

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

T.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Broken Arrow, OK, Employer**

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**Docket No. 16-1599
Issued: January 11, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 3, 2016 appellant, through counsel, filed a timely appeal from a June 30, 2016 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 over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits on September 21, 2012 because the

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.*

accepted conditions had resolved with no residuals; and (2) whether appellant met his burden of proof to establish that he had continuing employment-related disability after September 21, 2012 due to the accepted conditions.

On appeal counsel asserts that OWCP's June 30, 2016 decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board. In a February 22, 2012 decision, the Board found that appellant failed to establish total disability for the period May 20 to October 1, 2010 due to a May 20, 2010 employment injury, adjudicated by OWCP under File No. xxxxxx969.³ The facts outlined in the prior Board decision are incorporated herein by reference.⁴

During the pendency of appellant's appeal before the Board, on February 9, 2012 OWCP combined File No. xxxxxx969 and File No. xxxxxx742, with the latter serving as the master file.⁵

On February 10, 2012 OWCP referred appellant to Dr. Dennis E. Foster, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant's accepted conditions had resolved and whether he could return to his date-of-injury job. In a March 1, 2012 report, Dr. Foster noted his review of the statement of accepted facts and medical record. He described appellant's complaints of neck, back, and left shoulder pain, and physical examination findings. Dr. Foster indicated that, in spite of appellant's subjective complaints, there were very few objective findings that would substantiate an underlying problem. He advised that continued treatment, including therapy, was not indicated. In answer to specific OWCP questions, Dr. Foster repeated that there was no objective evidence that the accepted conditions were currently active and disabling, that no aggravation had occurred, and that appellant could return to his date-of-injury position as a distribution clerk. In an attached work

³ Docket No. 11-1694 (issued July 27, 2012); *petition for recon. denied* July 27, 2012.

⁴ On May 20, 2010 appellant, a distribution clerk, injured his back and neck when G.H., the postmaster, placed a large amount of mail flats onto his arm and pushed down on it. He stopped work that day and did not return. OWCP accepted sprains to the lumbar region of the back, neck, shoulder, and rotator cuff of the left upper arm. Appellant filed claims for disability compensation for the period May 20 to October 1, 2010. In decisions dated November 24, 2010 and June 3, 2011, OWCP denied his claim for disability compensation for the period May 20 to October 1, 2010, finding that the medical evidence of record was insufficient to establish disability from work due to the May 20, 2010 work injury.

⁵ Under File No. xxxxxx742, OWCP had accepted neck and thoracic sprains from a June 19, 1998 injury. On April 7, 2015 it denied appellant's claim for a schedule award. In a June 17, 2015 decision, OWCP denied his claim for a May 20, 2010 recurrence of disability, and, in a March 17, 2016 merit decision, it denied modification of the June 17, 2015 decision. Appellant did not appeal any of these decisions. He also has a third claim, File No. xxxxxx366, for a June 19, 1998 employment injury. A note appended to a development letter from OWCP to appellant dated December 15, 2009 indicated that he was still working and was not on light duty. By decision dated February 16, 2010, OWCP denied his claim from a recurrence of disability under this file number.

capacity evaluation, he advised that appellant could work in his usual job with no restrictions, and that maximum medical improvement (MMI) had been reached.

On April 27, 2012 appellant, through counsel, requested reconsideration with respect to OWCP's denial of disability compensation. The employing establishment reported that appellant stopped work in May 2010 and had been removed from employment for cause for failure to report for work.

Dr. Don Barney, an attending osteopath, who began treating appellant in 2010, submitted a work capacity evaluation (Form 5c) on March 14, 2012. He advised that appellant could not perform his usual job and had a restriction of one hour reaching above the shoulder until the fear factor was resolved. Dr. Barney noted that appellant's injury was not the cause of his disability, and that he could work as many hours as tolerated and could work without limits. On May 14, 2012 he reported that appellant's left shoulder and wrist had been a problem for some time and that his current problem was stress in having to work for his former boss, G.H. Dr. Barney described appellant's job duties and noted that he had an altercation when G.H. handed him a bundle of mail and left work, and the stress of dealing with G.H. caused him to keep from returning to work. He advised that appellant's left upper extremity had some restricted range of motion and that he also had lumbar spasms. Dr. Barney diagnosed severe stress syndrome, derangement of the left shoulder, left shoulder rotator cuff tear, and lumbar pain, acute and chronic. He recommended that appellant work at a different postal location.

Appellant also submitted an August 16, 2010 report from Judith K. Adams, Ph.D., a clinical psychologist, who described counselling sessions with him. Dr. Adams advised that he was very apprehensive and anxious about any thought of returning to work due to problems with his supervisor. She diagnosed major depressive disorder, recurrent, moderate, and indicated that appellant had substantial occupational impairment.

Dr. Deborah A. Kucharski, a chiropractor, performed a functional capacity evaluation on July 2, 2012. She indicated that appellant could do more physically than he demonstrated during testing, noting limitations in testing caused by reports of pain. Dr. Kucharski reported that he was unwilling to continue in occupational therapy, maintaining that it caused too much pain.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Foster and Dr. Barney regarding appellant's ability to work, and in July 2012 referred appellant to Dr. Sami Framjee, a Board-certified orthopedic surgeon, for an impartial evaluation.⁶ In an August 8, 2012 report, Dr. Framjee noted his review of the medical record and that appellant had not worked since May 20, 2010. He described appellant's medical and work history, and current symptoms of neck, upper and lower back, and left shoulder pain that were vague and nonspecific in nature. Dr. Framjee noted that appellant appeared depressed and advised that he complained of pain on superficial touch on examination of the cervical and thoracolumbar spine. Sensory examination revealed diffuse, nonorganic hypesthesia in the left arm and left leg. Straight-leg raising was negative bilaterally. Left shoulder examination revealed no swelling, deformity, atrophy, or tenderness to palpation. Range of motion was limited by appellant, and there was no clinical evidence of rotator cuff tear.

⁶ Dr. Framjee is also Board-certified in internal medicine and cardiovascular disease.

Dr. Framjee advised that he saw no anatomical injury to appellant's cervical spine, thoracic spine, lumbar spine, or left shoulder secondary to the May 20, 2010 work incident. He opined that appellant had reached MMI. In answer to specific questions, Dr. Framjee indicated that appellant had no clinical evidence of active strain/sprain of the cervical spine, thoracic spine, lumbar spine, or left shoulder and no evidence of aggravation. He opined that appellant could return to his date-of-injury job as a distribution clerk, and no further medical treatment was indicated secondary to the May 20, 2010 injury. On an August 8, 2012 work capacity evaluation, Dr. Framjee repeated that appellant could return to normal work.

In a merit decision dated August 21, 2012, OWCP denied modification of its prior decisions regarding appellant's entitlement to disability compensation for the period May 20 to October 1, 2010.

On August 21, 2012 OWCP proposed to terminate appellant's entitlement to wage-loss compensation and medical benefits. It found that Dr. Framjee's opinion constituted the weight of the medical evidence.

In reports dated August 13 and September 5, 2012, Dr. Barney described appellant's condition. He noted his review of Dr. Framjee's report, opining that it did not appear that Dr. Framjee used the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides* hereinafter),⁷ in assessing appellant's condition, and disagreed with his assessment and that of Dr. Foster. Dr. Barney concluded that appellant's May 2010 injury related back to his June 1998 injury.⁸

By decision dated September 21, 2012, OWCP finalized the termination of appellant's entitlement to wage-loss compensation and medical benefits. It found that the special weight of the medical evidence rested with the referee opinion of Dr. Framjee.

Appellant, through counsel, timely requested a hearing. He submitted treatment notes from Dr. Barney dated September 27 and October 31, 2012, in which the physician noted findings of pain and discomfort in the shoulder and lumbosacral area. Dr. Barney reiterated his diagnoses. In a letter dated October 31, 2012 to the Oklahoma Department of Social Security, he related that appellant had been diagnosed with severe bilateral carpal tunnel syndrome caused by his 18-year history as a mail sorter. Dr. Barney opined that appellant should be granted disability retirement.

At the hearing held on December 4, 2012 appellant testified that he had a 1998 claim where a mail case fell on his shoulder and back, a 2009 claim where he was injured picking up pallets, and a 2010 claim where the postmaster shoved a foot of flats into his arms, pushing with his body weight. He stated that since the 1998 injury he had continuing neck and shoulder pain, had worked modified duty since that time, and had only worked two to three days a week after the 2009 injury. Appellant also noted that he had filed an Equal Employment Opportunity (EEO) claim against the postmaster and felt that the 2010 incident was in retaliation. He

⁷ A.M.A., *Guides* (6th ed. 2009).

⁸ *Supra* note 5.

indicated that he had felt anxiety since the 1998 injury, but had never filed a claim for stress, and that due to the severe pain he had experienced since May 20, 2010, he had not returned to work. Counsel asserted that all three claims should be combined, and that Dr. Framjee should have commented on all injuries.

By decision dated January 29, 2013, an OWCP hearing representative found that the special weight of the medical evidence rested with the opinion of Dr. Framjee, the referee physician, and affirmed the September 21, 2012 termination decision.

In letters received by OWCP on February 2 and 13, 2013, appellant requested reconsideration. He asserted that both Dr. Foster and Dr. Framjee only saw him for five minutes each and that Dr. Barney's opinion should carry the weight of the evidence.

In a merit decision dated July 15, 2013, OWCP denied modification of its prior decisions. It found that the medical evidence presented was insufficient to alter the prior decisions.

Appellant again requested reconsideration on July 22, 2013. He submitted evidence previously of record, including a duplicate of Dr. Barney's October 31, 2012 letter to the Oklahoma Department of Social Security. Appellant asserted that the federal workers' compensation system was corrupt.

In a merit decision dated August 26, 2013, OWCP denied modification of its prior decision.

On September 10, 2013 appellant again requested reconsideration. He again forwarded Dr. Barney's October 31, 2012 letter. Appellant discussed the 1998 and 2009 injuries, and asserted that he had anxiety disorders dating back to 1998. He reported that he had retired on disability.⁹

In a merit decision dated December 12, 2013, OWCP denied modification of its prior decision.

Appellant, through counsel, again requested reconsideration on December 11, 2014. In reports dated January 28 through November 26, 2014, Dr. Barney noted that appellant reported that he was injured while working at the employing establishment. He described appellant's complaints and findings. Dr. Barney diagnosed sprain of the lumbar region, sprain of the neck, left rotator cuff sprain, and anxiety syndrome. In May 22, 2014 correspondence, he observed that neither Dr. Foster nor Dr. Framjee had applied the A.M.A., *Guides* to his analysis. Dr. Barney requested that appellant be allowed to receive medications for his discomfort due to the accepted conditions and should receive disability retirement. He noted that appellant had a severe anxiety disorder that rendered him unable to return to work with his previous postmaster, G.H., and requested help for appellant to obtain a schedule award.¹⁰

⁹ On August 4, 2013 appellant filed an occupational disease claim (Form CA-2) for carpal tunnel syndrome. The record before the Board does not indicate that OWCP has adjudicated this claim.

¹⁰ *Supra* note 5. As noted, by decision dated April 7, 2015, OWCP denied appellant's claim for a schedule award. Appellant did not file an appeal with the Board from this decision.

In a merit decision dated March 11, 2015, OWCP discussed the evidence submitted on reconsideration and denied modification of the prior decisions.

Appellant again requested reconsideration on August 7, 2015.¹¹

In monthly reports dated January 26, 2015 to February 26, 2016, Dr. Barney reiterated his findings and conclusions. In correspondence dated June 24 and July 31, 2016, he opined that appellant's problems were due to his May 20, 2010 employment injury, and that he needed continued treatment and medical care.

In a merit decision dated June 30, 2016, OWCP again found that the special weight of the medical evidence rested with the opinion of Dr. Framjee, the impartial medical specialist, and denied modification of its prior decisions.

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.¹² 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.¹³

Section 8123(a) of FECA 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.¹⁴ The implementing regulations provide 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.¹⁵ 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.¹⁶

¹¹ Appellant also filed a recurrence claim on November 3, 2015 (Form CA-2a) indicating that the claimed recurrence began on May 20, 2010, and was due to back, neck, shoulder pain, depression, and anxiety. He requested approval of medical visits and medications. On April 5, 2015 OWCP noted that the recurrence claim would be deleted and included with appellant's request for reconsideration.

¹² *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹³ *Id.*

¹⁴ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

¹⁵ 20 C.F.R. § 10.321.

¹⁶ *V.G.*, 59 ECAB 635 (2008).

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 21, 2012. The accepted conditions under the combined claim are sprains to the lumbar region of the back, neck, shoulder, and rotator cuff of the left upper arm. OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Barney, an attending osteopath, and Dr. Foster, an OWCP referral physician regarding appellant's work capabilities and whether he had continuing employment-related disability. It then properly referred him to Dr. Framjee, also Board-certified in orthopedic surgery, for an impartial evaluation to resolve the conflict.

In an August 8, 2012 report, Dr. Framjee noted his review of the medical record and that appellant had not worked since May 20, 2010. He described appellant's medical and work history, and current symptoms of neck, upper and lower back, and left shoulder pain that were vague and nonspecific in nature. Dr. Framjee thoroughly described examination findings and advised that appellant had no clinical evidence of active strain/sprain of the cervical spine, thoracic spine, lumbar spine, or left shoulder, and no evidence of aggravation. He opined that appellant could return to his date-of-injury job as a distribution clerk, and no further medical treatment was indicated. On an August 8, 2012 work capacity evaluation, Dr. Framjee repeated that appellant could return to normal work.

The Board finds that Dr. Framjee provided a comprehensive, well-rationalized opinion in which he clearly advised that any residuals of appellant's accepted conditions had resolved and that he could return to his normal work. Dr. Framjee's opinion is therefore entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.¹⁷

The medical evidence appellant submitted prior to the termination was insufficient to overcome the weight accorded Dr. Framjee, as an impartial medical specialist. In reports dated August 13 and September 5, 2012, Dr. Barney described appellant's condition and disagreed with his assessment and that of Dr. Foster. He also indicated that the A.M.A., *Guides* should be used in assessing disability. The Board has long held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.¹⁸ Dr. Barney had been on one side of the conflict resolved by Dr. Framjee. Moreover, the A.M.A., *Guides* is not utilized under FECA to assess disability with respect to wage loss, but only to assess permanent partial impairment for schedule award purposes.¹⁹ Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.²⁰

The Board therefore concludes that Dr. Framjee's opinion that appellant had recovered from the accepted conditions is entitled to the special weight accorded an impartial medical

¹⁷ See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

¹⁸ *I.J.*, 59 ECAB 408 (2008).

¹⁹ See 20 C.F.R. § 10.404; 5 U.S.C. § 8107.

²⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

examiner,²¹ and the additional medical evidence submitted is insufficient to overcome the weight accorded him as an impartial medical specialist regarding whether appellant had residuals of his accepted conditions. OWCP therefore properly terminated appellant's entitlement to wage-loss compensation and medical benefits on September 21, 2012.²²

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits on September 21, 2012, the burden shifted to him to establish that he had any continuing disability causally related to the accepted conditions.²³ Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant submitted insufficient medical evidence, following the September 21, 2012 termination, to establish that he continued to be disabled due to the accepted conditions.

Following the termination, appellant submitted reports from Dr. Barney dated September 27, 2012 to February 26, 2016. Dr. Barney was consistent in his opinion that appellant continued to have residuals of employment injuries. However, as noted, he had been on one side of the conflict in medical evidence. Moreover, 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.²⁵ Dr. Barney merely reiterated that appellant's problems were due to employment injuries, and that he needed continued treatment and medical care.

Dr. Barney also noted that appellant had severe anxiety regarding returning to work at the employing establishment. The record, however, does not indicate that appellant has filed a claim for an employment-related emotional condition.²⁶

²¹ See *supra* note 17.

²² *Manuel Gill*, 52 ECAB 282 (2001).

²³ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

²⁴ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

²⁵ *T.M.*, Docket No. 08-975 (issued February 6, 2009).

²⁶ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury).

As to appellant's assertion at the hearing that he had worked modified duty since a 1998 employment injury, the record before the Board includes a statement appended to a letter addressed to him indicating that he was not on light duty in 2009 when he filed a recurrence of disability under that claim.²⁷

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits affect the September 21, 2012, and that appellant failed to meet his burden of proof to establish continuing employment-related disability after that date causally related to the May 20, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁷ *Supra* note 5.