



## **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 5, 2017, as he no longer had disability or residuals due to his accepted conditions; and (2) whether appellant has established continuing employment-related disability after February 5, 2017 due to his accepted lumbar and right shoulder conditions.

## **FACTUAL HISTORY**

On June 26, 2011 appellant, then a 47-year-old program analyst filed an occupational disease claim (Form CA-2) alleging that his preexisting injury<sup>3</sup> was aggravated by the "repetitive motions and simple tasks" performed during his employment. He noted that he first realized that his condition resulted from his federal employment on June 20, 2011. Appellant stopped work on June 20, 2011 and returned to full duty on December 5, 2011.

OWCP accepted appellant's claim for temporary exacerbation of other acquired deformities of other parts of the right limb, resolved to preexisting injury level, and late effect of injury to nerve roots, spinal plexuses, and nerves of the right shoulder and arm, resolved to preexisting injury level. It subsequently accepted that he sustained a recurrence of disability for the period December 13, 2013 to November 10, 2014. Appellant sustained another recurrence of disability on July 27, 2015.

Appellant received medical treatment from Dr. Robert H. Potter, Jr., a family practitioner. In a December 28, 2015 examination report, Dr. Potter noted appellant's complaints of chronic and unremitting back and right shoulder pain that prevented him from "doing anything." He reported examination findings of normal alignment and mobility of the spine. Dr. Potter diagnosed late effect injury of the nerve shoulder and limb, back pain in the thoracic region, limb deformity, and chronic right shoulder pain. He completed a work excuse note, which excused appellant from work indefinitely. Dr. Potter indicated that appellant was "not expected to regain the ability to work in the future."

On March 9, 2016 OWCP referred appellant's case, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon and second opinion examiner, to determine the status of his current residuals and disability due to his accepted conditions. In an April 6, 2016 report, Dr. Langa discussed his medical history and provided physical examination findings regarding his back and right shoulder. She reported winging of the scapula with upper back atrophy, diffuse nonlocalized tenderness with diffuse palpation, and significantly restricted right shoulder range of motion. Dr. Langa diagnosed progressively worsening chronic right shoulder condition with scapular winging/atrophy (long thoracic nerve injury), degenerative joint disease, and significantly restricted range of motion. She determined that appellant was permanently disabled from work, but explained that his inability to

---

<sup>3</sup> The record reveals that in 1990 appellant sustained a serious crush injury to his right side when a beam fell on him while employed by a private employer. He required multiple shoulder surgeries which resulted in nerve damage, paralysis, and a failed major tendon transplant.

work was unrelated to his federal employment duties. Rather, appellant was experiencing a “relentless progression of the underlying preexisting condition.”

In an April 22, 2016 letter, Dr. Potter noted his disagreement with Dr. Langa’s April 6, 2016 second opinion report. He related that appellant had previously been on workers’ compensation for his shoulder problems and had made an effort to return to work. Dr. Potter described that on July 27, 2015 appellant was typing at work when he experienced “spontaneous pain” in his right shoulder. He opined that the injuries appellant suffered at work on July 27, 2015 resulted in his inability to continue to work in his previous capacity.

Dr. Potter further indicated in a June 24, 2016 examination note that appellant had objective medical findings of a winged scapula, muscle atrophy around the shoulder, and pain with range of motion. He reported diagnoses of back pain in the thoracic region, late effect injury of peripheral nerve shoulder girdle and upper limb, and chronic shoulder pain. Dr. Potter explained that appellant had been seen by many specialists who came to the same conclusion that appellant’s conditions resulted in a permanent disability, for which there was no cure. He opined that “this is caused by activity at work and aggravated by activity at work, in fact, any activity involving the right upper extremity.” Dr. Potter related that “any kind of work-related activity would accelerate the pain and disability.” He noted that appellant was unable to return to work.

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Potter, appellant’s treating physician, and Dr. Langa, OWCP’s second-opinion physician, regarding the current status of appellant’s accepted conditions. It referred appellant, along with an updated SOAF, to Dr. Oriente DiTano, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict. The May 31, 2016 SOAF indicated that appellant’s claim had been accepted for temporary exacerbation of preexisting limb acquired deformities of other parts on the right and late effect of injury to nerve roots spinal plexuses and nerves of shoulder and arm on the right. It also described his nonwork-related 1990 crush injury and noted that he sustained recurrences on June 20, 2011, December 13, 2013, and July 27, 2015.

In a July 22, 2016 report, Dr. DiTano indicated that he reviewed appellant’s medical records. He described appellant’s 1990 crush injury and the medical treatment he had received. Dr. DiTano noted that appellant reinjured his right shoulder in the process of doing his job, specifically typing, in 2011, 2012, and 2015. Upon physical examination, he observed significant scapular winging and limited range of motion. Dr. DiTano reported no atrophy, tenderness, crepitus, or instability of the shoulder. He explained that appellant’s June 20, 1990 injury caused a “chronic pathologic condition in [appellant’s] right shoulder” and thoracic nerve, which caused a permanent instability with appellant’s scapulothoracic joint motion and his glenohumeral joint balance. Dr. DiTano indicated that he did not believe that the “mechanism that occurred on June 20, 2011 from sitting at a desk typing would have caused an exacerbation of the shoulder condition, because one can sit at a computer and type with no rotator cuff and with a fused shoulder.” He noted that appellant would continue to have problems with his right shoulder, regardless of whether appellant is at the workplace or not.

In response to OWCP’s questions, Dr. DiTano determined that appellant no longer had residuals of his accepted work-related conditions. He also reported that appellant was partially disabled, but noted that the disability was due to the previous 1990 nonwork-related right shoulder

injury and not the June 20, 2011 work injury. Dr. DiTano explained that the “supposed injury that occurred on June 20, 2011” caused no restrictions because an injury would have occurred whether appellant was working or not. He reported that appellant was permanently disabled from work due to his preexisting shoulder condition and had reached maximum medical improvement. Dr. DiTano completed a work capacity evaluation form with specified restrictions related to his accepted conditions.

On July 26, 2016 OWCP proposed to terminate appellant’s wage-loss compensation and medical benefits. It found that the special weight of medical evidence rested with the July 8, 2016 medical report of Dr. DiTano, the impartial medical examiner, who determined that appellant’s residuals related to his accepted work-related conditions had ceased and that he was no longer disabled from work due to his accepted conditions. Appellant was afforded 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In an August 22, 2016 letter, counsel contended that, while Dr. DiTano determined that appellant could, in theory, sit and type without moving his shoulder, if appellant was in fact moving his shoulder and scapula while typing, then those mechanisms would cause an exacerbation of his underlying condition. He asserted that a determination of whether appellant used his rotator cuff and shoulder while typing must be made.

By letter dated October 20, 2016, OWCP requested clarification from Dr. DiTano. It asked “if [appellant] does move his shoulder, rotator cuff, and scapula when typing, then could this exacerbate his underlying chronic condition?” If Dr. DiTano answered no, he was asked to explain why not. If he answered yes, then he was asked to explain the effects of the assumed exacerbation and whether it was temporary or permanent.

In a November 9, 2016 report, Dr. DiTano opined that typing at a desk did not cause an exacerbation of appellant’s chronic underlying condition. He explained that appellant “potentially could have some motion of his shoulder, but I do n[o]t feel that motion would have exacerbated [appellant’s] chronic underlying condition.” DiTano noted that “a patient can have a fusion of a shoulder where there is absolutely no shoulder motion at all and can still easily type on a computer. If that is the case, then it would tell me that there is very little shoulder motion that is needed in typing....”

In a December 9, 2016 report, Dr. Potter indicated that he treated appellant for complaints of chronic pain and disability from preexisting injuries. He reviewed appellant’s history and provided examination findings of winging of the right scapula and decreased range of motion of the right shoulder. Dr. Potter diagnosed back pain in the thoracic region, hyperlipidemia, chronic right shoulder pain, and late effect of injury to peripheral nerve of shoulder girdle and or upper limb.

By decision dated January 13, 2017, OWCP finalized the termination of appellant’s wage-loss compensation and medical benefits, effective February 5, 2017. It found that the special weight of medical evidence rested with Dr. DiTano, the impartial medical examiner, who had determined, in July 22 and November 9, 2016 reports, that appellant no longer had any residuals or disability causally related to his accepted conditions.

On February 2, 2017 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on July 12, 2017.

In support of his claim appellant submitted additional evidence, including progress notes dated October 21 and November 16, 2015 by Dr. James L. Cosgrove, Board-certified in physical medicine, rehabilitation, and pain medicine. Dr. Cosgrove noted appellant's preexisting crush injury and noted appellant's complaints of increasing pain and numbness and difficulty performing activities of daily living. He reported examination findings of marked winging of the right scapula with limitation of the shoulder on range of motion. Dr. Cosgrove diagnosed winging of the scapula with shoulder subluxation, glenohumeral arthritis, and upper extremity dysfunction.

OWCP also received a July 27, 2017 letter by Dr. Potter who indicated that he had treated appellant for 30 years and was very familiar with appellant's employment history and current work requirements. He noted that he disagreed with Dr. DiTano's assumption that appellant's job duties did not require frequent shoulder motions. Dr. Potter contended that, as appellant's job duties in fact required frequent shoulder motion, those duties led to a permanent aggravation of his preexisting condition. He explained that appellant had undergone several surgeries and completed several rehabilitation programs since his original 1990 injury, but unfortunately "[appellant's] debility progressed." Dr. Potter noted that appellant's work activities increased his pain and prevented him from completing those duties. He recounted that "the activities that are required by his work cause aggravation of his underlying shoulder problems." Dr. Potter further indicated that appellant was "currently unable to perform the duties of his recent employment." He also provided a July 27, 2017 examination note.

By decision dated September 26, 2017, an OWCP hearing representative affirmed the January 13, 2017 termination decision. She found that the new medical evidence submitted was insufficient to overcome the special weight of the medical evidence accorded to Dr. DiTano.

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

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>7</sup> To terminate authorization for medical treatment, OWCP must

---

<sup>4</sup> *M.M.*, Docket No. 17-1264 (issued December 3, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *See R.R.*, Docket No. 19-0173 (issued May 2, 2019); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

<sup>6</sup> *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

<sup>7</sup> *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>8</sup>

Section 8123(a) of FECA 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.<sup>9</sup> In situations 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.<sup>10</sup>

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

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

In a July 22, 2016 report, Dr. DiTano accurately noted appellant's nonwork-related injury in 1990 and related that appellant reinjured his right shoulder at work in 2011, 2012, and 2015. He provided examination findings. Dr. DiTano opined that the mechanism that occurred on June 20, 2011 from sitting at a desk typing would not have caused an exacerbation of the shoulder condition. He further opined that the "supposed injury that occurred on June 20, 2011" caused no restrictions.

The May 31, 2016 SOAF provided to Dr. DiTano properly indicated that OWCP had accepted appellant's June 20, 2011 claim for temporary exacerbation of other acquired deformities of other parts of the right limb and late effect of injury to nerve roots spinal plexuses and nerves of the right shoulder and arm. However, Dr. DiTano did not follow this acceptance in rendering his medical opinion.

The Board has held that the report of an impartial medical examiner who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is defective and insufficient to resolve the existing conflict of medical opinion evidence.<sup>11</sup>

Dr. DiTano's report is, therefore, not entitled to the special weight as a referee physician and is insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits. Accordingly, the Board finds that OWCP erred by terminating appellant's wage-loss compensation and medical benefits, effective February 5, 2017, based on the impartial medical report of Dr. DiTano.

---

<sup>8</sup> *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

<sup>9</sup> 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

<sup>10</sup> *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

<sup>11</sup> *See V.C.*, Docket No. 14-1912 (issued September 22, 2015).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 26, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2019  
Washington, D.C.

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board