. OWCP requested that Dr. Bolno review the report of Dr. Jelen and explain why appellant was disabled from work.

On January 29, 2013 appellant's attorney argued that Dr. Jelen's report was inconsistent and unrationalized and thus not entitled to the weight of the evidence.

By decision dated March 20, 2013, OWCP terminated appellant's authorization for medical treatment effective March 19, 2013.⁵ It found that Dr. Jelen's report constituted the weight of the evidence and established that he had no further residuals of his August 10, 2010 work injury.

In a decision dated March 21, 2013, OWCP denied appellant's claim for compensation from September 25 to November 19, 2010, December 4, 2010 to March 25, 2011, March 26 to October 9, 2012, April 7 to October 9, 2012, October 20 to November 2, 2012 and September 24 to April 6, 2012. It found that Dr. Bolno, in his reports, diagnosed conditions unrelated to the August 2010 work injury. OWCP determined that Dr. Jelen's opinion represented the weight of the evidence and established that he had no disability due to his August 10, 2010 employment injury.

On March 25, 2013 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative on the March 20, 2013 decision. On March 26, 2013 counsel also requested an oral hearing on the March 21, 2013 decision.

At the July 17, 2013 hearing regarding the March 21, 2013 decision, counsel argued that Dr. Bolno's opinion supported disability. He questioned whether OWCP properly selected Dr. Jelen as an impartial medical examiner in accordance with its procedures and noted that Dr. Jelen did not address when disability ceased.

In a report dated July 30, 2013, Dr. Bolno asserted that on August 10, 2010 appellant "was pushing heavy containers of mail out of trailers when he sustained trauma to his cervical spine, shoulders and lumbar spine, with severe radicular pain in both the upper and lower extremities." He asserted that a September 2010 cervical MRI scan study showed foraminal encroachment on the left at C4-5, degenerative joint disease at C3-4 and C5-6, an anterior fusion at C6-7 and a herniated disc with impingement at C4-5 and C5-6.⁶ An MRI scan study also

⁵ OWCP's March 20, 2013 decision purported to also terminate compensation benefits; however, appellant was not receiving wage-loss compensation at the time of the termination.

⁶ In a report dated July 3, 2013, Dr. Bolno expressed his disagreement with Dr. Smith's opinion.

showed an anterior labral tear of the left shoulder and EMG studies showed cervical radiculopathy and severe carpal tunnel syndrome bilaterally. Dr. Bolno questioned Dr. Jelen's findings in view of the fact that appellant worked in his usual employment for five years before the August 10, 2010 work injury and given the examination findings and results of diagnostic studies. He asserted that the results of diagnostic studies confirmed that he had sustained more than a soft tissue injury.

On August 22, 2013 counsel changed his request for an oral hearing on the March 20, 2013 termination decision to a request for a review of the written record.

By decision dated October 21, 2013, OWCP's hearing representative affirmed the March 21, 2013 decision. In a decision dated November 4, 2013, the hearing representative affirmed the March 20, 2013 decision.

On appeal, counsel argues that Dr. Smith's opinion is speculative and thus of little probative value. He also contends that there is no evidence that OWCP properly selected Dr. Jelen as an impartial medical examiner. Counsel maintains that Dr. Jelen did not address the significance of a September 7, 2010 MRI scan study finding C3-4 nerve encroachment or the results of EMG studies. He also argues that Dr. Jelen's finding that the cervical strain appeared to be resolved was speculative in nature and that he did not address exactly when the disability ceased or knowledge of appellant's work duties.

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.⁷ 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.⁸ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹⁰

Section 8123(a) 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.¹¹ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion

⁷ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁸ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁹ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a).

of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹²

ANALYSIS -- ISSUES 1

The Board finds that the record contains an unresolved conflict regarding whether appellant sustained conditions other than neck strain as a result of the August 10, 2010 employment injury. In a report dated October 8, 2010, Dr. Bolno, appellant's attending physician, advised that on August 10, 2010 appellant sustained an acute labral tear in his left shoulder and aggravated a preexisting cervical condition which resulted in new cervical radiculopathy. Dr. Smith, an OWCP referral physician, diagnosed neck strain due to the August 10, 2010 work injury. He found that appellant had not aggravated preexisting arthritis of the neck. Based on Dr. Smith's opinion, OWCP accepted that appellant sustained resolved neck sprain as a result of his August 10, 2010 work injury.

On October 25, 2012 Dr. Bolno diagnosed an acute cervical sprain with radiculopathy, acute bilateral carpal tunnel syndrome, an acute glenoid tear of the left shoulder, bilateral shoulder strains and post-traumatic left shoulder arthritis. On November 16, 2012 he advised that appellant was totally disabled due to bilateral rotator cuff injuries and cervical radiculopathy as a result of an injury on August 10, 2010. OWCP determined that a conflict existed between Dr. Smith and Dr. Bolno regarding whether appellant had any continuing disability due to his accepted neck strain. It referred appellant to Dr. Jelen for an impartial medical examination. Based on Dr. Jelen's report, OWCP purported to terminate his compensation for total disability as well as his authorization for medical benefits. However, at the time of OWCP's termination decision, appellant was not receiving compensation for disability. Further, the Board finds that, at the time OWCP accepted appellant's claim for resolved neck sprain, the record contained an unresolved conflict in medical opinion between Dr. Bolno and Dr. Smith regarding whether appellant sustained a soft tissue injury or an aggravation of a preexisting cervical condition and labral tear of the left shoulder due to the August 10, 2010 work injury. Consequently, OWCP did not meet its burden of proof to terminate appellant's authorization for medical benefits due to the August 10, 2010 employment injury.

Given that the Board finds a conflict exists regarding the diagnosed conditions resulting from the August 10, 2010 employment incident, it is premature to address the issue of whether appellant sustained intermittent disability from September 25, 2010 to April 6, 2012 due to his accepted employment injury.¹³

¹² 20 C.F.R. § 10.321.

¹³ If OWCP further develops the record by sending appellant to an impartial medical specialist, he should resolve the issue of the diagnosed conditions resulting from the August 10, 2001 employment injury and address any periods of disability resulting from the work injury.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's authorization for medical benefits effective March 19, 2013.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2013 decision of the Office of Workers' Compensation Programs is reversed and the October 21, 2013 decision is set aside.

Issued: September 2, 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