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<b>C.L., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 17-0949</b>
	)	<b>Issued: September 19, 2017</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, Green Bay, WI, Employer</b>	)	
	)	

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

his burden of proof to establish a continuing employment-related disability or residuals after October 19, 2015.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 41-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2006 he injured his left arm and shoulder while lifting bags. He stopped work on January 1, 2007. OWCP accepted the claim for left shoulder and suprascapularis sprain.

On February 7, 2007 appellant underwent left rotator cuff repair surgery, performed by Dr. Thomas Sullivan, a Board-certified orthopedic surgeon. He received intermittent wage-loss compensation and medical benefits on the supplemental rolls commencing February 23, 2007. Appellant returned to work in a full-time, limited-duty capacity on April 16, 2007.

In a report dated October 1, 2007, Dr. Sullivan indicated that, with respect to the left shoulder, appellant had good range of motion and strength. He wrote that appellant could return to work without restrictions. In an April 11, 2008 form report, Dr. Sullivan indicated that appellant had work restrictions due to the right shoulder, but that he could perform light to medium work, with no more than 30 pounds lifting.

The employing establishment terminated appellant's employment effective October 1, 2008 finding it could not continue to provide light-duty work. Appellant was placed on the periodic compensation rolls.

OWCP expanded the accepted condition to include a consequential right shoulder rotator cuff tear and right shoulder tendinitis.

On February 11, 2009 appellant underwent an OWCP-authorized right shoulder arthroscopic procedure performed by Dr. Sullivan.

In a treatment note dated November 11, 2009, Dr. Sullivan noted full range of motion in both shoulders. He indicated that appellant would be referred for a functional capacity evaluation (FCE).

An attending physician, Dr. Concepcion Santillan, a Board-certified neurologist, opined in a March 29, 2010 report that appellant continued to report right shoulder pain, which she believed was probably due to his right shoulder injury.

OWCP referred appellant for a second opinion examination with Dr. Kenneth Yuska, a Board-certified orthopedic surgeon, to determine appellant's work capacity. In his report dated September 13, 2010, Dr. Yuska opined that appellant no longer had residuals of the accepted

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<sup>3</sup> Docket No. 12-1610 (issued May 9, 2013); Docket No. 09-1287 (issued December 30, 2009).

employment-related conditions. He found that appellant's complaints of pain were subjective and not supported by objective medical evidence.

OWCP found a conflict existed under 5 U.S.C. § 8123(a) as to whether appellant had residuals of the accepted injury. It referred appellant to Dr. Stephen Barron, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated December 20, 2010, Dr. Barron provided a history and results on examination. He opined that appellant could work with a 50-pound lifting restriction based on the right shoulder.

The employing establishment offered appellant a light-duty job on January 18, 2011, that was based on the work restrictions provided by Dr. Barron. Appellant refused the job offer.

By letter dated March 29, 2011, OWCP found the January 18, 2011 light-duty job offer suitable and apprised appellant of his rights and responsibilities under 5 U.S.C. § 8106(c). In a letter to Dr. Barron also dated March 29, 2011, it requested an additional report as to whether appellant could perform the light-duty job, and whether appellant had complex regional pain syndrome (CRPS).

In a report dated April 13, 2011, Dr. Barron opined that appellant was capable of performing the light-duty job. He also opined that appellant did not have CRPS.

By decision dated April 18, 2011, OWCP found that appellant had refused an offer of suitable work under 5 U.S.C. § 8106(c) and terminated appellant's compensation. It noted the response from Dr. Barron dated April 13, 2011.

Appellant, through counsel, requested a hearing before an OWCP hearing representative, by letter dated May 16, 2011. In a decision dated October 25, 2011, the hearing representative set aside OWCP's April 15, 2011 decision terminating appellant's compensation. She found it was unclear whether the job offer was temporary or permanent.

In a November 9, 2011 letter to the claims examiner, the employing establishment represented that the January 18, 2011 offer was a "permanent job assignment." By decision dated January 4, 2012, OWCP again determined that appellant had refused an offer of suitable work. It found the termination of compensation was effective April 25, 2012.

Appellant, through counsel, requested a hearing before an OWCP hearing representative on January 25, 2012. In a decision dated July 2, 2012, the hearing representative affirmed OWCP's January 4, 2012 decision finding that OWCP had properly complied with the procedural and substantive requirements of 5 U.S.C. § 8106(c).

On July 23, 2012 appellant appealed to the Board. By decision dated May 9, 2013, the Board reversed the July 2, 2012 OWCP decision.<sup>4</sup> The Board found appellant was entitled to a new suitability determination, with the required notice and an opportunity to respond, after OWCP received the November 9, 2011 letter from the employing establishment. It was also noted that there was no conflict with respect to CRPS, and that a subsequently acquired condition is considered in determining the suitability of a position.

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<sup>4</sup> Docket No. 12-1610 (issued May 9, 2013).

By letter dated June 6, 2013, OWCP requested that appellant submit current medical evidence with respect to his diagnoses and disability status. On August 19, 2013 it received an FCE report from an occupational therapist dated July 19, 2013.

On September 10, 2013 appellant submitted treatment notes from Dr. Sullivan from January 9, 2007 to December 2, 2010. Dr. Sullivan signed a work capacity evaluation (Form OWCP-5c on July 15, 2013, providing work restrictions. He indicated that appellant could work full time, with a 14-pound lifting restriction, and restrictions of four to six hours sitting, and one to three hours of other activities that included reaching above shoulder, walking, standing, and bending.

OWCP referred appellant for a second opinion examination by Dr. Mysore Shivaram, a Board-certified orthopedic surgeon. In a report dated September 5, 2014, Dr. Shivaram provided a history and results following a September 3, 2014 examination. He reported that the examinations of the right and left shoulders were within normal limits. Dr. Shivaram indicated that x-rays showed no degenerative changes. He opined that appellant could return to work without limitations.

The record indicates that on October 2, 2014 OWCP determined that a conflict existed between Dr. Shivaram and Dr. Sullivan as to continuing residuals. It selected Dr. William Moore, a Board-certified orthopedic surgeon, as a referee physician to resolve the conflict.

In a report dated March 3, 2015, Dr. Moore provided a history and results of a February 4, 2015 examination. He reviewed in detail the medical history and medical evidence in the case. Dr. Moore noted that appellant displayed maladaptive pain behavior throughout the examination. He opined that for the left shoulder appellant was able to return to work without restriction as of October 1, 2007. Dr. Moore noted Dr. Sullivan's report of that date. As to the right shoulder, he opined that appellant could have returned to work without restriction as of November 11, 2009. Dr. Moore wrote that, although appellant had reported bilateral shoulder pain on the current examination, there were no objective findings to support his complaints. He concluded that appellant had no continuing disability or any work limitation.

By letter dated April 6, 2015, OWCP notified appellant that it proposed to terminate appellant's wage-loss compensation and medical benefits. Appellant was advised to submit any additional evidence or argument within 30 days. On June 19, 2015 he submitted a June 4, 2015 FCE from an occupational therapist.

In a decision dated October 20, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 19, 2015. It found the weight of the medical evidence was represented by Dr. Moore.

Appellant, through counsel, requested a hearing before an OWCP hearing representative on October 27, 2015.

On March 7, 2016 appellant submitted a December 2, 2015 report from Dr. Sullivan, who indicated that appellant was reporting bilateral shoulder pain. Dr. Sullivan provided a history that appellant had developed CRPS and had been essentially disabled since that time. He provided results on shoulder examination, noting that appellant had significant difficulties with

elevation, worse on the right. Dr. Sullivan wrote that appellant was clearly disabled as a result of the work injuries and this was consistent with CRPS. A hearing was held on June 13, 2016.

By decision dated August 24, 2016, the hearing representative affirmed the termination of compensation. She found the evidence from Dr. Moore was sufficient to meet OWCP's burden to terminate compensation.

On September 22, 2016 appellant, through counsel, requested reconsideration. He submitted an August 30, 2016 report from Dr. David Kaufman, a Board-certified neurologist. Dr. Kaufman provided a history that appellant complained of pain throughout his entire body, particularly in the upper extremities, worse on the right. He provided results on examination and noted that an electromyogram (EMG) for the right upper extremity was normal. Dr. Kaufman opined that appellant had a functional neurologic disorder, but he did not believe appellant had CRPS. He wrote that he did think this disorder was derived "from the injuries he experienced during his employment since I do not think this problem would have occurred without those injuries." In a September 9, 2016 note, Dr. Kaufman wrote that appellant could return to sedentary work.

By decision dated February 6, 2017, OWCP reviewed the merits of the case and denied modification. It found the evidence submitted was not sufficient to modify the termination decision.

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

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>6</sup>

5 U.S.C. § 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>7</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>8</sup>

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and

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<sup>5</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

<sup>6</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>7</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>8</sup> *William C. Bush*, 40 ECAB 1064 (1989).

based on a proper factual and medical background, must be given special weight.<sup>9</sup> Medical rationale is a medically sound explanation for the opinion offered.<sup>10</sup>

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

In the present case, OWCP accepted left shoulder and suprascapularis sprain, and consequential right shoulder rotator cuff tear and right shoulder tendinitis, as causally related to a December 29, 2006 lifting incident. Appellant was receiving compensation on the periodic rolls from October 1, 2008. OWCP terminated wage-loss compensation and medical benefits effective October 19, 2015. It bears the burden of proof to terminate compensation, and the issue is whether OWCP met that burden.

The Board finds that the medical evidence of record is sufficient to meet OWCP's burden of proof in this case. OWCP properly found a conflict with respect to appellant's disability status.<sup>11</sup> Attending physician Dr. Sullivan found that appellant could only work with restrictions such as a 14-pound lifting restriction and restrictions on other activity such as reaching above shoulder, walking, standing, and bending. The second opinion physician, Dr. Shivaram, opined in a September 5, 2014 report that appellant could return to work without restrictions. He reported essentially normal examinations for the shoulders.

Dr. Moore, the physician selected as an impartial specialist to resolve the conflict, provided a complete and well-reasoned medical opinion in a March 3, 2015 report that appellant did not have any residuals of the December 29, 2006 employment injuries. He provided an extensive review of the medical evidence of record. Dr. Moore unequivocally opined that appellant did not have a need for any further treatment to either shoulder. He explained that there was no organic basis for any subjective complaints, and referred to the medical record to support his opinion that residuals had ceased. As noted above, the opinion of an impartial specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>12</sup> The Board finds that Dr. Moore provided a comprehensive report that resolved the conflict, and his opinion represents the weight of the medical evidence.<sup>13</sup> OWCP therefore met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 19, 2015.

Appellant also submitted a June 19, 2015 FCE from an occupational therapist in support of a finding that he still had residuals of the accepted condition. Evidence from an occupational

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<sup>9</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

<sup>10</sup> See *Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound and logical).

<sup>11</sup> See *S.B.*, Docket No. 16-0933 (issued December 9, 2016).

<sup>12</sup> *Supra* note 9.

<sup>13</sup> See *N.B.*, Docket No. 14-0918 (issued August 18, 2014); *J.L.*, Docket No. 13-0304 (issued March 10, 2014).

therapist does not constitute competent medical evidence under FECA as an occupational therapist is not considered a physician under section 8101(2) of FECA.<sup>14</sup>

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

After termination or modification of 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 had an employment-related disability which continued after termination of compensation benefits.<sup>15</sup>

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

Following the October 20, 2015 termination decision, appellant submitted a December 2, 2015 report from Dr. Sullivan. In this report Dr. Sullivan provided results on examination and opined that appellant was disabled as a result of the work injuries and this was consistent with CRPS. However, the diagnosis of CRPS has not been established, nor has any causal relationship with employment been established. Appellant has the burden to establish any additional conditions for which compensation is claimed as causally related to the employment injury.<sup>16</sup>

Dr. Barron had opined in his April 13, 2011 report that appellant did not have CRPS. An attending physician, Dr. Kaufman, also indicated in his August 30, 2016 report that he did not believe appellant had CRPS. Dr. Sullivan does not provide medical rationale to support an opinion that appellant continued to have an employment-related disability or condition. After termination or modification of 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 had an employment-related condition or disability which continued after termination of compensation benefits.<sup>17</sup>

Appellant also submitted an August 30, 2016 report from Dr. Kaufman, who diagnosed a functional neurologic disorder, without further explanation. Dr. Kaufman did not provide a complete history, or show an understanding of the December 29, 2006 employment incident. The opinion that appellant had a neurologic disorder that derived from his employment injuries is not based on a complete background or supported by sound medical rationale. Medical opinions

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<sup>14</sup> 5 U.S.C. § 8101(2) provides that a physician includes, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *R.S.*, Docket No. 16-1303 (issued December 2, 2016) (occupational therapists are not considered physicians as defined under FECA); *J.J.*, Docket No. 15-0727 (issued July 16, 2015) (reports from an occupational therapist have no probative value as an occupational therapist is not a physician as defined under FECA).

<sup>15</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

<sup>16</sup> *T.W.*, Docket No. 15-1020 (issued November 13, 2015).

<sup>17</sup> *Supra* note 15.

that are not based on a proper background and unsupported by medical rationale are of diminished probative value.<sup>18</sup>

The Board accordingly finds that appellant has not met his burden of proof to establish a continuing employment-related disability or condition after October 19, 2015.

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 wage-loss compensation and medical benefits, effective October 19, 2015. The Board further finds that appellant did not establish continuing employment-related disability or residuals after October 19, 2015.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 6, 2017 is affirmed.

Issued: September 19, 2017  
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

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<sup>18</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).