

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

G.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

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**Docket No. 16-0431
Issued: October 12, 2016**

Appearances:

*Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 7, 2016 appellant, through counsel, filed a timely appeal of an October 27, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits as of June 9, 2015; and (2) whether appellant has established that she had continuing disability caused by residuals of her accepted aggravation of left shoulder sprain and

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

aggravation of brachial radiculitis conditions following the termination of compensation benefits on June 9, 2015.

FACTUAL HISTORY

Appellant, then a 47-year-old distribution clerk on May 12, 2009, filed a traumatic injury claim (Form CA-1) alleging that on September 22, 2008 after grasping mail with both hands, she experienced pain in her hands, which radiated to her left shoulder, and caused a headache.³

On June 19, 2009 OWCP accepted her claim for aggravation of left shoulder sprain and aggravation of brachial radiculitis. It commenced payment of compensation for temporary total disability. Appellant received compensation benefits on the supplemental rolls paid retroactively to October 8, 2008 and on the periodic rolls as of October 15, 2009.

In a report dated April 28, 2011, Dr. Mark A.P. Filippone, Board-certified in physical medicine and rehabilitation and appellant's treating physician, asserted that her condition was unchanged and that her symptoms had persisted since his most recent reexamination of March 29, 2011. He noted on examination that both shoulders and upper arms hurt and that she was experiencing pain, guarding, and spasm in the cervical paraspinals. Dr. Filippone advised that appellant underwent an electromyogram (EMG), which showed evidence of partial denervation in the abductor pollicis brevis bilaterally, partial denervation in the mid-cervical dorsal rami bilaterally, and in muscles in the left upper extremity, which demonstrated mild partial denervation in muscles innervated by the left C5-7 cervical nerve roots. He opined that there was motor sensory and nerve conduction evidence of bilateral carpal tunnel syndrome and EMG evidence of partial denervation in muscles innervated by the mid cervical dorsal rami bilaterally; there was also EMG evidence of left C5-7 cervical radiculopathy. Dr. Filippone opined that all of these findings were consistent with the injuries she sustained while working for the employing establishment and that she continued to be totally disabled.

In a January 27, 2012 report, Dr. Filippone reiterated that appellant continued to experience right shoulder and neck pain, that her condition was unchanged and that she remained totally disabled due to these conditions.

In a report dated May 14, 2012, Dr. Filippone asserted that appellant was experiencing hot and burning neck pain, which he rated a 7.5 on a scale of 1 to 10 in intensity; he rated his left shoulder pain as a 7 on a scale of 1 to 10, radiating into the left arm and into the left fingers. He advised that appellant continued to be totally disabled. Dr. Filippone diagnosed disc herniations at C5-6 and C6-7; bulging disc at C4-5; and cervical radiculopathy; left shoulder partial thickness tear of the supraspinatus tendon; impingement of the rotator cuff; and glenohumeral joint effusion/fluid within the subdeltoid bursa. He opined that these conditions were directly and solely the result of the injuries she sustained while working for the employing establishment.

In order to determine appellant's current condition and ascertain whether she still suffered residuals from her accepted conditions, OWCP referred her for a second opinion

³ Appellant had initially filed a notice of recurrence (Form CA-2a) on March 17, 2009 alleging a September 21, 2008 recurrence of an October 22, 2003 injury. On May 28, 2009 OWCP informed appellant's counsel that based on the description of the circumstances surrounding this injury claim, the claim would be processed as a claim for traumatic injury.

examination with Dr. Kenneth P. Heist, an osteopath Board-certified in orthopedic surgery. In a June 13, 2012 report, Dr. Heist reviewed the medical history and the statement of accepted facts (SOAF), stated findings on examination and concluded that her accepted left shoulder bursitis and tendinitis conditions had resolved. He noted that appellant showed some restriction of motion in her left shoulder, neck, and lumbar spine, which he attributed to her preexisting conditions of degenerative spinal and joint disease. Dr. Heist opined that she was capable of returning to work eight hours a day with restrictions no lifting exceeding 20 pounds occasionally or 10 pounds frequently, and on lifting, carrying, pushing, pulling, or otherwise moving objects.

OWCP found that there was a conflict in the medical evidence between Dr. Filippone and Dr. Heist, the second opinion physician, as to whether appellant still had residuals from her accepted left shoulder and neck conditions. It referred her to Dr. Ian B. Fries, Board-certified in orthopedic surgery, for an impartial medical examination. In a June 19, 2014 report, Dr. Fries found that appellant had fully recovered from her accepted left shoulder and neck conditions. He asserted that, while she had subjective findings of widespread, poorly defined tenderness of her head, neck, and shoulder girdles, she had no objective evidence of significant musculoskeletal or neurologic pathology; appellant had no signs of internal derangements of either shoulder and no provocative signs to confirm radiculopathy. Dr. Fries reported that she had very poor recall, which precluded him from depending on her for historical details; he also noted that her medical records were incomplete. Nevertheless, he found that there was sufficient evidence to find that she was no longer disabled due to the effects of her accepted conditions. Dr. Fries concluded that appellant had no residuals from her brachial radiculitis and left shoulder conditions and opined that she was physically capable of performing full duty at her date-of-injury position.

On May 7, 2015 OWCP issued a notice of proposed termination of compensation to appellant. It found that the weight of the medical evidence, as represented by Dr. Fries' impartial opinion, established that her accepted brachial radiculitis and left shoulder had ceased and that she had no work-related residuals stemming from these conditions. It allotted appellant 30 days within which to submit additional evidence. Appellant did not respond within the allotted time.

By decision dated June 9, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, finding that Dr. Fries' impartial opinion represented the special weight of the medical evidence.

On June 15, 2015 appellant, through her representative, requested a hearing before an OWCP Branch of Hearings and Review hearing representative, which was held on September 14, 2015.

In reports dated June 4 and 11, 2015, received by June 19, 2015, Dr. Filippone expressed his disagreement with Dr. Fries' opinion that appellant was capable of performing her preinjury job and essentially reiterated his previous findings and conclusions. He conceded that appellant had manifested certain "bizarre complaints" and symptom magnification, but opined that she was not a "malingerer" patient.

By decision dated October 27, 2015, an OWCP hearing representative affirmed the June 9, 2015 termination decision.

LEGAL PRECEDENT

Under FECA, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ 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.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

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

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁸ For a conflict to arise the opposing physician's viewpoints must be of "virtually equal weight and rationale."⁹ Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS

In this case, OWCP based its decision to terminate appellant's compensation on the opinion of Dr. Fries, the impartial medical physician. The Board finds that OWCP met its burden of proof.

While appellant's treating physician, Dr. Filippone, continued to opine following physical examination that appellant was totally disabled; Dr. Heist, OWCP's second opinion physician opined, following physical examination, that appellant could return to work with restrictions. OWCP properly determined that a conflict existed in the medical opinion evidence and referred appellant to Dr. Fries to determine her disability status.¹¹

On appeal, appellant's counsel argues that Dr. Fries' impartial medical report was vague, insufficiently rationalized, presented inaccurate conclusions regarding appellant's ability to

⁴ *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

⁵ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁶ *See Del K. Rykert*, 40 ECAB 284 (1988). *L.J.*, Docket No. 14-1682 (December 11, 2015).

⁷ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁸ 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁹ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁰ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹¹ *See supra* note 9.

perform her work duties and was based on an inaccurate SOAF. Counsel contends that because the June 17, 2013 SOAF did not specifically list all of the restrictions stemming from appellant's prior work injury, which pertained to her upper extremities and neck, and because he noted that the medical records were incomplete, Dr. Fries' report cannot carry the weight of medical evidence since it is based upon an inaccurate SOAF. He argues that Dr. Fries should have been made aware of the modified mail processing job that appellant was performing at the time of her 2008 work injury to determine if she has residual disability. Appellant's counsel notes that EMG testing performed on May 3, 2013 confirmed that she continued to suffer from left C5-7 radiculopathies and that, during his physical examination, Dr. Fries noted that she had loss of motion in her neck and upper extremities and loss of strength and sensory deficiencies in the upper extremities. Lastly, counsel asserts that Dr. Fries was unable to quantify how much of appellant's disability was attributable to each of her previous work-related injuries. He therefore argues that his report did not merit the special weight of a referee medical examiner.

The Board does not accept counsel's contentions. Dr. Fries was provided a SOAF describing the essential elements, including the accepted conditions, the job title and work history, and the relevant medical history. In his 31-page report, he fully addresses appellant's job and medical history.¹² Dr. Fries provided a thorough, exhaustive medical opinion based on his examination of appellant and provided findings based on his examination, the SOAF and her medical history. He concluded that she had no residuals from the only accepted conditions, brachial radiculitis, and aggravation of left shoulder strain, and opined that she was physically capable of performing full duty at her date-of-injury job. Dr. Fries reported that appellant had no objective evidence of significant musculoskeletal or neurologic pathology, with no signs of internal derangements of either shoulder and no provocative signs to confirm radiculopathy. He opined that she had fully recovered and was no longer totally disabled due to her accepted left shoulder and neck conditions. OWCP relied on Dr. Fries' opinion in its June 9, 2015 decision, finding that appellant had no residual disability or impairment causally related to her accepted brachial radiculitis and left shoulder conditions.

The Board finds that Dr. Fries' impartial opinion negates a causal relationship between appellant's continuing conditions and disability related to her employment. The medical evidence of record establishes that appellant no longer has any residuals from her accepted brachial radiculitis and left shoulder conditions.¹³ Dr. Fries' opinion is sufficiently probative, rationalized, and based upon a proper factual background. Therefore, OWCP properly accorded his opinion the special weight of an impartial medical examiner.¹⁴ Accordingly, it properly

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.5 (September 2009) and *id.* Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3(a)(4); see also *D.C.*, Docket No. 16-0430 (issued August 29, 2016).

¹³ The Board rejects counsel's argument that Dr. Fries' opinion is lacking in probative value because he did not consider appellant's specific work restrictions stemming from her previous work injury and did not enumerate the degree of disability stemming from each of her work-related incidents. The question of whether appellant had any residual disability stemming from her accepted conditions is a medical question, to be determined by a physician. As OWCP's impartial medical examiner, Dr. Fries was charged with determining whether she had any residuals stemming from her accepted left shoulder sprain and aggravation of brachial radiculitis conditions, based on the evidence of record. For the reasons noted in this decision, Dr. Fries' findings in this regard are fully supported by the evidence of record and his conclusions are fully rationalized and sufficient to merit the special weight of an impartial medical examiner.

¹⁴ *Supra* note 10.

found that Dr. Fries' impartial medical opinion negated a causal relationship between appellant's current condition and her accepted brachial radiculitis and left shoulder conditions and that it represented the weight of the medical evidence in its June 9, 2015 termination decision.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Following a proper termination of compensation benefits, the burden of proof shifts back to the claimant to establish continuing employment-related disability.¹⁶ To establish a causal relationship between the condition, any attendant disability, and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.¹⁷ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁸ To prevail, the claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹⁹

ANALYSIS -- ISSUE 2

The issue of whether appellant is still entitled to compensation for continuing disability and whether she continued to experience residuals from her accepted condition is a medical one, based on the medical evidence of record.²⁰ While she submitted the June 4 and 11, 2015 reports from Dr. Filippone, these reports did not provide a probative medical opinion as to whether she was disabled or currently required medical treatment due to an employment-related condition; these reports merely restate one side of the conflict in medical evidence which was resolved by Dr. Fries' opinion.²¹ Dr. Filippone did not provide a well-reasoned and sufficiently supported opinion that would vitiate OWCP's June 9, 2015 determination that appellant did not have any employment-related disability or residuals stemming from her accepted brachial radiculitis and left shoulder conditions. Appellant did not provide a probative medical opinion as to whether she was disabled or currently required medical treatment due to an employment-related condition.²² For the reasons discussed above, OWCP's hearing representative properly affirmed

¹⁵ See *V.A.*, Docket No. 15-1073 (issued November 25, 2015).

¹⁶ *Id.*

¹⁷ *Supra* note 8.

¹⁸ See *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁹ See *J.A.*, Docket No. 15-0908 (issued August 6, 2015).

²⁰ *Supra* note 10.

²¹ See *H.P.*, Docket No. 15-0568 (issued September 14, 2015) (the submission of reports by physicians who were on one side of the conflict without more by way of rationale, were insufficient to create a new conflict in medical opinion to overcome the special weight properly accorded the impartial medical examiner).

²² The Board notes that, in the event appellant believes that that a change in her work duties caused a worsening of his previously accepted work injury, she may file a claim for a recurrence of disability or a new occupational disease claim based on additional exposure at work for her new symptoms and need for additional medical treatment.

the June 9, 2015 decision, which found that the special weight of the medical evidence was represented by Dr. Fries, the impartial medical examiner.

A mere conclusion without the necessary medical rationale to explain how and why the physician believes that appellant still has residuals of the accepted condition is not sufficient to meet her burden of proof. The medical evidence must also include rationale explaining how the physician reached his conclusion.²³ Appellant thus did not meet her burden of proof to establish continuing disability after June 9, 2015. The Board will affirm the hearing representative's October 27, 2015 decision.

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 met its burden of proof to terminate appellant's compensation benefits as of June 9, 2015. The Board further finds that she has not met her burden of proof to establish continuing employment-related disability after June 9, 2015.

²³ See *T.M.*, Docket No. 08-975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board