



## **ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective September 18, 2014, as he had no further disability or residuals of his March 9, 2007 employment injury; and (2) whether appellant met his burden of proof to establish continuing disability after September 18, 2014.

On appeal, counsel argues that OWCP improperly gave weight to the opinion of the second opinion physician, which was fatally flawed and could not be used to terminate benefits. He further contended that, even if this opinion were considered, it would create a conflict in the medical opinion evidence with appellant's physicians, and require OWCP to obtain an impartial medical examination prior to termination of benefits.

## **FACTUAL HISTORY**

On March 9, 2007 appellant, then a 57-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 2007, while attempting to pull a bag into the front side of the x-ray machine, the feed belt started and caught his left thumb between the back and the outer casing of the x-ray unit, resulting in pain to his left shoulder and upper arm. On April 30, 2007 OWCP accepted his claim for sprain of shoulder and upper arm, left suprascapular, and left impingement syndrome. It paid compensation for the intermittent periods of disability during the period June 23, 2007 through April 27, 2009.

On January 7, 2010 Dr. Howard Routman, a Board-certified osteopath and appellant's treating physician, returned appellant to work full duty with no restrictions. On June 17, 2010 appellant requested a change of physicians as he claimed he disagreed with Dr. Routman's assessment of his disability. He requested that his new physician be Dr. Stuart B. Krost, a Board-certified physiatrist.

In a June 17, 2010 report, Dr. Krost found that appellant could return to light duty with a maximal lift up to 20 pounds and frequent lifting up to 10 pounds with the right shoulder. Appellant could sit and stand one to two hours without a change of position and there was no restriction placed on using hand controls or foot pedals. He could work full time with an eight-hour day.

Appellant's request for a new physician was denied by OWCP on July 20, 2010, finding that Dr. Routman had well documented his care for the 2007 injury, but if appellant wanted Dr. Routman to refer appellant to another physician, OWCP would honor that referral. By note of August 5, 2010, Dr. Routman referred appellant to Dr. Krost for continued care and OWCP, by letter dated October 21, 2011 accepted Dr. Krost as appellant's treating physician.

In a December 1, 2011 report, Dr. Krost noted that appellant had complaints of left shoulder arthralgia secondary to a March 2007 employment-related injury. He noted that appellant presented with continued left shoulder rotator cuff tear with impingement, which has progressed to adhesive capsulitis. Dr. Krost noted that a magnetic resonance imaging (MRI) scan of the left shoulder revealed a dorsal surface partial tear with acromioclavicular

hypertrophy. He restricted appellant to light-duty work with maximum lifting of 20 pounds and advised him to avoid lifting with left shoulder.

By letter dated December 8, 2011, OWCP requested clarification from Dr. Krost. Dr. Krost responded to the questions on February 21, 2012 and indicated that appellant's work injury had not resolved. He noted that appellant's current status was chronic shoulder pain and adhesive capsulitis with reduced range of motion. Dr. Krost noted that appellant needed further follow up with regard to medical treatment and medication.

On December 12, 2011 OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion. It asked Dr. Lotman to determine the extent of appellant's work-related disability and to specifically address the current status of appellant's March 9, 2007 work injury. In a January 27, 2012 report, Dr. Lotman opined that appellant did not have evidence of a left shoulder strain or a left shoulder impingement syndrome as "both have apparently resolved." He noted that appellant's subjective complaints were not substantiated with objective physical findings. Dr. Lotman noted that tenderness over the biceps tendon should not limit passive range of motion in any direction, as was demonstrated during the examination.

In a supplemental report dated April 5, 2012, Dr. Lotman noted that appellant had a subjective complaint of biceps tendinitis and that there was no objective finding consistent with that diagnosis. He noted that appellant had refused an MRI scan and that, in the absence of objective corroboration, it was his opinion that appellant did not have biceps tendinitis. Therefore, Dr. Lotman found that further treatment for biceps tendinitis was not reasonable, related, or necessary as it was not an accepted condition and concluded that appellant could return to his date-of-injury position.

In a September 13, 2012 follow-up report, Dr. Krost noted continued complaints of left shoulder arthralgia secondary to an employment-related injury in March 2007. He noted that appellant presented with continued left shoulder rotator cuff tear with impingement, which has progressed to adhesive capsulitis. Dr. Krost also noted that an MRI scan of the left shoulder revealed a dorsal surface partial tear with acromioclavicular hypertrophy.

The employing establishment removed appellant from its employment effective January 23, 2013 due to medical disqualification and he went on the Office of Personnel Management (OPM) retirement rolls.

On April 15, 2013 OWCP referred appellant to Dr. Richard L. Weiner, a Board-certified neurosurgeon, to resolve the conflict between Drs. Krost and Lotman with regard to the extent of appellant's remaining injury-related disability and work capacity. In a May 20, 2013 report, Dr. Weiner assessed appellant with impingement of left shoulder, shoulder tendinitis left biceps, and supraspinatus. He noted that appellant was a candidate for surgery, which would be followed by physical therapy, after which a full return to work would be anticipated as far as the shoulder. Dr. Weiner opined that without surgery appellant would be restricted to light-duty work that involved no strenuous activity with the left upper extremity. He added that appellant was not working due to a back condition.

By letter dated August 6, 2013, the employing establishment advised that it wanted to create a job for appellant based upon his medical restrictions.

By letter to OPM dated January 14, 2014, OWCP noted that appellant had elected to receive compensation benefits under FECA in lieu of benefits under OPM. By letter dated February 19, 2014, it advised him that it would pay compensation benefits starting February 9, 2014. The record reflects that appellant began receiving compensation benefits on the periodic rolls as of February 9, 2014.

In a February 19, 2014 report, Dr. Ramon Berenguer, a general practitioner, diagnosed left rotator cuff injury and left shoulder degenerative arthropathy. He noted that appellant had a left rotator cuff injury from 2007 and that since the injury appellant had mild baseline pain that was occasionally aggravated.

On February 25, 2014 OWCP expanded the acceptance of appellant's claim to include biceps and rotator cuff tendinitis, left shoulder.

On April 1, 2014 OWCP referred appellant to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second opinion to determine appellant's current disability status. Dr. Millheiser was asked to determine the nature of the work-related condition and the extent of disability. In an April 21, 2014 report, he noted that appellant had no current objective findings. Dr. Millheiser indicated that the only residual of the employment injury was restricted motion. He opined that after noting the minimal findings in the MRI scans, appellant's work history, and his refusal to get another MRI scan, "I feel that the work injury has resolved." Dr. Millheiser concluded that appellant could perform the duties of a screener. He diagnosed post sprain right shoulder, post adhesive capsulitis right shoulder, and did not recommend any further course of treatment.

On August 7, 2014 OWCP proposed terminating appellant's medical and compensation benefits because the residuals from the employment-related conditions had ceased, based on the opinion of Dr. Millheiser. It afforded him 30 days to submit any additional evidence or argument.

In a September 5, 2014 letter, counsel contended that Dr. Millheiser provided an "opinion on one side of a conflict that has already been resolved." He concluded that this opinion was not enough to overcome the special weight of the evidence represented by the impartial medical examiner, Dr. Weiner.

By decision dated September 18, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date.

On October 1, 2014 appellant, through counsel, requested a review of the written record by an OWCP hearing representative. In support of the request, counsel submitted a December 19, 2014 report by Dr. Krost, who noted that appellant had left shoulder rotator cuff tear with impingement. Dr. Krost recommended interventional injections, medicines, and light-duty work restrictions with limited use of left shoulder.

In a decision dated March 23, 2015, the hearing representative affirmed the September 18, 2014 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>3</sup> Having determined that, an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

OWCP has accepted sprain of the left shoulder and upper arm, left suprascapular, and left impingement syndrome. The conditions were later expanded to include biceps and rotator cuff tendinitis, left shoulder. The Board finds that OWCP met its burden of proof to justify termination of benefits.

Dr. Krost, appellant's treating physician, opined that appellant's work injury had not resolved, and the second opinion physician, Dr. Lotman, opined that the work injury had resolved. Accordingly, OWCP referred appellant to an impartial medical examiner, Dr. Weiner, to resolve the conflict with regard to the extent of appellant's remaining injury-related disability and work capacity at that time, pursuant to 5 U.S.C. § 8123(a). In a May 20, 2013 report, Dr. Weiner diagnosed impingement of left shoulder and shoulder tendinitis left biceps and supraspinatus causally related to the accepted employment injury. On February 9, 2014 OWCP returned appellant to the periodic rolls, and on February 25, 2014 OWCP expanded the acceptance of his claim to include biceps and rotator cuff tendinitis of the left shoulder.

OWCP later referred appellant to Dr. Millheiser for a second opinion to determine the current extent of appellant's disability status. In his April 1, 2014 report, Dr. Millheiser found that appellant's work injury had resolved. He advised that in his examination he noted that appellant had markedly limited motion of the left shoulder and exhibited pain with any motion. Appellant could not put his arm into a position necessary for Dr. Millheiser to determine whether there was any remaining impingement. He determined that even a frozen shoulder could abduct from 45 to 60 degrees using scapulothoracic motion. Appellant in this case, however, had only 20 degrees left shoulder flexion, 25 degrees abduction, 20 degrees external rotation, 10 degrees internal rotation, and 3 degrees adduction. Dr. Millheiser, however, found no instability, no specific tenderness, and no crepitus. He found that appellant had no objective findings, no atrophy, and believed that no further diagnostic testing was necessary. Dr. Millheiser noted that after reviewing the minimal findings on appellant's MRI scans, appellant's work history, and his refusal to undergo another MRI scan, he found that appellant's work injury had resolved.

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<sup>3</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

OWCP based its decision to terminate appellant's benefits effective September 18, 2014 on the second opinion of Dr. Millheiser. The Board finds that his opinion is sufficiently rationalized to carry the weight of the evidence. Dr. Millheiser's report reflects a review of the medical evidence, a proper statement of accepted facts, and a rationalized decision based on a thorough examination.<sup>5</sup> The Board finds that OWCP met its burden of proof to terminate medical and wage-loss benefits.

### **LEGAL PRECEDENT -- ISSUE 2**

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant 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.<sup>6</sup>

### **ANALYSIS -- ISSUE 2**

Following termination of appellant's compensation, counsel submitted the December 19, 2014 report from Dr. Krost. He provided a diagnosis of left shoulder rotator cuff tear with impingement and recommended light-duty restrictions with limited use of the left shoulder. This report fails to establish that appellant was disabled due to the accepted conditions of sprain of the shoulder and upper arm, left suprascapular, and left impingement syndrome. Dr. Krost found appellant able to work with restrictions. As appellant failed to submit a medical opinion finding him totally disabled due to his accepted conditions, the Board finds that he has failed to meet his burden of proof to establish continuing disability after the termination of benefits.<sup>7</sup>

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 properly terminated appellant's wage-loss compensation and medical benefits, effective September 18, 2014, as there was no further residuals of the accepted conditions.<sup>8</sup> The Board further finds that he failed to meet his burden of proof to establish continuing benefits subsequent to the September 19, 2014 termination decision.

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<sup>5</sup> V.Y., Docket No. 14-828 (issued November 18, 2014).

<sup>6</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>7</sup> *See G.G.*, Docket No. 15-0985 (issued August 21, 2015).

<sup>8</sup> Given the disposition of the first issue the second issue is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 23, 2015 is affirmed.

Issued: September 14, 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