United States Department of Labor
Employees' Compensation Appeals Board

C.V., Appellant	)	
and	)	**Docket No. 17-1159**
	)	**Issued: April 6, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Sea Isle City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 5, 2017 appellant, through counsel, filed a timely appeal from November 21, 2016 and February 13, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 properly terminated appellant's wage-loss compensation and authorization for medical benefits effective August 5, 2016 as she had no further disability or residuals causally related to her March 4, 2014 employment injury;

[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.*

(2) whether appellant has established that she had continuing employment-related disability subsequent to August 5, 2016; and (3) whether OWCP properly denied authorization for right shoulder surgery.

FACTUAL HISTORY

On March 4, 2014 appellant, then a 42-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right hand and thumb when she slipped on ice while in the performance of duty. She stopped work on March 5, 2014. OWCP accepted the claim for a right hand contusion, traumatic right carpal tunnel syndrome, and traumatic right shoulder bursitis. It paid appellant wage-loss compensation for total disability beginning May 17, 2014.

A magnetic resonance imaging (MRI) scan study of the right shoulder performed May 19, 2014 revealed mild tendinosis of the rotator cuff without a tear.

On August 8, 2014 Dr. David Anapolle, a Board-certified orthopedic surgeon, performed a right carpal tunnel release. On September 19, 2014 he performed a subacromial decompression and a "coracoacromial ligament release and partial acromioplasty" of the right shoulder.

In a January 20, 2015 progress report, Dr. Anapolle indicated that appellant's shoulder had improved after surgery, but that she continued to have pain and tingling in the medial nerve of the hand. He noted that a January 8, 2015 electromyogram (EMG) and nerve conduction velocity study showed no improvement in carpal tunnel syndrome.[3] Dr. Anapolle diagnosed status post right shoulder subacromial decompression and status post right carpal tunnel release and rule out persistent carpal tunnel syndrome. He kept appellant on modified duty due to carpal tunnel syndrome pending an evaluation by a hand specialist. Dr. Anapolle noted that she could work full duty with respect to her right shoulder once her hand healed. In a separate January 20, 2015 form report, he indicated by a checkmark in a box that appellant was unable to work.

On April 24, 2015 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination. On May 5, 2015 counsel advised that he had obtained a copy of the correspondence referring her for a second opinion examination, but noted that OWCP had not sent him the letter.

In a report dated May 8, 2015, Dr. Askin reviewed the history of injury and discussed appellant's continued symptoms of right hand numbness and burning and shoulder soreness with activity. He related, "There is nothing potentially caused by or disturbed by a fall that would actually be the cause of carpal tunnel syndrome as opposed to a contusion of the median nerve, which is not a condition that requires surgery." On examination, Dr. Askin found a negative Phalen's test bilaterally, a negative Tinel's sign on the right side and a positive Tinel's sign on the left, and eight millimeters of two-point discrimination in the right thumb and index finger. He opined that, as appellant's right wrist condition was not improved by a carpal tunnel release, it might not be the reason for her symptoms. Dr. Askin noted no objective findings of the accepted conditions. He related, "I am not stating that [appellant] has no symptoms, but the accepted conditions cannot be present. [Appellant] has had sufficient treatment to document that

[3] Electrodiagnostic testing performed January 8, 2015 showed moderate right carpal tunnel syndrome.

these are not potentially relevant diagnoses that need to be considered going forward." Dr. Askin opined that appellant had no restrictions due to her accepted work injury. He recommended against additional surgery.

Dr. John M. Bednar, a Board-certified orthopedic surgeon, evaluated appellant on May 7, 2015 at the request of Dr. Anapolle. He diagnosed status post right carpal tunnel release, traumatic right wrist median neuropathy, and traumatic neuropathy of the palmer cutaneous branch of the median nerve. Dr. Bednar found that appellant was unable to perform her usual employment. In a progress report dated June 4, 2015, he opined that she had permanent work restrictions of no repetitive use of the hand and no lifting over five pounds.

OWCP determined that a conflict existed between Dr. Askin and Dr. Bednar regarding the extent of any employment-related condition or disability. It referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination.

On March 3, 2016 Dr. Anapolle evaluated appellant for pain and a lump in the right acromioclavicular (AC) joint that began "a few months ago without injury." He diagnosed right shoulder pain and an unspecified tissue disorder. Dr. Anapolle related, "If the mass proves to be a ganglion cyst arising from the AC joint, it may be related to [appellant's] traumatic injury. If the mass it not a ganglion cyst, it would not be considered related to her injury." He found that appellant could not work and ordered a right shoulder MRI scan. A March 23, 2016 MRI scan of the right shoulder revealed chronic AC joint arthritis and a "subcutaneous soft tissue ganglion likely arising from the arthritis AC joint."[4]

Dr. Anapolle, in an April 5, 2016 progress report, diagnosed primary osteoarthritis of the right shoulder and a right shoulder ganglion. He recommended a distal clavicle resection. On April 13, 2016 Dr. Anapolle requested authorization to perform arthroscopic surgery on the right shoulder and a partial removal of the collar bone.[5]

By letter dated April 15, 2016, OWCP advised Dr. Anapolle that it was unable to authorize surgery at that time as the medical evidence of record did not support that it was medically necessary.

In a report dated April 12, 2016, Dr. Fries reviewed the medical evidence of record. On examination he found "a very painful mass approximately pea-size at the [AC] joint, with some mild crepitance and pain with direct pressure on [the] mass" as well as tenderness at the AC joint and distal clavicle on the right. Dr. Fries found a negative Tinel's test, but noted that appellant experienced soreness at the thenar eminence base during the examination. He found normal two-point discrimination and measured upper arm circumference as 33 centimeters of the right and 34 centimeters on the left. Dr. Fries diagnosed right shoulder impingement syndrome after an arthroscopic decompression, a possible acute AC joint cyst of the right shoulder, mild right carpal tunnel syndrome after surgery, persistent pain at the volar wrist and thenar eminence of questionable etiology, and incidental left ulnar surgery at the elbow. He opined that

[4] On March 29, 2016 Dr. Anapolle performed an aspiration and injection of the ganglion cyst.

[5] On April 7, 2016 Dr. Bednar noted that an EMG showed that appellant's right wrist had improved and recommended against surgery. A March 22, 2016 EMG report noted a normal study.

electrodiagnostic studies performed after the right carpal tunnel release showed "prolonged distal median motor and sensory conduction, as often seen subsequent to carpal tunnel decompression surgery. The lack of change does not confirm the release was unsuccessful." Dr. Fries noted that appellant had undergone additional electrodiagnostic studies and an MRI scan study and that he would be "pleased to consider these recent test results…." He described the current findings as "modest limitation of right shoulder motion, well-healed right shoulder and right wrist surgical incisions, and a painful mass near the [AC] joint. No sensory deficits are elicited nor provocative tests for carpal tunnel syndrome." Dr. Fries found that appellant had no further disability or residuals of the accepted right hand contusion, traumatic right shoulder bursitis, or traumatic right carpal tunnel syndrome. He determined that appellant could return to work considering only the accepted conditions, noting that she had a right shoulder mass that may require excision depending on the results of the MRI scan study. Dr. Fries related, "Surgery is not necessary for the accepted conditions. It may be necessary for the right shoulder mass that occurred three months ago."

In a work restriction evaluation (OWCP-5c), dated May 31, 2016, Dr. Anapolle found that appellant was unable to work pending surgery.

By decision dated June 15, 2016, OWCP denied authorization for a right shoulder arthroscopy and partial removal of the collar bone. It found that opinion of Dr. Fries constituted the weight of the evidence and established that the surgery was not medically necessary as a result of the accepted work injury. On June 21, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the June 15, 2016 decision.

OWCP, by letter dated June 29, 2016, advised appellant of its proposed termination of her wage-loss compensation and medical benefits as the weight of the evidence established that she had no further disability or residuals of her work injury.

In a July 13, 2016 response to the proposed termination of compensation, counsel asserted that Dr. Fries' report was not rationalized as he did not explain his finding that she had no residuals of her work injury and could resume her usual employment. He noted that the physician found shoulder limitations upon examination and right upper arm atrophy versus the left side upon examination and diagnosed right shoulder impingement, an AC joint cyst, and mild right carpal tunnel syndrome. Counsel also indicated that Dr. Fries did not have the results of the most recent diagnostic testing.

By decision dated August 5, 2016, OWCP terminated appellant's compensation and authorization for medical benefits effective that date. It found that the opinion of Dr. Fries, as the impartial medical examiner, constituted the special weight of the evidence and established that she had no further employment-related disability or need for further medical treatment.

Counsel, on August 22, 2016, requested an oral hearing before an OWCP hearing representative regarding the August 5, 2016 decision.

On October 3, 2016 counsel changed the request for an oral hearing, on the June 15, 2016 decision, to a request for a review of the written record.

By decision dated November 21, 2016, following a review of the written record, an OWCP hearing representative affirmed the June 15, 2016 decision. She found that Dr. Anapolle

did not provide a reasoned opinion relating the need for additional right shoulder surgery for the diagnosed right shoulder ganglion and osteoarthritis to the accepted work injury.

A hearing was held on November 28, 2016 regarding the August 5, 2016 termination of appellant's compensation. Appellant related that she was in pain during the examination with Dr. Fries because of his movement of her shoulder and unable to complete testing. She described her right shoulder and wrist symptoms.

By decision dated February 13, 2017, OWCP's hearing representative affirmed the August 5, 2016 decision. She found that Dr. Fries' opinion was sufficiently rationalized to constitute the special weight of the evidence as the impartial medical examiner and established that the employment-related disability and conditions had ceased.

On appeal counsel asserts that the medical evidence showed that appellant had residuals of her work injury and that the injury resulted in an AC joint ganglion cyst that required surgery. He notes that Dr. Askin did not have a copy of the March 23, 2016 MRI scan study necessary to determine the cause of the ganglion cyst. Counsel also maintains that OWCP did not provide him notice of the scheduling of the second opinion examination and thus it was not probative.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify 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.[6] 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.[7] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[8] 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.[9]

Section 8123(a) 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.[10] The implementing regulations states 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

[6] *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[7] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[8] *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[9] *Id*.

[10] 5 U.S.C. § 8123(a).

select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11]

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.[12]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a contusion of the right hand, traumatic right carpal tunnel syndrome, and traumatic right shoulder bursitis on March 4, 2014. It paid her wage-loss compensation for total disability beginning May 17, 2014.

OWCP later determined that a conflict arose between appellant's attending physicians, and Dr. Askin, an OWCP referral physician, regarding whether she had any further disability or residuals of her March 4, 2014 employment injury. It referred her to Dr. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination.

Where 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.[13] The Board finds that the opinion of Dr. Fries is well rationalized and based on a proper factual and medical history. Dr. Fries accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings.[14] In his April 12, 2016 report, he reviewed in detail the medical evidence of record. On examination, Dr. Fries found a painful mass at the AC joint, normal two-point discrimination, and a negative Tinel's test. He diagnosed right shoulder impingement syndrome after an arthroscopic decompression, a possible acute AC joint cyst of the right shoulder, mild right carpal tunnel syndrome after surgery, persistent pain at the volar wrist and thenar eminence of questionable etiology, and incidental left ulnar surgery at the elbow. Dr. Fries listed the objective findings as some limitation in right arm motion and a painful mass near the AC joint. He found that appellant had no further disability or residuals due to the accepted conditions of a right hand contusion, traumatic right shoulder bursitis, and traumatic right carpal tunnel syndrome. Dr. Fries provided rationale for his opinion by noting that her examination showed no sensory deficits of the right arm or findings of carpal tunnel syndrome. He found that appellant could resume work considering only the accepted conditions. Dr. Fries further explained that, based on his examination, she had no continued need for medical treatment due to her right hand contusion, traumatic right shoulder bursitis, and traumatic right carpal tunnel syndrome. As his report is detailed, well rationalized and based on a proper factual background, his opinion is

[11] 20 C.F.R. § 10.321.

[12] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[13] *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[14] *See Manuel Gill*, 52 ECAB 282 (2001).

entitled to the special weight accorded an impartial medical examiner.[15] OWCP, therefore, met its proof to terminate appellant's wage-loss compensation and medical benefits for the accepted conditions of a right hand contusion, traumatic right shoulder bursitis, and traumatic right carpal tunnel syndrome.

On appeal counsel argues that he was not notified of the second opinion examination. The record indicates, however, that while OWCP did not send him a copy of its April 24, 2015 referral to Dr. Askin, by letter of May 5, 2015 he notified OWCP that he had a copy of the referral. The Board has held that, when a representative had actual knowledge of a second opinion examination, the lack of proper notification is harmless error.[16]

Counsel further asserts that Dr. Fries' opinion lacks rationale as he failed to review the recent test results and did not fully explain why the accepted conditions had resolved such that appellant could resume her usual employment.[17] As discussed, however, his report is detailed, based on a proper medical history, and supported by sufficient rationale to constitute the special weight of the medical evidence.[18]

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates compensation benefits, the burden shifts to the employee to establish that she has continuing disability after that date related to her accepted injury.[19] To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.[20] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[21]

ANALYSIS -- ISSUE 2

Given the Board's finding that OWCP properly relied upon the opinion of Dr. Fries in terminating compensation, the burden of proof shifted to appellant to establish that she remained entitled to compensation after that date.[22] Appellant did not, however, submit any probative evidence supporting continuing disability subsequent to OWCP's termination of her wage-loss

[15] *See J.M., supra* note 13; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

[16] *See I.H.*, Docket No. 09-0141 (issued August 6, 2009).

[17] Dr. Fries noted that appellant had undergone recent electrodiagnostic testing and imaging studies, but that he did not have the results. An EMG study performed March 22, 2016 was normal, and a March 23, 2016 MRI scan study showed a ganglion at the AC joint most likely due to arthritis.

[18] *See supra* notes 10, 12.

[19] *Supra* note 14.

[20] *Id*.

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

[22] *See supra* note 14.

compensation and thus failed to meet her burden of proof. She resubmitted a March 23, 2016 MRI scan study of the right shoulder. However, diagnostic studies are of limited probative value as they did not address causal relationship.[23] Consequently, appellant has not established continuing employment-related disability after August 5, 2016.

LEGAL PRECEDENT -- ISSUE 3

Section 8103 of the FECA[24] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.[25] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on its authority being that of reasonableness.[26] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[27] In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[28]

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence. Thus, in order for a surgery to be authorized, appellant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[29]

ANALYSIS -- ISSUE 3

Dr. Anapolle performed a subacromial decompression, coracoacromial ligament release, and partial acromioplasty of appellant's right shoulder on September 19, 2014. On January 20, 2015 he found that she could work full duty with respect to her right shoulder. In a report dated March 3, 2016, Dr. Anapolle found a lump in the right shoulder AC joint. He advised that, if the lump was a ganglion cyst, it might be due to appellant's work injury and referred her for a right shoulder MRI scan study. Dr. Anapolle's opinion that a ganglion cyst might be related to the

[23] *See P.D.*, Docket No. 16-0239 (issued May 4, 2016); *G.G.*, Docket No. 16-0007 (issued February 12, 2016).

[24] *Supra* note 2.

[25] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[26] *Joseph P. Hofmann*, 57 ECAB 456 (2006); *James R. Bell*, 52 ECAB 414 (2001).

[27] *Claudia L. Yantis*, 48 ECAB 495 (1997).

[28] *Cathy B. Mullin*, 51 ECAB 331 (2000).

[29] *Id*.

accepted employment injury is couched in speculative terms and thus is of little probative value.[30]

A March 23, 2016 MRI scan study of the right shoulder showed AC joint arthritis and a ganglion likely due to the arthritis at the AC joint. On April 5, 2016 Dr. Anapolle diagnosed primary right shoulder osteoarthritis and a ganglion. On April 13, 2016 he requested that OWCP authorize arthroscopic right shoulder surgery and the partial removal of the collar bone. Dr. Anapolle, however, did not explain how the work injury, accepted by OWCP for traumatic right shoulder bursitis, caused or contributed to the development of the ganglion cyst for which he recommended surgery.[31] Absent sufficient explanation of the issue of causal relationship, the Board finds that OWCP did not abuse its discretion by denying Dr. Anapolle's surgical recommendation, particularly in view of the findings by Dr. Askin and Dr. Fries that appellant had no residuals of her accepted right shoulder condition.[32]

On appeal counsel contends that the medical evidence establishes that appellant sustained a ganglion cyst at the AC joint that required surgery due to her work injury. OWCP did not accept a ganglion cyst as employment related. Appellant has the burden to prove that conditions not accepted by OWCP are causally related to her accepted employment injury through the submission of rationalized medical evidence.[33] She has not submitted such evidence and thus failed to show that the ganglion cyst was employment related.

Counsel further asserts that Dr. Fries did consider the March 23, 2016 MRI scan study which was necessary to determine the cause of the ganglion cyst. A March 23, 2016 MRI scan study showed a ganglion at the AC joint most likely due to arthritis. Dr. Fries addressed the issue of whether appellant had any further disability or need for medical treatment due to her accepted conditions rather than surgical authorization or the causal relationship between the ganglion cyst and her work injury.

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 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 August 5, 2016 as she had no further disability or residuals causally related to her March 4, 2014 employment injury. The Board further finds that she has not established that she had continuing employment-related disability subsequent to August 5, 2016 and that OWCP properly denied authorization for right shoulder surgery.

[30] *Rickey S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[31] *See F.S.*, Docket No. 14-0972 (issued October 15, 2014).

[32] *Id*.

[33] *See Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2017 and November 21, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 6, 2018
Washington, DC

Christopher J. Godfrey, 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