United States Department of Labor
Employees' Compensation Appeals Board

G.C., Appellant	)	
and	)	**Docket No. 18-0842**
	)	**Issued: December 20, 2018**
OFFICE OF PERSONNEL MANAGEMENT, Boyers, PA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 7, 2018[1] appellant filed a timely appeal from a September 12, 2017 merit decision and a February 28, 2018 nonmerit decision of the Office of Workers' Compensation

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 12, 2017, the date of OWCP's last merit decision, was March 11, 2018. As this fell on a Sunday, appellant had until the next business day, Monday, March 12, 2018 to file the appeal. Since using March 13, 2018 the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 7, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

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.[3]

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 5, 2017; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 15, 1979 appellant, then a 33-year-old employment examiner, filed a traumatic injury claim (Form CA-1) alleging that on January 16, 1979 she sustained injuries when a semi-truck skidded in the snow and rear-ended the government vehicle that she was driving while in the performance of duty. OWCP initially accepted the claim for sprain of neck and adhesive capsulitis of the right shoulder. It later expanded acceptance of the claim to include cervicalgia and paid compensation benefits.[4]

Appellant returned to work and worked intermittently until July 28, 1983.[5] OWCP subsequently placed her on the periodic compensation rolls.[6]

To determine the status of appellant's accepted conditions and disability, OWCP referred her to Dr. Ning Sun, a Board-certified neurologist, for a second opinion evaluation. In a March 20, 2012 report, Dr. Sun noted the history of injury and presented examination findings. An assessment was provided of mild right carpal tunnel syndrome electromyograph and nerve conduction velocity, possible cervical radiculopathy, cervical muscle spasm, and right shoulder pain with previous abnormal magnetic resonance imaging (MRI) scan. In a March 21, 2012 report, Dr. Sun advised that appellant's neck pain and right shoulder pain were related to the work injury. He noted that her condition was permanent and that she was totally disabled. In a work capacity evaluation form (Form OWCP-5c), Dr. Sun opined that appellant could not work until she had

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the February 28, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

[4] May 18 and July 8, 1997 statements of accepted facts (SOAF) indicate that the claim was accepted for neck strain (resolving cervical myositis and resolving lumbar sacral myositis), adhesive capsulitis of the left shoulder (misidentified), and post-traumatic brachial neuritis. February 1, 2012 and March 4, 2015 SOAFs indicate that the accepted conditions were neck strain, adhesive capsulitis of the left shoulder (misidentified), and post-traumatic brachial neuritis.

[5] By decision dated June 4, 1984, OWCP issued a schedule award for five percent permanent impairment to appellant's right upper extremity. The award ran for 15.60 weeks from April 3 to July 21, 1984 for fraction of a day.

[6] Appellant reported periods of part-time employment from 1986 through 1997.

significant improvement. In a March 29, 2012 report, he indicated that it was unclear whether her right carpal tunnel syndrome was related to her work injury. Dr. Sun noted that appellant's neck pain and shoulder pain were permanent as it increased after she continued to work after the work injury.

In a June 21, 2012 report, Dr. Herbert White, Jr., an internist and occupational medicine specialist, diagnosed cervical disc disease with right cervical radiculopathy -- worse; right rotator cuff tear -- worse; right shoulder anterior glenoid labral tear; right carpal tunnel syndrome -- worse; status post right shoulder adhesive capsulitis. He opined that appellant was unable to work.

In an August 23, 2012 report, Dr. White determined that appellant continued to have paresthesia that radiated from the neck into the right arm and decreased range of motion of the right wrist, shoulder, and neck as well as weakness in those areas. He noted that this resulted in a severe impairment of the right upper extremity as well as neck movement as the use of her neck for flexion, extension, and rotation was severely impaired. Dr. White opined that the conditions diagnosed in his June 21, 2012 report were directly caused by the work injury and rendered appellant unable to work.

On January 23, 2014 OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 11, 2014 report, Dr. Brecher reviewed the SOAF and the medical record, and reported his examination findings.[7] He opined that appellant's brachial neuritis and neck sprain had resolved and that there were minimal changes on imaging of her neck. While appellant still has some adhesive capsulitis with decreased range of motion of the shoulders, Dr. Brecher opined that it was mostly active, not passive, as she could reach 90 degrees actively, which was insufficient to preclude her from doing her job. He noted that her only physical limitation was an inability to work over shoulder height, which would not affect her ability to perform her job. Dr. Brecher opined that appellant reached maximum medical improvement (MMI) on October 8, 1997, when she had a physical capacity examination which indicated that she could return to her date-of-injury job. He recommended that she could return to work as her physical abilities appeared to match the physical requirements of her job description.

Dr. White continued to diagnose cervical disc displacement with myelopathy, labral tear of the shoulder, adhesive capsulitis of the shoulder, and rotator cuff syndrome.

OWCP determined that there was a conflict of medical opinion between appellant's treating physician, Dr. White and the second opinion examiner, Dr. Brecher, regarding residuals of her accepted work-related conditions and level of disability. To resolve the conflict, it selected Dr. Hythem P. Shadid, a Board-certified orthopedic surgeon, as the impartial medical specialist. OWCP provided him a copy of the medical record and an updated SOAF. The March 4, 2015 SOAF noted that the case was accepted for neck strain, adhesive capsulitis of the left shoulder, and post-traumatic brachial neuritis.

In a November 30, 2015 report, Dr. Shadid reviewed the medical evidence of record, including the SOAF, and presented examination findings. He indicated that there was no objective

[7] Dr. Brecher reported that the SOAF indicated that the case was accepted for neck sprain, adhesive capsulitis of the left shoulder, and post-traumatic brachial neuritis.

evidence of a neck strain, left shoulder adhesive capsulitis, or a post-traumatic brachial neuritis. Dr. Shadid noted that, while appellant moved slowly, her cervical range of motion was age appropriate and pain free on examination. He noted that the normal September 1980 myelogram and normal cervical spine MRI scan supported his findings.

With regard to the shoulders, Dr. Shadid noted that, while appellant did not appear to put forth much effort, both shoulders had symmetrical active range of motion. Passively, he was able to get both shoulders to 160 degrees of flexion and 90 degrees of external rotation with minimal difficulty. Dr. Shadid indicated that this range of motion was inconsistent with an adhesive capsulitis. Furthermore, an adhesive capsulitis is a self-limiting condition and the orthopedic literature showed that it tends to resolve in two years or less, even when untreated. Dr. Shadid opined that there was no evidence on examination for an adhesive capsulitis. The only findings were that of a mildly degenerated rotator cuff and anterior labrum, both of which are typical findings for a woman of appellant's age.

Dr. Shadid noted that the brachial neuritis was diagnosed based on subjective complaints only and at no point was there objective evidence for the condition over the years. He explained that appellant's complaints of intermittent numbness over the years may have been due to a mild carpal tunnel syndrome rather than a brachial neuritis. Dr. Shadid indicated that there was no evidence of his examination of any neuritis brachial or otherwise.

Dr. Shadid advised that none of appellant's current subjective complaints were due to the work-related injury and throughout her medical history, subjective complaints were the only basis for the accepted conditions. He reiterated that there was no objective basis for any of the accepted conditions on examination. Dr. Shadid concluded that appellant no longer suffered from active residuals of the work-related injury and that she was able to perform her regular duties. He indicated that she had reached MMI on April 23, 1979, when she returned back to work, or within 3.5 months of the accident. Dr. Shadid explained that the problem with Dr. White's opinion, as with many others in this case, was that it was not based on the evidence. He noted that Dr. White had failed to support his opinion with objective findings and provided no medical basis or rationale to establish that appellant's diagnosed conditions were medically connected to the January 16, 1979 employment injury. Dr. Shadid also indicated that, contrary to her claims of severe impairment to her right upper extremity and cervical spine, she was functioning well with all activities of daily living and that there was no significant impairment on examination when compared to other woman of her stated age.

On February 1, 2017 OWCP notified appellant of its proposed termination of her wage-loss compensation and medical benefits, based on Dr. Shadid's opinion. It afforded her 30 days to submit additional evidence or argument.

In response, appellant submitted a February 6, 2017 statement and bone scans from 2013 which noted multiple levels of degenerative disc disease in the lumbar spine, retrolistheis at C3 on C4, slight scoliosis at lateral thoracic spine, and coarsening of the trabecular pattern of the sacrum typical for Paget's disease.

By decision dated March 16, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 5, 2017, finding that the medical evidence of record

established that the accepted injuries had ceased without residuals or continued disability from work. It accorded Dr. Shadid's opinion the special weight of the medical evidence.

On March 27, 2017 appellant requested an oral hearing before an OWCP hearing representative, which was held on July 12, 2017.

OWCP received duplicative copies of evidence already of record,[8] a July 10, 2017 download request summary of diagnostic tests from May 1, 2013 through January 31, 2014; and a June 27, 2017 MRI scan of cervical spine, which noted multilevel cervical spondylosis with no acute findings, disc herniation, or central stenosis.

In a July 15, 2017 letter, appellant asserted that her accepted medical conditions were permanent and that her symptoms had progressed. She indicated her belief that the physicians whom OWCP relied on in terminating her compensation benefits were invalid as they did not perform diagnostic tests and had reviewed outdated evidence. Appellant further contended that the reports from Dr. White and Dr. Sun established an ongoing need for treatment and disability.

By decision dated September 12, 2017, an OWCP hearing representative affirmed OWCP's termination decision. The hearing representative noted that no recent evidence from Dr. White had been received to support a finding of total disability from appellant's date-of-injury position or that she had any residuals from her work-related injuries.

On December 5, 2017 appellant requested reconsideration. In a November 25, 2017 letter, she stated that her claim had been accepted for neck strain, cervical and lumbosacral myositis; post-traumatic brachial neuritis; and adhesive capsulitis of right shoulder. Appellant contended that Dr. Shadid did not perform a complete examination as she was only observed or forced beyond her tolerance to perform certain tasks. Additionally, Dr. Shadid ignored her current medical conditions, did not have a complete list of her accepted medical conditions, or a complete medical history. Appellant indicated that on April 6, 1998 OWCP had expanded the acceptance of her claim to include the additional conditions of "neck strain, cervical and lumbosacral myositis, post-traumatic brachial neuritis, and adhesive capsulitis L shoulder."

Duplicative copies of evidence already of record were received.

By decision dated February 28, 2018, OWCP denied appellant's request for reconsideration as she had not raised an argument or submitted evidence sufficient to warrant further review of the merits under section 8128(a). It found that the submitted evidence was previously of record and reviewed and that she had not provided new evidence in support of her arguments.

[8] This included December 7, 2009 right shoulder MRI scan, which revealed partial undersurface tear of the supraspinatus tendon, a suspicious tear of the anterior glenoid labrum, and mild degenerative joint disease of the acromioclavicular joint; a December 7, 2009 cervical spine MRI scan, which revealed multilevels of mild disc bulges without evidence of significant central canal stenosis or neural foraminal narrowing; Dr. Sun's March 20, 2012 work capacity evaluation; correspondence form appellant to her claims examiners; an August 23, 2012 work capacity evaluation from Dr. White rendering appellant totally disabled.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[9] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[10] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[11]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[12] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[13]

Section 8123(a) of FECA 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.[14] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[15] In situations where there are 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 on a proper factual background, must be given special weight.[16]

OWCP's procedures provide as follows:

> "The [claims examiner] is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When the [district medical adviser], second opinion specialist, or referee physician renders a medical opinion based on an SOAF which is incomplete or inaccurate or does not use the SOAF as the

[9] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[10] *Id.*

[11] *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[12] *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[13] *Kathryn E. Demarsh, id.; James F. Weikel*, 54 ECAB 660 (2003).

[14] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[15] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[16] *Anna M. Delaney*, 53 ECAB 384 (2002).

framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[17]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[18] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[19] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.[20]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for a decision.

OWCP referred appellant to Dr. Shadid, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Brecher and Dr. White as to whether her disability had ceased. It based its decision to terminate her wage-loss compensation and medical benefits on Dr. Shadid's November 30, 2015 report.

The Board finds however that Dr. Shadid's report is insufficient to resolve the conflict between Dr. White and Dr. Brecher as it was based on an inaccurate SOAF. Specifically, OWCP had accepted an adhesive capsulitis of the right shoulder and had issued, on June 4, 1984, a schedule award for five percent permanent impairment to appellant's right upper extremity. However, the SOAF issued to Dr. Shadid incorrectly noted that the accepted conditions included an adhesive capsulitis of the left shoulder, as opposed to the right shoulder. It also failed to mention that appellant was awarded a schedule award for a right upper extremity permanent impairment. While Dr. Shadid opined that she had no objective evidence of a neck strain, left shoulder adhesive capsulitis, or a post-traumatic brachial neuritis and provided rationale for his conclusions, his report IME report is not based on an accurate SOAF as it fails to state, with the necessary specificity, the accepted conditions in the claim.[21] As such, the IME report is based on an inaccurate history and is of diminished probative value.[22]

When a second opinion or impartial medical specialist renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is diminished or negated altogether.[23] OWCP did not provide Dr. Shadid with an accurate SOAF including all accepted

[17] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[18] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[19] 20 C.F.R. § 10.121.

[20] *See Melvin James*, 55 ECAB 406 (2004).

[21] *See supra* note 16.

[22] *See V.H.*, Docket No. 17-0439 (issued December 13, 2017); *A.A.*, Docket No. 15-0937 (issued August 17, 2015).

[23] *See supra* note 17; *A.R.*, Docket No. 11-0692 (issued November 18, 2011).

conditions. Therefore, his report is not based on an accurate factual framework and cannot represent the weight of the medical evidence sufficient to terminate wage-loss compensation and medical benefits.[24]

Once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[25] Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP should prepare a complete and accurate SOAF and request that Dr. Shadid submit a clarifying report regarding residuals, if any, of appellant's accepted work-related conditions and extent of disability. Following this and any further development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical and compensation benefits, effective March 5, 2017.[26]

[24] *Id.; see also G.W.*, Docket No. 13-1922 (issued July 29, 2014).

[25] *See R.B.*, Docket No. 14-1043 (issued December 12, 2014); *V.H.*, Docket No. 14-0433 (issued July 3, 2014).

[26] The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2018 and September 12, 2017 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 20, 2018
Washington, DC

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

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

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