

FACTUAL HISTORY

On January 26, 2012 appellant, then a 50-year-old claims examiner, filed an occupational disease claim alleging that she experienced a muscle injury, left side numbness, and stress due to overcompensating on her left side after a right shoulder injury. She stopped work on January 27, 2012. OWCP accepted the claim, assigned file number xxxxxx606, for left shoulder calcifying tendinitis, a left shoulder sprain and partial infraspinatus tear, and cervicalgia.²

OWCP had previously accepted right rotator cuff syndrome under file number xxxxxx521 and resolved right shoulder strain under file number xxxxxx115. It combined the current file number, xxxxxx606, into master file number xxxxxx521. The facts from file number xxxxxx521 relevant to the instant appeal will be set forth.

Under file number xxxxxx521, OWCP paid wage-loss compensation from January 26, 2012 until February 19, 2013. Appellant underwent a right shoulder acromioplasty with a distal clavicle excision and labral repair on April 30, 2012.

OWCP referred appellant to Dr. John Hearts Welborn, Jr., a Board-certified orthopedic surgeon, for a second opinion examination under file number xxxxxx521. On January 9, 2013 Dr. Welborn diagnosed myofascial pain syndrome, impingement syndrome, acromioclavicular arthritis, and a super glenoid labrum sprain/strain. He found residuals of her shoulder surgery. Dr. Welborn advised that appellant could return to work with no lifting over 20 pounds or overhead work more than two hours per day.

On January 23, 2013 Dr. Vatche Cabayan, a Board-certified orthopedic surgeon, diagnosed right shoulder pain after surgery, and left shoulder pain with a partial infraspinatus tear. He found that appellant should not reach overhead or push, pull, or lift over 10 pounds.

On February 19, 2013 appellant accepted a February 12, 2013 limited-duty job offer from the employing establishment and returned to work. The position did not require reaching above her shoulders, pushing, pulling, or lifting. The employing establishment indicated that appellant would work “at a computer terminal with a telephone headset, an ergonomic workstation, and an ergonomic chair” performing keyboarding for no more than two hours per workday.

On February 19, 2013 Dr. Cabayan found that appellant was unable to use her right arm. On February 21, 2013 he advised that she was disabled from employment.

OWCP determined that a conflict existed between Dr. Cabayan and Dr. Welborn regarding appellant’s work restrictions under file number xxxxxx521. It referred her to Dr. Peter Sfakianos, a Board-certified orthopedic surgeon, for an impartial medical examination. In the statement of accepted facts, OWCP described appellant’s accepted left shoulder condition in file number xxxxxx606. It requested that Dr. Sfakianos provide all diagnoses due to the work injury,

² By decision dated March 15, 2012, OWCP denied appellant’s claim after finding that the medical evidence was insufficient to show that she sustained a diagnosed condition as a result of the accepted work factors. In a decision dated April 26, 2013, it vacated its March 15, 2012 decision and accepted her claim.

advise whether she required additional right shoulder surgery or left shoulder surgery, and address whether she could perform the duties of the February 12, 2013 job offer.

Dr. Cabayan continued to submit progress reports. In a report dated June 4, 2013, he noted that appellant was stressed due to her continued pain.

On July 17, 2013 appellant filed the claim for compensation beginning July 1, 2013 under the current file number, xxxxxx606.

In a report dated July 24, 2013, Dr. Cabayan described appellant's complaints of pain in her neck and left shoulder radiating into her arms. He found that a magnetic resonance imaging (MRI) scan study of the left shoulder showed "rotator cuff tendinitis with no discrete tear, glenohumeral joint effusion, mild subacromial-subdeltoid bursitis, and mild acromioclavicular joint osteoarthritis." Dr. Cabayan diagnosed a cervical discogenic condition and impingement of the left shoulder. He noted that appellant was not working and should avoid reaching overhead, heavy lifting, pushing, or pulling. In a disability certificate dated July 24, 2013, Dr. Cabayan found that she was unable to work until August 22, 2013.

By letter dated July 31, 2013, OWCP advised appellant that it had obtained an impartial medical examination regarding her right shoulder in file number xxxxxx521, but that her subsidiary left shoulder claim had also been sent to the referee physician, *i.e.*, Dr. Sfakianos, for review. It stated that it would take further action pending receipt of the report from the impartial medical examiner.

In a report dated August 13, 2013, Dr. Sfakianos discussed appellant's history of a right shoulder injury and surgery and noted that she also had an accepted left shoulder claim for calcifying tendinitis, shoulder sprain, cephalgia, and a partial infraspinatus tear.

On examination of the upper extremities Dr. Sfakianos found full reflexes, no spasm, full strength and sensation, and tenderness at the paracervical and trapezial musculature more on the right. He measured restriction range of motion of the shoulders with active motion but full with passive motion. Dr. Sfakianos found fair to good strength of the rotator cuff bilaterally with negative labral signs. He indicated that he wanted to review the "actual diagnostic studies," especially the May 5, 2013 MRI scan study, prior to responding to the questions posed but stated, "In the absence of a personal reading of all the diagnostic studies involved and instead relying exclusively on the interpretations of the reading radiologists, and with that proviso in place, I believe that the following would represent my best effort, given what I see before me." Dr. Sfakianos diagnosed shoulder impingement syndrome, acromioclavicular joint arthrosis, and upper extremity overuse syndrome. He also found that appellant had myofascial pain syndrome, psychosocial stressors, and major depression as nonwork-related conditions. Dr. Sfakianos recommended against further surgery for either shoulder. He determined that appellant could resume work within the restrictions of the February 12, 2013 offered position considering only her musculoskeletal issues as long as "ergonomically advantageous alterations are applied to her workstation." Dr. Sfakianos noted that there may also be psychological facts that he was "completely ill-equipped to discuss in any detail..." He indicated that he would provide a supplemental report if provided with appellant's diagnostic studies. In an accompanying work

restriction evaluation, Dr. Sfakianos opined that she could work with restrictions against reaching above her shoulder for two hours per day or lifting, pushing, or pulling over 20 pounds.

By letter dated August 22, 2013, OWCP noted that appellant had filed claims for compensation beginning July 1, 2013 under file number xxxxxx606, accepted for tendinitis and sprain of the left shoulder, and cervicgia. It found that she had returned to work following right shoulder surgery under another file number on February 19, 2013 but stopped work the end of June 2013 and claimed compensation under the current file number. OWCP informed appellant that Dr. Sfakianos, who provided an impartial medical examination under file number xxxxxx521, also evaluated her left shoulder and found that she could work within the restrictions of the February 19, 2013 job offer. It advised that his report currently constituted the weight of the evidence and requested that she submit a report from her attending physician addressing why she was disabled from her limited-duty employment as a result of her work injury.

On September 3, 2013 Dr. Cabayan reviewed Dr. Sfakianos' report. He diagnosed calcific tendinitis of the right shoulder after decompression, a resection of the distal clavicle and labral repair, left shoulder impingement syndrome, neck pain, and an "element of stress and anxiety related to this condition that will be addressed by another physician I assume." Dr. Cabayan found that computer work appeared to aggravate appellant's condition. He noted that when she returned to work previously she injured her left arm and was currently "unable to do her job altogether. It appears that the combination of the body shoulders is more than additive and it seems to be cumulative and compounding the problem more significantly making [her] unable to handle her job." Dr. Cabayan further stated, "I do not think that [appellant] is in any position to push and pull 20 pounds as suggested by the referee and it is certainly clear to me that [she] is not going to be able to handle her job...." He recommended that appellant remain off work. Dr. Cabayan further noted that the impartial medical examiner acknowledged that he had not reviewed the objective studies and "in essence, [the impartial medical examiner] made opinions without having the objective findings."

In a report dated September 20, 2013, submitted under file number xxxxxx521, Dr. George Demetrius Karalis, a psychiatrist, opined that OWCP should expand acceptance of appellant's claim under file number xxxxxx521 to include major depression. He reviewed her history of a right shoulder injury in May 2009 and a consequential injury to her left shoulder and neck under file number xxxxxx606. Dr. Karalis stated, "The orthopedic treatment has proven emotionally taxing to [appellant], because of the chronic pain, the continuing decreased range-of-motion, ongoing invasive and noninvasive therapeutic and diagnostic procedures, and lost time from work...." He further opined that appellant sustained an impairment of cognition resulting from her pain, depression, and medications. Dr. Karalis related that pain from an injury caused increased anxiety and depression, which heightened pain, creating a cycle that ultimately continued independent from the physical problem. He diagnosed severe major depression as a result of pain and loss of motion from appellant's 2009 orthopedic injury. Dr. Karalis found that she was totally disabled from her mental condition beginning June 30, 2013, but that "the depression was clinically evident and progressing since shortly after the 2009 physical injury."

In a progress report dated October 7, 2013, Dr. Cabayan described appellant's complaints of pain, depression, and anxiety. He reviewed Dr. Karalis' report and recommended that OWCP authorize psychotherapy.

By decision dated November 4, 2013, OWCP denied appellant's claim for compensation for total disability beginning July 1, 2013. It found that Dr. Sfakianos' opinion as the impartial medical examiner constituted the weight of the evidence and established that she could perform her limited-duty employment. OWCP further determined that appellant had not established that she sustained an employment-related psychiatric condition. It reviewed the report from Dr. Karalis but found that his sole report was insufficient to overcome the weight of the impartial medical examiner that she could return to work with limitations.

In progress reports dated December 10, 2013 and January 21, March 11, and April 11 and 30, 2014, Dr. Cabayan evaluated appellant for her left shoulder and neck condition. He diagnosed left shoulder impingement syndrome, cervical disc disease from C2 to C6, and an element of depression, weight gain, and a sleep disorder. In his March 11, 2014 report, Dr. Cabayan opined that appellant "cannot do work reaching or repetitive motion, pushing, pulling, or lifting with [the] left arm ([appellant] is recovering from surgery on the opposite shoulder on another claim)." He noted that she had retired. On April 11, 2014 Dr. Cabayan again requested referral to a psychiatrist for depression and anxiety and to a physiatrist for an injection. He stated, "[Appellant] cannot do any repetitive neck flexion, extension, rotation, overhead reaching, [or] forceful pushing and pulling." In a report dated April 30, 2014, Dr. Cabayan found that, regarding the left arm, appellant should avoid repetitive motion, reaching overhead, and "forceful pushing, pulling, or lifting...."

On May 15, 2014 appellant, through counsel, requested reconsideration.

By decision dated May 28, 2014, OWCP denied modification of its November 4, 2013 decision. It found that the reports from Dr. Cabayan were insufficient to overcome the weight of Dr. Sfakianos as the impartial medical examiner.

In a report dated April 4, 2014, submitted under file number xxxxxx521 and received by OWCP on June 2, 2014, Dr. Cabayan reviewed Dr. Sfakianos' report and noted that he opined that appellant could return to work only if she was provided proper ergonomic equipment. Appellant related that the employing establishment did not make ergonomic changes to her workstation. Dr. Cabayan asserted that she had problems with her neck and both shoulders and "would have difficulty doing any kind of reaching with either arm and making [appellant] really not capable of handling any kind of work sitting at a keyboard. In this environment, it seems to me that, reaching being precluded in both arms, it appears logical that it would preclude [appellant] from work especially when ergonomics were not provided."

On June 6, 2014 appellant, through counsel, again requested reconsideration. In progress reports dated May 30 and July 7, 2014, Dr. Cabayan diagnosed impingement syndrome of the left shoulder, cervical disc disease from C2 to C6, some depression, and weight gain. He listed work restrictions, including avoiding overhead reaching.

In a decision dated July 16, 2014, OWCP denied modification of the May 28, 2014 decision. It determined that Dr. Cabayan erroneously determined that the employing establishment had not made ergonomic changes to her workstation.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in FECA³ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁴ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁵ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁶ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁷

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.⁸ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion 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.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a left shoulder sprain, left shoulder calcifying tendinitis, cervicalgia, and a left shoulder partial infraspinatus tear under the current file number, xxxxxx606. It further accepted that she sustained right rotator cuff syndrome under file number xxxxxx521, and doubled file number xxxxxx606 into master file number xxxxxx521. On February 19, 2013 appellant accepted a limited-duty job offer. She stopped work on July 1, 2013 and filed a claim for compensation under file number xxxxxx606.

OWCP determined that a conflict existed between Dr. Cabayan, appellant's attending physician, and Dr. Welborn, an OWCP referral physician, regarding her work restrictions from her right shoulder injury under file number xxxxxx521. It provided Dr. Sfakianos with a

³ *Supra* note 1; 20 C.F.R. § 10.5(f).

⁴ *Paul E. Thams*, 56 ECAB 503 (2005).

⁵ *Id.*

⁶ *Id.*

⁷ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

statement of accepted facts that also described her left shoulder injury under file number xxxxxx606. OWCP asked that he determine whether appellant was capable of working in her February 12, 2013 limited-duty position. Based on Dr. Sfakianos opinion, serving as the impartial medical specialist, OWCP found that she had not established that she was disabled for work beginning July 1, 2013 under file number xxxxxx606.

The Board notes, however, that Dr. Sfakianos was not an impartial medical specialist regarding appellant's left shoulder condition and work restrictions under file number xxxxxx606. Dr. Welborn, who was on one side of the conflict resolved by Dr. Sfakianos under file number xxxxxx521, did not address her left shoulder condition or resulting work restrictions. Consequently, Dr. Sfakianos' opinion is that of a second opinion physician regarding the extent of her disability due to left shoulder calcifying tendinitis, a left shoulder sprain and partial infraspinatus tear, and cervicalgia under file number xxxxxx606.

On August 13, 2013 Dr. Sfakianos diagnosed impingement syndrome of the shoulder, acromioclavicular joint arthrosis, and overuse syndrome of the upper extremity. He found that appellant could work in the February 12, 2013 position considering only her orthopedic condition as long as she had an ergonomic workstation. The February 12, 2013 job offer provided that she would have an ergonomic chair, workstation, and telephone headset.

In a progress report dated July 24, 2013, Dr. Cabayan diagnosed a cervical discogenic condition and left shoulder impingement. He advised that appellant was unable to work until August 22, 2013. On September 3, 2013 Dr. Cabayan diagnosed tendinitis of the right shoulder, left shoulder impingement syndrome, and neck pain. He noted that, when appellant resumed work after surgery on her right shoulder, she developed a left shoulder condition. Dr. Cabayan determined that she should remain off work. In a report dated April 4, 2014, he found that appellant was unable to work at a keyboard.

The Board finds that a conflict exists between Dr. Cabayan, appellant's physician, and Dr. Sfakianos, OWCP physician, regarding whether appellant's accepted work injury under file number xxxxxx606 disabled her from her limited-duty employment beginning July 1, 2013. 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.¹⁰ On remand, OWCP should refer appellant to an impartial medical examiner for an opinion on whether she was unable to work beginning July 1, 2013 due to her accepted work injury. Following any necessary further development, it shall issue a *de novo* decision on this issue.

LEGAL PRECEDENT -- ISSUE 2

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable

¹⁰ 5 U.S.C. § 8123(a).

primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.¹¹

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹²

ANALYSIS -- ISSUE 2

In a report dated September 20, 2013, Dr. Karalis diagnosed major depression as a result of pain and limitations from appellant's 2009 orthopedic injury under master file number xxxxxx521. He further found that she had a cognitive impairment as a result of her medication. Dr. Karalis determined that appellant's major depression originated from her orthopedic injury but now continued independent of that condition. He opined that she was totally disabled as a result of her emotional condition beginning June 30, 2013. On October 7, 2013 Dr. Cabayan reviewed Dr. Karalis' report and recommended psychotherapy. In its November 4, 2013 decision, issued under file number xxxxxx606, OWCP found that appellant had not established a consequential psychiatric condition as the report from Dr. Karalis was insufficient to overcome the opinion of the impartial medical examiner, Dr. Sfakianos stated that she was not disabled from her limited-duty employment. Dr. Sfakianos, however, addressed only appellant's orthopedic condition. His opinion, therefore, is not relevant to the issue of whether she sustained a consequential emotional condition.

Dr. Karalis' report is detailed, based on an accurate history, and not contradicted by any substantial medical evidence of record. The Board thus finds that this aspect of appellant's claim requires additional development of the medical evidence.¹³ On remand, OWCP should refer her, together with a statement of accepted facts, to a second opinion physician to determine whether she sustained an emotional condition due to her accepted work injuries. After this and such further development as OWCP deems necessary, it should issue a *de novo* decision on this issue.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant established that she was disabled beginning July 1, 2013 causally related to her accepted employment injury and whether she sustained a consequential emotional condition.

¹¹ See S.S., 59 ECAB 315 (2008); *Debra L. Dillworth*, 57 ECAB 516 (2006).

¹² *Charles W. Downey*, 54 ECAB 421 (2003).

¹³ See S.G., Docket No. 13-35 (issued July 9, 2013).

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 8, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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