

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

A.E., Appellant)	
)	
and)	Docket No. 18-0891
)	Issued: January 22, 2019
U.S. POSTAL SERVICE, VALLEY STREAM)	
POST OFFICE, Valley Stream, NY, Employer)	
)	

Appearances:
Thomas S. Harkins, Esq., for the appellant¹
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 March 20, 2018 appellant, through counsel, filed a timely appeal from an October 6, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.³

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.*

³ The Board notes that, following the October 6, 2017 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.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 7, 2016; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after July 7, 2016 causally related to her June 7, 2012 employment injury.

FACTUAL HISTORY

On June 7, 2012 appellant, then a 46-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she felt a sharp pain in her right shoulder closing the back of her truck while in the performance of duty. She continued to deliver mail on June 7, 2012 with increasing pain. OWCP assigned the claim File No. xxxxxx742 and on July 30, 2012 accepted appellant's claim for right shoulder strain. On July 29, 2013 it subsequently expanded acceptance of the claim to include right shoulder joint derangement, right shoulder adhesive capsulitis, and displacement of cervical disc C5-6. Appellant returned to light-duty work on January 10, 2014 working six hours a day. On November 21, 2015 she accepted a second light-duty position working six hours a day.⁴

In December 24, 2015, February 4, and March 17, 2016 treatment notes, Dr. Eric P. Keefer, a Board-certified orthopedic surgeon, diagnosed right shoulder tendinitis, cervicgia, right carpal tunnel syndrome,⁵ and cervical herniated disc due to the June 7, 2012 employment incident. He indicated that appellant could work with restrictions relative to lifting and use of the upper extremities.

In a letter dated April 1, 2016, OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon, to determine the status of appellant's accepted conditions and disability due to her June 7, 2012 employment injury. In his April 19, 2016 report, Dr. Sultan reviewed the SOAF and discussed appellant's history of injury on June 7, 2012.⁶ He performed a physical examination and found that appellant had no objective findings on physical examination in her cervical spine, right shoulder, or right hand and wrist. Dr. Sultan opined that appellant had no objective findings of neurological impairment although she reported subjective complaints.

⁴ On February 9, 2016 appellant filed another traumatic injury claim for injuries sustained when she slipped in snow on the sidewalk on February 8, 2016 when exiting a building in the performance of duty. OWCP assigned that claim File No. xxxxxx149. By decision dated March 29, 2016, it accepted this claim for contusion of the left knee. On June 8, 2016 OWCP subsequently expanded acceptance of the claim to include complex tear of the lateral meniscus of the left knee. On April 21, 2016 it administratively combined appellant's current case, File No. xxxxxx742, with File No. xxxxxx149, with the former serving as the master file. On August 1, 2016 OWCP entered appellant on the periodic rolls for wage-loss compensation due to her accepted left knee condition in File No. xxxxxx149. On August 15, 2016 appellant underwent left knee arthroscopy and lateral meniscectomy.

⁵ Appellant requested authorization for right carpal tunnel surgical release on August 8 and December 3, 2013. OWCP denied these requests.

⁶ Dr. Sultan had previously performed second opinion evaluations of appellant due to her June 7, 2012 employment injuries on May 30, 2013 and September 23, 2014.

Dr. Sultan found that appellant could work eight hours a day without restrictions. He recommended no further treatment.

On April 28, 2016 Dr. Keefer completed a narrative report and examined appellant due to her neck, shoulder, and right hand pain. He described her neck and right shoulder pain. Dr. Keefer reported that appellant had tenderness in the anterior shoulder and lateral shoulder as well as tenderness and spasm of the trapezius. He also found positive impingement testing, but no scapular winging. Regarding appellant's right hand, Dr. Keefer found positive Tinel's sign and positive Phalen's and Finkelstein tests. He reported decreased sensation in the median nerve distribution. Dr. Keefer's examination of appellant's cervical spine demonstrated bilateral paracervical tenderness, diminished range of motion, and positive right Spurling test. He provided work restrictions and requested physical therapy. Dr. Keefer diagnosed cervical herniated disc, right shoulder tendinitis, and cervical radiculopathy which he attributed to appellant's original June 7, 2012 employment injury of lifting a vehicle door. He opined that appellant's right carpal tunnel syndrome could be the result of the initial incident or that her cervical injury could have led to nerve problems with the carpal tunnel as a double crush injury. Dr. Keefer noted that appellant was not working due to her accepted left knee condition.

In a letter dated May 20, 2016, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Sultan's April 19, 2016 report. It afforded her 30 days for a response if she disagreed with the proposed termination.

Dr. Keefer completed a treatment note on June 2, 2016 and provided findings on physical examination of her neck, right shoulder, and right wrist due to the June 7, 2013 employment injury. He reported positive impingement and Whipple testing in the right shoulder, as well as tenderness and spasm of the trapezius. Dr. Keefer reported decreased sensation in the median nerve distribution of the right hand, positive Tinel's sign, as well as positive Phalen's and Finkelstein's tests. Appellant's neck examination demonstrated bilateral paracervical tenderness on the left and positive right Spurling test. Dr. Keefer diagnosed right shoulder tendinitis, cervical herniated disc, cervical radiculopathy, and right carpal tunnel syndrome. He opined that appellant could return to work with restrictions on lifting and use of the upper extremities.

In a letter dated June 15, 2016, counsel objected to the proposed termination of wage-loss compensation and medical benefits. He contended that there was a conflict of medical opinion evidence between Dr. Keefer and Dr. Sultan.

In a note dated May 16, 2016, Dr. Joseph A. Cardinale, a physician Board-certified in pain management, examined appellant due to neck pain. He diagnosed cervicalgia, herniated cervical disc, and cervical radiculopathy. Dr. Cardinale found that appellant had a positive Spurling test and opined that she was totally disabled.

By decision dated July 7, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that Dr. Sultan's report was entitled to the weight of the medical opinion evidence and established that appellant had no ongoing disability or medical residuals.

In a report dated July 7, 2016, Dr. Keefer examined appellant due to her neck, right shoulder, and right wrist conditions. He reported positive findings on physical examination of appellant's right shoulder, neck, and right hand. Dr. Keefer also continued to support that

appellant could work with restrictions due to cervical radiculopathy, right shoulder tendinitis, right carpal tunnel syndrome, and herniated cervical disc. He repeated his findings, diagnoses, and restrictions on August 10, 2017. On June 16, 2016 Dr. Cardinale repeated his findings and conclusions from May 16, 2016.

Dr. Keefer completed a note on August 18, 2016. He examined appellant's right shoulder and found tenderness in the anterior and lateral regions as well as tenderness and spasm of the trapezius. Dr. Keefer found a partial thickness rotator cuff tear and positive Whipple test. In regard to appellant's right hand, he found positive Tinel's sign, as well as positive Phalen's and Finkelstein's tests. Dr. Keefer also noted decreased sensation in the median nerve distribution. He found bilateral paracervical tenderness on evaluation of appellant's cervical spine, diminished range of motion in all planes, and positive right Spurling test. Dr. Keefer diagnosed right shoulder tendinitis, cervicgia, cervical herniated disc, right carpal tunnel syndrome. He attributed these conditions to appellant's injury from lifting her vehicle door on June 7, 2012.

On November 15, 2016 appellant, through counsel, requested reconsideration of the July 7, 2016 termination decision. He contended that appellant remained disabled and required further medical treatment. Counsel further contended that appellant had sustained additional conditions not accepted by OWCP as a result of her July 7, 2012 employment injury, specifically a herniated cervical disc. Counsel further contended that Dr. Sultan's report created a conflict of medical opinion evidence with those of Dr. Keefer, and required referral to an impartial medical examiner. In support of the request for reconsideration, he submitted an October 18, 2016 report from Dr. Keefer.

In his September 28, 2016 report, amended on October 18, 2016, Dr. Keefer reviewed appellant's history of injury and his treatment of appellant beginning June 9, 2012. He noted that he first found positive Tinel's sign and positive Phalen's test on April 2, 2013. Dr. Keefer diagnosed cervicgia, herniated cervical disc, myalgia, myositis, right shoulder strain, shoulder bursitis, carpal tunnel syndrome, and tendinitis. He provided work restrictions and opined that the injuries to appellant's right shoulder, neck, and wrist were causally related to her injury at work on June 7, 2012.

By decision dated October 6, 2017, OWCP denied modification of the July 7, 2016 termination decision, finding that appellant had not established continuing disability and medical residuals on or after that date.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to FECA, once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁷ OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁸ Its burden of proof includes the necessity of furnishing rationalized

⁷ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁸ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

medical opinion evidence based on a proper factual and medical background.⁹ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁰ 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.¹¹

Section 8123(a) of FECA which 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 (known as a referee physician or impartial medical specialist) who shall make an examination.¹² This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³ When there exists opposing 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.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits because a conflict in the medical opinion evidence had been created between Dr. Keefer and Dr. Sultan, regarding whether appellant's accepted June 7, 2012 employment injuries had resolved.

OWCP accepted appellant's June 7, 2012 claim for right shoulder strain, right shoulder joint derangement, right shoulder adhesive capsulitis, and displacement of cervical disc C5-6. On April 1, 2016 it referred her for a second opinion with Dr. Sultan, who in his April 19, 2016 report found she had no objective physical findings or medical residuals of the accepted conditions. Dr. Sultan found that appellant could return to full duty with no restrictions. OWCP determined that his opinion constituted the weight of the evidence and on July 7, 2016 terminated appellant's entitlement to wage-loss compensation and medical benefits due to the June 7, 2012 employment injury.

Dr. Sultan found that appellant had no disability and medical residuals due to her June 7, 2012 employment injury. In contradistinction, appellant's treating physician, Dr. Keefer submitted a June 2, 2016 report providing positive objective findings on physical examination including positive impingement and Whipple testing as well as spasm of the trapezius in the right

⁹ See *R.P.*, *supra* note 7; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ See *R.P.*, *supra* note 7; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

¹¹ See *R.P.*, *supra* note 7; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *supra* note 10.

¹² 5 U.S.C. § 8123(a); see *R.P.*, *supra* note 7; *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹³ 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

¹⁴ See *R.P.*, *supra* note 7; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

shoulder; in the right wrist positive Tinel's sign and positive Phalen's and Finkelstein tests; as well as positive right Spurling test in the cervical spine. He found that appellant could perform light duty only with restrictions on lifting and use of the upper extremities.

Appellant's treating physician and OWCP's second opinion physician disagreed regarding her ongoing medical conditions and her ability to return to full-duty work. As such, the Board finds that a conflict of medical opinion exists relative to these issues. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.¹⁵ As OWCP failed to resolve the conflict of medical opinion evidence, the Board finds that it failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁶

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss and medical benefits, effective July 7, 2016, due to her accepted June 7, 2012 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 22, 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

¹⁵ *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

¹⁶ In light of the Board's disposition in Issue 1, Issue 2 is moot.