

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

C.L., Appellant	)	
	)	
and	)	<b>Docket No. 18-1379</b>
	)	<b>Issued: February 5, 2019</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, Green Bay, WI, Employer</b>	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 2, 2018 appellant, through counsel, filed a timely appeal from a May 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

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

## ISSUE

The issue is whether appellant has met his burden of proof to establish continuing employment-related residuals or disability after October 19, 2015.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth 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 in the performance of duty. He stopped work on January 1, 2007. OWCP accepted the claim for left shoulder and suprascapularis sprain.

On February 7, 2007 Dr. Thomas Sullivan, a Board-certified orthopedic surgeon performed an authorized left rotator cuff repair. OWCP paid appellant 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.

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

In December 2008, OWCP expanded acceptance of the claim to include a consequential right shoulder rotator cuff tear and right shoulder tendinitis.

On February 11, 2009 Dr. Sullivan performed an authorized right shoulder arthroscopic repair.

By decision dated April 18, 2011, OWCP terminated appellant's compensation, effective that same date, finding that appellant had refused an offer of suitable work under section 8106(c)(2) of FECA. The April 18, 2011 decision was vacated by an OWCP hearing representative on October 25, 2011. By decision dated January 5, 2012, OWCP terminated appellant's compensation, effective April 25, 2011, again finding that he had refused an offer of suitable work. That decision was affirmed by an OWCP hearing representative on July 2, 2012. Appellant, through counsel, appealed to the Board, and by decision dated May 9, 2013, the Board reversed the July 2, 2012 hearing representative's decision.<sup>4</sup>

On October 2, 2014 OWCP determined that a conflict in medical opinion existed between Dr. Mysore Shivaram, a Board-certified orthopedic surgeon and OWCP referral physician, and

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<sup>3</sup> Docket No. 09-1287 (issued December 30, 2009); Docket No. 12-1610 (issued May 9, 2013); Docket No. 17-0949 (issued September 19, 2017).

<sup>4</sup> Docket No. 12-1610 (issued May 9, 2013). OWCP paid appellant retroactive compensation beginning April 18, 2011 and returned him to the periodic compensation rolls.

Dr. Sullivan, appellant's treating physician as to whether appellant had continuing residuals or disability due to the accepted conditions. It selected Dr. William Moore, a Board-certified orthopedic surgeon, as a referee physician to resolve the conflict.

By decision dated October 20, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 19, 2015. It found the special weight of the medical evidence was represented by Dr. Moore, the impartial medical examiner, who found that appellant's residuals related to his accepted conditions had ceased and that he was no longer disabled from work.

On March 7, 2016 appellant requested a telephonic hearing and submitted a December 2, 2015 report from Dr. Sullivan. In that report Dr. Sullivan related appellant's medical history and physical examination findings. He opined that appellant was clearly disabled as a result of his employment injury, which was consistent with chronic regional pain syndrome (CRPS). Dr. Sullivan noted that appellant had not received reasonable treatment for this condition. He concluded that appellant was totally disabled from work and that his disability was caused by more than his rotator cuff diagnoses.

On August 24, 2016 an OWCP hearing representative affirmed the October 20, 2015 termination decision. She found the evidence from Dr. Moore sufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.

On September 22, 2016 appellant, through counsel, requested reconsideration. He submitted an August 30, 2016 report in which Dr. David Kaufman, a Board-certified neurologist, provided a history that appellant complained of pain throughout his entire body, particularly in the upper extremities, worse on the right. Dr. Kaufman provided results on examination and noted that an electromyogram (EMG) for the right upper extremity was normal. He opined that appellant had a functional neurologic disorder, but that he did not believe appellant had CRPS because there was no evidence for neuropathy or radiculopathy. Dr. Kaufman opined that he thought 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." (sic) In a September 9, 2016 note, he advised that appellant could return to sedentary work.

By merit decision dated February 6, 2017, OWCP denied modification of the October 20, 2015 termination decision.

Appellant, through counsel, appealed to the Board on March 29, 2017. By decision dated September 19, 2017, the Board affirmed the February 6, 2017 decision, finding that the medical evidence of record was sufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits. The Board noted that OWCP properly found a conflict with respect to appellant's disability status between Dr. Sullivan, for appellant, and Dr. Shivaram, for the government, and properly referred appellant to Dr. Moore for an impartial medical evaluation. The Board found that in his March 3, 2015 report, Dr. Moore provided a complete and well-reasoned medical opinion that appellant had no residuals of the December 29, 2006 employment injuries, noting that he described an extensive review of the medical evidence of record, provided examination findings, and unequivocally opined that appellant did not have a need for any further treatment to either shoulder. Dr. Moore 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. The Board concluded that his opinion was of sufficient rationale to be accorded special weight such that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 19, 2015. The Board further found that appellant had not met his burden of proof to establish continuing employment-related residuals or disability after October 19, 2015. The Board reviewed a December 2, 2015 report from Dr. Sullivan and an August 30, 2016 report from Dr. Kaufman and found that neither provided sufficient rationale to establish CRPS or any neurological disorder causally related to the December 29, 2006 employment injury.<sup>5</sup>

On February 28, 2018 appellant, through counsel, requested reconsideration and submitted a January 16, 2018 report from Dr. Sullivan. In that report Dr. Sullivan reported a history of extensive neurologic workups for right upper extremity problems, noting that appellant had not been able to use his right arm and had not been employed since shortly after his right rotator cuff repair. He indicated that appellant was diagnosed with CRPS for some time, but more recently felt that issues were more representative of a functional neurologic disorder. Physical examination findings included no evidence of dystrophy, diminished shoulder range of motion, and give-way weakness with testing of elbow flexion, elbow extension, wrist extension, wrist flexion, and intrinsic. Dr. Sullivan advised that right shoulder x-rays showed no evidence of glenohumeral arthrosis and indicated that orthopedically appellant was structurally intact, as confirmed by magnetic resonance imaging in the past. He opined that he believed appellant's current situation was directly related to his injury at work that necessitated rotator cuff repair, and that he had 30 percent permanent disability with regard to his shoulder. Dr. Sullivan recommended physical therapy and diagnosed chronic right shoulder pain.

By merit decision dated May 21, 2018, OWCP denied modification, finding that Dr. Sullivan's report was of limited probative value and insufficient to overcome the special weight of the medical evidence accorded to Dr. Moore as the impartial medical examiner.

### **LEGAL PRECEDENT**

Once OWCP properly terminates a claimant's compensation benefits, he or she has the burden of proof to establish continuing residuals or disability after that date related to the accepted injury.<sup>6</sup> To establish 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 causal relationship.<sup>7</sup> A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had employment-related residuals or disability which continued after termination of compensation benefits.<sup>8</sup>

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<sup>5</sup> Docket No. 17-0949 (issued September 19, 2017).

<sup>6</sup> *V.G.*, Docket No. 17-0583 (issued July 23, 2018).

<sup>7</sup> *O.W.*, Docket No. 17-1881 (issued May 1, 2018).

<sup>8</sup> *V.G.*, *supra* note 6.

## ANALYSIS

The Board finds that appellant has not established that he had any continuing employment-related residuals or disability after October 19, 2015.

Following the Board's September 19, 2017 decision,<sup>9</sup> appellant, through counsel, requested reconsideration and submitted a January 16, 2018 report from Dr. Sullivan. In this report Dr. Sullivan noted appellant's accepted rotator cuff diagnosis, continuing pain complaints, and that appellant had also been diagnosed with CRPS for some time. He then noted that appellant recently had issues "more representative" of a functional neurologic disorder. Dr. Sullivan, however, offered no specific diagnosis of this neurologic disorder and offered no rationalized medical opinion as to how appellant's December 29, 2006 injury led to appellant's current conditions. While the opinion supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, the opinion must be one of reasonable medical certainty and not speculative or equivocal in character. A medical opinion not fortified by medical rationale is of diminished probative value.<sup>10</sup> Moreover, Dr. Sullivan, who had been on one side of the conflict resolved by Dr. Moore, provided no rationale that appellant's current right shoulder pain or unidentified neurological condition were caused by the September 29, 2006 employment injury. The Board has held that reports from a physician who was on one side of a medical conflict are insufficient to overcome the special weight accorded to the impartial medical examiner, or to create a new conflict.<sup>11</sup>

For these reasons, the Board finds that Dr. Sullivan's January 16, 2018 report is insufficient to overcome the special weight of Dr. Moore's opinion to establish that appellant had continuing disability or residuals after October 19, 2015 due to the accepted bilateral shoulder conditions. Appellant, therefore, has not met his burden of proof.

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 appellant has not established continuing employment-related residuals or disability after October 19, 2015.

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<sup>9</sup> *Supra* note 5.

<sup>10</sup> *See B.A.*, Docket No. 17-1471 (issued July 27, 2018).

<sup>11</sup> *I.J.*, 59 ECAB 408 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy 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