

October 4, 2007 employment injury; and (2) whether appellant has established continuing employment-related disability after January 22, 2014.

FACTUAL HISTORY

On October 5, 2007 appellant, then a 40-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 4, 2007 he injured his left shoulder, forehead, and right knee when he fell down stairs in the performance of duty. OWCP accepted the claim for a left shoulder strain and paid wage-loss compensation for total disability on the supplemental rolls beginning November 24, 2007, and was placed on the periodic rolls effective January 5, 2008.

Appellant on March 24, 2009 underwent a debridement of the superior labrum and biceps tendon, anterior labrum, the undersurface of a partial thickness rotator cuff tear, a labral repair, a resection of the acromial, and a partial bursectomy.

On March 23, 2012 Dr. Salvatore Pasquale, Board-certified in internal medicine, found that appellant required pain medication that prevented him from safely performing some duties.

On September 5, 2012 OWCP referred appellant to Dr. Harvey Seigel, an osteopath, for a second opinion examination. In a report dated September 27, 2012, Dr. Seigel reviewed the history of injury and the medical reports of record. On examination he found a negative Spurling's maneuver with no tenderness, muscle spasm, weakness, or atrophy. Dr. Seigel found "absurdly voluntarily limited range of motion" of the left shoulder. He diagnosed a resolved left shoulder strain based on the lack of objective findings and advised that appellant had no additional accepted conditions as a result of the October 4, 2007 work injury. Dr. Seigel opined that he could resume his usual employment.

Based on Dr. Siegel's report, in a decision dated May 15, 2013, after appropriate notices, OWCP terminated appellant's compensation and authorization for medical benefits effective that date.

Appellant on June 11, 2013 requested an oral hearing.

On June 18, 2013 Dr. Kevin Scully, a Board-certified orthopedic surgeon, evaluated appellant for left shoulder pain in the acromioclavicular (AC) joint. He diagnosed disruption of the AC joint with grade one separation of the shoulder and recommended surgery. In an accompanying form report dated June 18, 2013, Dr. Scully checked a box marked "yes" that the condition was due to employment and found that he was totally disabled.

Dr. Scully on September 12, 2013 performed left shoulder surgery with a postoperative diagnosis of left biceps tendinosis and a Type 2 superior labrum anterior posterior (SLAP) tear.

A hearing was held on November 25, 2013. In a decision dated January 15, 2014, an OWCP hearing representative found that OWCP properly terminated appellant's compensation as of May 15, 2013 based on Dr. Seigel's report. He found, however, that the record now contained a conflict in opinion between Dr. Seigel and Dr. Scully regarding appellant's current condition and work restrictions. The hearing representative affirmed the May 15, 2013 decision as modified to reflect that OWCP should further develop whether appellant sustained continuing disability or additional employment-related conditions due to his accepted injury.

In a report dated December 4, 2013, Dr. Scully discussed appellant's history of a prior arthroscopic surgery on the left shoulder, which did not help his shoulder pain. He related that he performed a Mumford distal claviclectomy, subacromial decompression, and biceps tenotomy. Dr. Scully opined that the conditions that he treated "were causally related to [appellant's] work injury when the stairs collapsed beneath him." He found that appellant could perform limited-duty employment pending rehabilitation.

On January 21, 2014 a physician assistant with Dr. Scully's office found that appellant could resume work without restrictions. The provider advised that he may need injections in the future.

Counsel telephoned OWCP regarding the status of the claim on March 6, 2014. A claims examiner advised that appellant was scheduled for impartial medical examination and that wage-loss compensation and medical benefits would "not be reinstated pending the examination."

OWCP referred appellant to Dr. Ronald L. Mann, a Board-certified orthopedic surgeon, for an impartial medical examination to determine whether appellant sustained additional left shoulder conditions due to his work injury and whether he had continuing employment-related disability or need for further medical treatment.

In a report dated April 7, 2014, Dr. Mann diagnosed left shoulder strain with internal derangement. He noted that the initial shoulder surgery in March 2009 had not been successful, but that the surgery in September 2013 had resulted in improvement. Dr. Mann attributed the need for both shoulder surgeries to the October 4, 2007 employment injury. He further opined that appellant sustained a SLAP tear and underwent a biceps tenodesis as a result of his work injury. Dr. Mann determined that appellant had "significantly improved since [appellant's] surgery of September 2013." He found that appellant had not yet fully recovered, but that he could return to his usual employment in January 2014 as found by Dr. Scully.

OWCP on April 17, 2014 expanded acceptance of appellant's claim to include left bicipital tendinitis and a left SLAP tear.

By decision dated April 17, 2014, OWCP found that appellant's compensation remained terminated, effective May 15, 2013, in accordance with its prior decision. It determined that Dr. Mann's opinion represented the weight of the evidence as the impartial medical examiner and established that he had no further disability.

On April 15, 2014 the employing establishment offered appellant his original position of carrier.

Appellant on April 28, 2014 requested a telephone hearing. In a statement dated May 13, 2014, counsel contended that appellant's benefits should continue from May 15, 2013 to May 12, 2014, the date he resumed work.

Following a preliminary review, on October 27, 2014 an OWCP hearing representative reversed in part and set aside in part the April 17, 2014 decision. She found that Dr. Mann's opinion supported a finding of disability after May 15, 2013. The hearing representative noted that counsel did not dispute that appellant could resume work on January 21, 2014. She determined that OWCP should pay appellant compensation for disability from May 15, 2013 to

January 21, 2014 and adjudicate the issue of entitlement to benefits after that date. The hearing representative further found that OWCP should reinstate authorization for medical benefits as Dr. Mann found that appellant continued to have residuals of his accepted conditions that required medical treatment. She also noted that appellant had subsequently retired from the employing establishment as a result of multiple sclerosis.

In a decision dated November 17, 2014, OWCP terminated appellant's wage-loss compensation effective January 22, 2014 as both Dr. Mann and Dr. Scully indicated that appellant could resume work that date without restrictions.

By letter dated November 17, 2014, OWCP requested an updated medical report from Dr. Scully regarding appellant's condition.

Counsel on December 8, 2014 requested an oral hearing. He argued that on March 6, 2014 a claims examiner informed him that appellant could not resume work until after the scheduled referee examination. Counsel asserted that appellant was entitled to benefits until May 15, 2014 as he did not receive Dr. Mann's report until late April 2014 and required two weeks to relocate back to his prior work location.

OWCP scheduled a telephone hearing on May 7, 2015. In a letter dated May 7, 2015, counsel indicated that appellant was unable to partake in the telephone hearing and reiterated that his benefits should not have been terminated until he received Dr. Mann's report at the end of April 2014.

Following a review of the written record, by decision dated July 24, 2015, an OWCP hearing representative affirmed the November 17, 2014 decision. He concluded that OWCP properly terminated benefits effective May 15, 2013, at which time the burden shifted to appellant to show continuing disability. The hearing representative determined that both Dr. Mann and Dr. Scully found that appellant could resume work on January 22, 2014. He also noted that OWCP had reinstated appellant's medical benefits.

On September 8, 2015 appellant, through counsel, requested reconsideration. He contended that OWCP informed him on March 6, 2014 that appellant could not return to work until his referee examination. Counsel advised that appellant did not find out that Dr. Mann cleared him to resume work until April 28, 2014, when he received his report. He maintained that OWCP did not establish that appellant's disability ceased until April 7, 2014, the date of Dr. Mann's report. Counsel asserted that appellant should have received benefits until OWCP notified him that he could return to work. He noted that on November 17, 2014 OWCP requested an updated medical report from Dr. Scully, which suggested that it believed appellant might be entitled to further compensation.³

In a decision dated December 11, 2015, OWCP denied modification of its July 24, 2015 decision. It found that appellant was not entitled to compensation for disability under FECA after disability ended.

³ The determination of the need for the examination is a matter within the province and discretion of OWCP. 5 U.S.C. § 8123(a); *L.B.*, Docket No. 13-0239 (issued April 12, 2013).

On appeal, counsel argues that OWCP required that appellant be cleared prior to resuming work and then denied him compensation from the time he was cleared to work until the date he was informed of the clearance. He notes that OWCP found that Dr. Mann's report constituted the weight of the evidence, and that OWCP only established that the disability ceased when the physician examined appellant on April 7, 2014. Counsel advises that appellant did not learn of Dr. Mann's finding until April 28, 2014. He asserts that OWCP should pay for the time appellant missed work since it had to clear his return to work.

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.⁴ 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.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a left shoulder strain due to an October 4, 2007 employment injury. It paid compensation for total disability on the supplemental rolls beginning November 24, 2007 and on the periodic rolls effective January 5, 2008. On September 5, 2012 OWCP referred appellant to Dr. Seigel for a second opinion examination. In his September 27, 2012 report, Dr. Seigel determined that appellant had no further disability as a result of his accepted left shoulder strain. In reaching his conclusion, he reviewed the history of injury and provided findings on examination. Dr. Seigel found no atrophy, reduced strength, a voluntary reduction in motion, and no muscle spasm. He provided a thorough review of the factual and medical background and reached conclusions regarding appellant's condition which comported with his detailed examination findings.⁶ OWCP, therefore, properly found that Dr. Seigel's opinion represented the weight of the evidence and established that appellant had no further disability after May 15, 2013.

The remaining contemporaneous medical evidence submitted prior to the termination is insufficient to show that appellant had further disability due to his left shoulder strain. On March 23, 2012 Dr. Pasquale advised that appellant required pain medication. He did not, however, provide a diagnosis or causation finding and thus his report is of little probative value.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates appellant's compensation benefits, the burden shifts to appellant to establish continuing disability related to his accepted injury.⁷ To establish a causal relationship between the condition, as well as any attendant disability claimed, and the

⁴ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁵ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁶ *See Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

⁷ *Manual Gill*, 52 ECAB 282 (2001).

employment injury an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁸ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁹

Where appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.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 states 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.¹²

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 2

Given the Board's finding above that OWCP properly relied upon the opinion of Dr. Seigel in terminating compensation, the burden of proof shifted to appellant to establish that he remained entitled to compensation after that date.¹⁴

In a decision dated January 15, 2014, an OWCP hearing representative affirmed the termination of appellant's benefits for his accepted left shoulder strain, but found that newly submitted evidence created a conflict between Dr. Scully and Dr. Seigel regarding whether appellant had continuing disability or sustained additional conditions due to his October 4, 2007 employment injury. OWCP referred appellant to Dr. Mann for an impartial medical examination.

⁸ *Id.*

⁹ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

¹¹ 5 U.S.C. § 8123(a).

¹² 20 C.F.R. § 10.321.

¹³ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹⁴ *See supra* note 7.

On April 7, 2014 Dr. Mann diagnosed left shoulder strain with internal derangement. He found that appellant's September 12, 2013 surgery was necessary due to his employment injury and that he also sustained biceps tenodesis and a SLAP tear due to his October 4, 2007 injury. Dr. Mann concurred with the finding from Dr. Scully's office that appellant could return to his usual employment in January 2014. He advised that appellant required further medical treatment.

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵ Based on Dr. Mann's report, OWCP expanded acceptance of appellant's claim to include left bicipital tendinitis and a left SLAP tear. It further found that appellant was entitled to compensation from May 15, 2013, the date of its termination, to January 22, 2014. The Board finds that Dr. Mann's report is well rationalized and based on a proper factual and accurate history; consequently, his opinion is entitled to special weight as the impartial medical examiner.¹⁶

On appeal, counsel does not challenge the finding by Dr. Scully and Dr. Mann that appellant could resume his usual employment on January 22, 2014. Instead, he argues that an OWCP claims examiner told him on March 6, 2014 that appellant could not return to work until after Dr. Mann's evaluation, which did not occur until April 7, 2014. The record, however, establishes that a claims examiner informed counsel on March 6, 2014 that appellant was scheduled for an impartial medical examination and that benefits would not be reinstated pending the examination.¹⁷

Counsel contends that appellant did not receive Dr. Mann's report until April 28, 2014 and thus was not able to make arrangements to return to work until May 15, 2014. He maintains that OWCP did not establish that appellant's disability ceased until it received Dr. Mann's report. As discussed, however, OWCP met its burden of proof to terminate compensation, effective May 15, 2013. Subsequent to the termination of his compensation, appellant established that he had continuing disability until January 22, 2014. Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹⁸ Appellant has not met his burden of proof to establish entitlement to compensation after January 22, 2014 due to his accepted employment injury.¹⁹

¹⁵ *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁶ *See J.M.*, *id*; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁷ On appeal counsel advised that he did not receive the December 11, 2015 decision. However, the decision indicated that it was sent to counsel at the proper address and the record does not indicate that it was returned as undeliverable. Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *See B.L.*, Docket No. 16-0514 (issued May 24, 2016).

¹⁸ *See Edward H. Horton*, 41 ECAB 301 (1989).

¹⁹ *See I.J.*, 59 ECAB 408 (2008).

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective May 15, 2013 as he had no further disability causally related to his October 4, 2007 employment injury. The Board further finds that he has not established continuing employment-related disability after January 22, 2014.

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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