



## **ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's medical benefits effective February 13, 2014 as he no longer had any residuals causally related to his accepted March 16, 2004 employment injury; and (2) whether appellant established the additional condition of cervical disc disease causally related to the March 16, 2004 employment incident.

On appeal counsel contends that there was never a conflict in medical opinion regarding residuals of the shoulder condition, but only a conflict with respect to expansion of the claim to encompass a cervical condition. He argues that the report from the impartial medical examiner is unrationalized and must be rejected with regard to whether there were residuals of the right shoulder injury. Counsel notes that the Board previously affirmed appellant's right upper extremity schedule award. He further argues that Dr. Davne's opinion is unrationalized expansion of the claim to include a cervical condition.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> On March 16, 2004 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he slipped and fell, injuring his right shoulder. OWCP accepted his claim for right rotator cuff tear and authorized right shoulder arthroscopy, which was performed on April 2, 2004. Appellant initially worked full-time modified duty and resumed unrestricted work on August 17, 2004.

On October 25, 2004 appellant filed a claim for a schedule award (Form CA-7). By decision dated June 21, 2005, OWCP granted a schedule award for four percent permanent impairment of the right upper extremity. Appellant requested a hearing before an OWCP hearing representative and, by decision dated March 2, 2006, OWCP set aside the June 21, 2005 schedule award and remanded the matter for further development. By decision dated September 12, 2006, OWCP granted a schedule award for permanent impairment of the right upper extremity totaling 14 percent. Appellant filed an appeal with the Board. On March 8, 2007 the Board affirmed OWCP's September 12, 2006 schedule award decision, finding that appellant had failed to establish more than 14 percent permanent impairment of the right upper extremity.<sup>5</sup> The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

In 2008, appellant's attending physician, Dr. Daisy A. Rodriguez, a Board-certified internist, diagnosed brachial plexitis of right shoulder and cervical disc pathology at C3-4, C5-6, and C6-7 as secondary conditions to the accepted employment injury of March 16, 2004.

Appellant subsequently sought to expand his claim to include neck and shoulder conditions. In October 2012, OWCP arranged a second opinion examination with Dr. Robert Draper, a Board-certified orthopedic surgeon, to determine whether appellant required ongoing treatment related to his March 16, 2004 employment injury and whether additional neck and shoulder conditions were causally related to the original employment injury. In his November 9,

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<sup>4</sup> Docket No. 06-2138 (issued March 8, 2007).

<sup>5</sup> *Id.*

2012 report, Dr. Draper noted the history of injury, his review of the statement of accepted facts (SOAF) and medical record, and diagnosed right shoulder torn rotator cuff supraspinatus tear, osteoarthritis of the right acromioclavicular (AC) joint; status post arthroscopy and open repair of torn rotator cuff with complete repair (April 2, 2004), and recurrent tear of right shoulder supraspinatus tendon, which examination findings included negative Yergason's sign, impingement test and Hawkins sign. He indicated that appellant's right shoulder pathology was causally related to the March 16, 2004 work injury, but opined that appellant had reached maximum medical improvement and that there was no indication for any additional treatment or testing for the right shoulder.

Dr. Draper also completed a work capacity form and indicated that appellant did not require any restrictions due to the right shoulder conditions. He opined that appellant's multi-level cervical degenerative disc disease was not causally related to the accepted employment condition. Dr. Draper explained that, throughout the years, the degenerative cervical disc disease had progressed to protrusion of the disc and disc herniation, as documented by the multiple magnetic resonance imaging (MRI) scans of file, and that this progression of the degenerative cervical disc disease was related to the aging process and was not causally related to the March 16, 2004 work injury. Dr. Draper also noted that appellant's neck complaints did not occur until at least one year after the injury or longer.

OWCP issued two decisions on November 28, 2012. It accepted the additional condition of disorder of bursae and tendons in right shoulder and denied expansion of appellant's claim to include a cervical disc disorder, displacement of cervical intervertebral disc without myelopathy based on Dr. Draper's November 19, 2012 second opinion report. It issued a notice of proposed termination of medical benefits on November 28, 2012. On December 17, 2012 it indicated that the proposed termination of medical benefits was rescinded and a new second opinion medical evaluation would be arranged.

On December 17, 2012 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. Counsel argued that he had not learned of the second opinion examination until he received a copy of that report and the decision rejecting that claim.

On January 23, 2013 OWCP's hearing representative vacated the November 28, 2012 decision denying the expansion of appellant's claim to include cervical conditions. She remanded the case as OWCP had failed to provide a copy of the letter to counsel advising appellant that a second opinion examination with Dr. Draper had been scheduled and had also failed to send a copy of the November 28, 2012 decision denying expansion of this claim to counsel.

In February 2013, OWCP referred appellant for a new second opinion examination with Dr. Steven Valentino, an osteopath. Dr. Valentino was asked to address whether appellant had any residuals of the accepted conditions of sprain of the right shoulder and upper arm/rotator cuff and disorder of the bursae and tendon right shoulder region. He was also asked whether appellant's cervical conditions were causally related to this claim by either direct cause of the injury or as a result of any aggravation, acceleration, exacerbation or precipitation of a preexisting condition. In a February 26, 2013 report, Dr. Valentino noted the history of injury and his review of the medical records and presented examination findings, which revealed normal range of motion in the upper extremities and negative impingement and instability tests.

He diagnosed resolved right rotator cuff repair. Dr. Valentino indicated that appellant was not in need of active or ongoing treatment related to the accepted conditions of sprain of the right shoulder and upper arm/rotator cuff right shoulder and disorder of the bursa and tendon of the right shoulder region. He also opined that the cervical intervertebral disc disorder did not relate to appellant's March 16, 2004 employment injury by mechanism of the injury or was aggravated, accelerated or exacerbated, or precipitated by the work injury. Rather, Dr. Valentino advised that appellant's cervical MRI scans were consistent with age-related degenerative changes and were not trauma related. An enclosed work capacity evaluation indicated that appellant had fully recovered from the work-related injury.

By decision dated April 5, 2013, OWCP issued a *de novo* decision denying expansion of the claim to include the cervical disc displacement. Determinative weight was accorded to Dr. Valentino's February 26, 2013 opinion.

On April 30, 2013 counsel requested a review of the written record before an OWCP hearing representative regarding the denial of the expansion of the claim to include cervical disc displacement.

By decision dated September 5, 2013, an OWCP hearing representative affirmed the April 5, 2013 decision. The hearing representative found that the medical evidence from Dr. Rodriguez was not sufficiently rationalized to support that the claim should be expanded or to create a conflict of opinion with Dr. Valentino on the cervical disc issue.

On September 18, 2013 OWCP issued a new notice of proposed termination of medical benefits. Determinative weight was based on Dr. Valentino's February 26, 2013 report that the accepted conditions of right shoulder sprain and rotator cuff and disorder of the bursae and tendons in the right shoulder had ceased or were no longer employment related.

In a new report from Dr. Rodriguez, dated October 28, 2013, he noted the history of injury and examination findings of the right shoulder, which revealed limited range of motion. She indicated that there remained severe tightness in the supraspinatus and infraspinatus tendons at the shoulder joint line, severe pain in the shoulder joint during resisted external rotation of the right humerus and severe tightness in the right lateral deltoid, biceps brachial, and extensor carpi radialis. Dr. Rodriguez opined that the mechanism of the injury as described and appellant's federal work activities were consistent with his ongoing symptoms, which caused and contributed to the right shoulder rotator cuff injury. Appellant believed that despite surgical repair and physical therapy, there continued to be a slow deterioration, accelerated by his federal duties, and that repetitive use of the right upper extremity contributed to the worsening of appellant's right shoulder rotator cuff residual condition. Dr. Rodriguez indicated her disagreement with Dr. Valentino's opinion that the accepted conditions had resolved. She described appellant's condition as moderate and recommended chronic pain management. Dr. Rodriguez also disagreed with Dr. Valentino's opinion that appellant's cervical spine conditions were not related to the March 16, 2004 work injury. She indicated that the diagnostic studies supported diagnoses of cervical HNP at C3-4, C5-6, C6-7, cervical radiculopathy at C5, C6, C7 and C8 and cervical facet joint syndrome. Dr. Rodriguez advised that these material changes altered the course of the underlying disease and appellant now had permanent injuries which were progressively aggravated or accelerated by his job. Dr. Rodriguez also indicated that medical treatment was necessary.

In November 2013, OWCP declared that a conflict in medical opinion existed between Dr. Rodriguez and Dr. Valentino regarding ongoing residuals of the accepted work-related conditions as well as the expansion of the claims to include additional medical conditions. Accordingly, appellant was referred to Dr. Sanford Davne, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in medical opinion evidence.

In a December 19, 2013 report, Dr. Davne noted the history of injury, his review of the medical records and SOAF. He noted appellant's complaints of constant right shoulder pain and electric shocks to the arm and back as well as constant headaches and migraines, but that he was unable to identify a date when the symptoms began. Examination revealed a normal heel toe gait, with level shoulders, and pelvis. Cervical flexion and rotation were recorded. The left and right paracervical regions were slightly tender, as was the right subscapular. The right shoulder was tender over the AC joint. Shoulder motion was recorded, strength was noted as excellent, and neurologic testing was normal. Muscle strength was full in the arm. MRI scan studies of the neck and right shoulder from November 6, 2013 were reviewed.

Dr. Davne diagnosed a full thickness tear of the supraspinatus tendon, degeneration of the right AC joint, status post repair of the torn rotator cuff, and longstanding multilevel degenerative cervical disc disease. He found no need for medical treatment for the accepted right shoulder bursitis or rotator cuff tear. Dr. Davne opined that the cervical disc disease was "entirely unrelated" to the employment injury of March 16, 2004. He explained that early medical records contemporaneous to the work-related fall revealed no cervical symptoms or pathology. Dr. Davne noted that appellant was unable to attribute the cervical complaints temporally to the work accident. He found no evidence of any work-related injury to appellant's cervical spine or any aggravation of his chronic degenerative disc disease associated with the work injury.

By decision dated February 18, 2014, OWCP terminated appellant's entitlement to medical benefits effective February 13, 2014. Special weight was accorded to Dr. Davne's impartial medical opinion that appellant no longer had any residuals related to his accepted work-related medical condition as a result of the March 16, 2004 work injury.

Counsel timely requested a telephonic hearing before an OWCP hearing representative. He argued that Dr. Davne's report was unrationalized and failed to document an examination of the shoulder. On April 15, 2015 counsel asked for the status of the hearing request and reiterated that Dr. Davne's opinion was too flawed to carry the weight of the evidence.

Twelve chart notes from Dr. Rodriguez documenting visits between March 20, 2014 and September 17, 2015 were received into record. She diagnosed right shoulder bursitis, right rotator cuff tears of the infraspinatus and supraspinatus tendons, right brachial plexus injury, cervical disc herniation at C3-4, C5-6, and C6-7 with radiculopathy, bilateral carpal tunnel syndrome, chronic pain, and cervical facet joint syndrome.

A telephonic hearing was held on November 18, 2015. Counsel argued that Dr. Davne's report was unrationalized. He also argued that Dr. Davne could not be accorded referee status with regard to the shoulder pathology as no conflict in medical opinion existed over that diagnosis.

By decision dated January 29, 2016, an OWCP hearing representative affirmed OWCP's February 18, 2014 decision that appellant no longer had any residuals of his work-related injury and that OWCP properly denied expansion of the claim to include cervical disc disease.

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

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.<sup>6</sup> Having determined that an employee has a disability causally related to his 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>7</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>8</sup> To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>9</sup>

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.<sup>10</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>11</sup> 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.<sup>12</sup>

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

OWCP accepted that the March 16, 2004 work injury resulted in right rotator cuff tear and authorized right shoulder arthroscopy, which was performed on April 2, 2004. It subsequently accepted additional conditions of disorder of bursae and tendons in the right shoulder. OWCP denied expansion of the claim to include a cervical disc disorder and terminated appellant's medical benefits based on the opinion of the impartial medical examiner, Dr. Davne, who found that the accepted employment-related conditions had resolved without residuals. It bears the burden to justify modification or termination of benefits.<sup>13</sup>

Dr. Valentino, acting as a second opinion physician on behalf of OWCP, opined, in a February 26, 2013 report, that the accepted conditions of right shoulder sprain and rotator cuff

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<sup>6</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>7</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>8</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>9</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>10</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>11</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>12</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>13</sup> See *supra* note 5; see also *K.B.*, Docket No. 15-0011 (issued April 7, 2015).

and disorder of the bursae and tendons in the right shoulder had ceased or were no longer injury related. In an October 28, 2013 report, appellant's attending physician, Dr. Rodriguez, provided examination findings of the right shoulder, which included tightness and pain, and opined that despite surgical repair and physical therapy, there continued to be a slow deterioration of appellant's right shoulder rotator cuff residual condition and that repetitive use of the right upper extremity by his federal duties contributed to the worsening of his right shoulder rotator cuff residual condition. She indicated that the accepted shoulder conditions had not resolved and he required chronic pain management for his permanent injuries which had been progressively worsened by his job. OWCP identified a conflict in medical opinion evidence between Dr. Valentino, the second opinion physician, and Dr. Rodriguez on the issue of appellant's continuing residuals and need for medical treatment due to his accepted shoulder conditions. These conflicts required referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a).

OWCP referred appellant to Dr. Davne to resolve this conflict of medical opinion evidence. It based its decision to terminate appellant's medical benefits on Dr. Davne's December 19, 2013 report. The Board finds, however, that OWCP's termination of appellant's medical benefits effective February 13, 2014 must be reversed because Dr. Davne's medical report is of insufficient probative value to carry the special weight of the medical evidence as an impartial medical examiner.

In his December 19, 2013 report, Dr. Davne reviewed appellant's history of injury and history of medical treatment. His findings on physical examination, which included cervical flexion and rotation, paracervical and right subscapular regions, and shoulder motion and strength and neurologic testing, were reported as normal, except for tenderness at the left and right paracervical regions, the right subscapular, and the right shoulder AC joint. Dr. Davne noted that the MRI scan of the right shoulder showed full thickness tear of the supraspinatus tendon, a degeneration of the right AC joint, postarthroscopic and open repair of the rotator cuff from April 2, 2004 as well as multilevel cervical neural foraminal stenosis, bilateral. He concluded that appellant had reached maximum medical improvement (MMI) regarding the accepted injuries from the March 16, 2004 employment injury and was no longer in need of any medical treatment.

The Board finds that Dr. Davne provided insufficient medical rationale for his conclusion that appellant no longer required medical treatment for his accepted right shoulder conditions. Dr. Davne's opinion was not based on an accurate history and is conclusory in nature.<sup>14</sup> In determining the probative value of an impartial medical examiner's report, the Board considers such factors as the opportunity for and thoroughness of examination performed by the physician, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed by the physician on the issues addressed to him or her by OWCP.<sup>15</sup> Although Dr. Davne indicated that appellant had reached MMI and was no longer in need of any medical treatment, he never clarified why appellant's diagnosed right shoulder conditions, as visualized on the MRI scan, including the tear of the

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<sup>14</sup> See *C.L.*, Docket No. 14-1585 (issued December 16, 2014); *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

<sup>15</sup> *James T. Johnson*, 39 ECAB 1252, 1256 (1988).

supraspinatus tendon of the rotator cuff, were not residuals of the accepted injury. Dr. Davne also never explained the significance of continued findings of tenderness of the shoulder region upon examination. His report is internally inconsistent and unrationalized with regard to whether appellant was still in need of active and ongoing treatment as related to the accepted conditions from the March 16, 2004 employment injury. When an impartial medical examiner fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.<sup>16</sup>

Because Dr. Davne's report lacks probative value, the Board finds that OWCP erred in relying on his opinion as the basis to terminate medical benefits for the accepted right shoulder conditions. He provided conclusions without sufficient medical rationale to support his findings. The Board shall reverse the termination of medical benefits, effective February 13, 2014 as OWCP has not met its burden of proof.<sup>17</sup>

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

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>18</sup> Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.<sup>19</sup> A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>20</sup> Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).<sup>21</sup>

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>22</sup>

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

OWCP denied expansion of appellant's claim for a cervical condition based on Dr. Davne's impartial medical opinion.

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<sup>16</sup> See *A.R.*, Docket No. 12-443 (issued October 9, 2012); see also *P.F.*, Docket No. 13-728 (issued September 9, 2014); *T.M.*, Docket No. 08-975 (issued February 6, 2009) (a medical report consisting solely of conclusory statements without supporting rationale is of little probative value).

<sup>17</sup> See *supra* note 6.

<sup>18</sup> *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>19</sup> *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>20</sup> *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>21</sup> *Id.*

<sup>22</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

In relevant part, Dr. Valentino, acting as a second opinion physician on behalf of OWCP, opined, in a February 26, 2013 report, that appellant's cervical intervertebral disc disorder did not relate to the March 16, 2004 employment injury by mechanism of the injury or by way of any aggravation, acceleration or exacerbation, or precipitation. Appellant's attending physician, Dr. Rodriguez, had opined appellant's cervical disc pathology was secondary to the accepted employment injury of March 16, 2004. OWCP properly identified a conflict in medical opinion evidence between Dr. Valentino, the second opinion physician, and Dr. Rodriguez on the issue of the causal relationship of appellant's cervical disc conditions. These conflicts required referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a).

The Board finds, however, that Dr. Davne's impartial medical report is of insufficient probative value to carry the special weight of the medical evidence.

In his December 19, 2013 report, Dr. Davne reviewed appellant's history of injury and history of medical treatment. In relevant part, he indicated that while there was evidence of multilevel cervical degenerative disc disease with multilevel bilateral foraminal stenosis, it was his medical opinion that these conditions were unrelated to the March 16, 2004 accepted injury. This opinion was based on Dr. Davne's review of medical records contemporaneous with the fall, which revealed no cervical symptoms or pathology. He also indicated that appellant was unable to attribute the cervical complaints temporally to the work accident and there was no evidence of any work-related injury to his cervical spine or any aggravation of his chronic degenerative disc disease associated with the work injury.

The Board finds that Dr. Davne provided insufficient medical rationale for his conclusion that OWCP should not expand the claim to include cervical conditions. The report of an impartial medical examiner is given special weight if the report is sufficiently rationalized and based upon a proper factual background.<sup>23</sup> Dr. Davne based his conclusion upon his review of the medical records contemporaneous with the fall and that there was no evidence of any work-related injury to his cervical spine or any aggravation of his chronic degenerative disc disease associated with the work injury. However, he failed to give any medical explanation as to how appellant's physical examination and history supported his conclusion. When an impartial medical examiner fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.<sup>24</sup>

Board precedent and OWCP procedures provide that if a report of an impartial medical examiner is vague, speculative, incomplete, or unrationalized, it is the responsibility of OWCP to secure a supplemental report to correct any defect. If the impartial specialist is unable or unwilling to provide a supplemental report or if the supplemental report is also defective, OWCP should arrange for another impartial medical examination.<sup>25</sup>

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<sup>23</sup> *Harold Travis*, 30 ECAB 1071, 1078 (1979).

<sup>24</sup> *See supra* note 15.

<sup>25</sup> *See Raymond A. Fondots*, 53 ECAB 637 (2002); and *Harold Travis*, 30 ECAB 1071 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(c)(2) (September 2010).

The Board shall set aside OWCP's decision denying appellant's request for expansion of the claim to include his cervical condition, and remand the case to OWCP for further development. Appellant and the case record shall be referred to Dr. Davne for a supplemental opinion regarding expansion of the claim to include a cervical condition. Following this and any necessary further development, OWCP shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits. The Board further finds that the case is not in posture for decision regarding expansion of the claim to include cervical conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2016 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part, and the case is remanded for further action consistent with this decision.

Issued: May 19, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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