

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

A.C., Appellant	)	
	)	
and	)	<b>Docket No. 19-1522</b>
	)	<b>Issued: July 27, 2020</b>
DEPARTMENT OF HOMELAND SECURITY,	)	
TRANSPORTATION SECURITY	)	
ADMINISTRATION, Fort Lauderdale, FL,	)	
Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Capp P. Taylor, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 9, 2019 appellant, through counsel, filed a timely appeal from a June 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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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> The Board notes that, following the June 10, 2019 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 has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 25, 2018, as he no longer had residuals or disability causally related to his accepted January 6, 2017 employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals causally related to his accepted January 6, 2017 employment injury on or after June 25, 2018.

## **FACTUAL HISTORY**

On February 22, 2017 appellant, then a 56-year-old Transportation Security Agency (TSA) manager, filed a traumatic injury claim (Form CA-1) alleging that on January 6, 2017 he injured his right shoulder and arm when he extended his right arm to assist a child from being trampled by a crowd while in the performance of duty. OWCP accepted his claim for right shoulder bursitis, right rotator cuff sprain, right upper arm strain, right shoulder sprain, and right shoulder fascia and tendon strain. On April 4, 2017 appellant stopped work. OWCP paid wage-loss compensation benefits and placed him on the periodic rolls, effective April 30, 2017.

Appellant underwent authorized right shoulder arthroscopic surgeries on April 13, 2017 and January 11, 2018. The operative reports noted a preoperative diagnosis of right shoulder internal derangement.

On January 5, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second-opinion evaluation regarding the status of appellant's accepted June 25, 2018 employment injury. The SOAF noted that appellant's duties as a TSA manager included lifting and carrying passenger checkpoint baggage weighing up to 50 pounds without assistance, or more than 50 pounds with assistance, using hands to search passengers checked baggage, pushing/pulling baggage, squatting, bending, stooping, and reaching overhead to conduct pat-downs, standing continuously for up to four hours, and walking up to three miles each shift.

In a January 22, 2018 report, Dr. Millheiser noted his review of the SOAF and the medical evidence of record. He described the June 25, 2018 employment injury and noted appellant's accepted right shoulder and upper arm conditions. Dr. Millheiser related appellant's current complaints of right shoulder, back, and left ankle pain. He indicated that during his examination he did not remove appellant's right shoulder from the shoulder immobilizer because he was one week postsurgery. Upon physical examination, Dr. Millheiser noted some mild tenderness about the right shoulder and no clinical signs of infection. He diagnosed supraspinatus tear of the right shoulder, post-rotator cuff repair, and post-labral debridement. Dr. Millheiser reported that appellant's right shoulder would need to be reevaluated once therapy was completed. He opined that appellant was unable to work as appellant had no use of his right upper extremity and completed a work capacity evaluation form (OWCP-5c), which indicated that he was unable to work.

According to a February 23, 2018 telephone call memorandum (Form CA-110), OWCP requested that the employing establishment provide a copy of appellant's position description. On February 24, 2018 OWCP received a job analysis form, which listed the duties and responsibilities for a TSA manager.

Appellant submitted a March 21, 2018 report from Dr. Jesse Z. Shaw, an osteopathic physician who specializes in orthopedic surgery, who recounted appellant's complaints of right shoulder pain. Upon examination of appellant's right shoulder, Dr. Shaw observed mild diffuse swelling and tenderness and stiffness. He diagnosed right shoulder pain, right rotator cuff sprain, right shoulder bursitis, right shoulder impingement syndrome, and right upper arm strain.

On March 28, 2018 OWCP requested clarification from Dr. Millheiser regarding appellant's ability to work. It explained that, according to the updated position description, received on February 24, 2018, the position of TSA manager was primarily an administrative/sedentary position with no physical requirements. OWCP requested that Dr. Millheiser review the current position description and opine as to whether appellant was capable to perform the duties of a TSA manager. In an April 18, 2018 supplemental report, Dr. Millheiser indicated that the employing establishment had informed him that the position of a TSA manager was primarily an administrative/sedentary position with no physical requirements. He concluded that, based on a review of the current position description, appellant could perform the duties of his usual position, which was sedentary administrative work.

On May 10, 2018 OWCP proposed to terminate appellant's wage-loss compensation benefits because he was no longer disabled from work as a result of the accepted January 6, 2017 employment injury. It found that the weight of the medical evidence rested with the January 22 and April 18, 2018 reports of Dr. Millheiser, who found that appellant was able to perform his usual work duties. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

Appellant continued to receive medical treatment from Dr. Shaw and submitted examination reports dated May 2 and June 6, 2018. Dr. Shaw provided examination findings of appellant's right shoulder and diagnosed right shoulder pain, right rotator cuff sprain, right upper arm strain, right shoulder bursitis, and right shoulder impingement syndrome. Appellant also submitted a report dated March 6, 2018, and physical therapy treatment records dated April 11 to May 30, 2018.

By decision dated June 25, 2018, OWCP finalized the termination of appellant's wage-loss compensation benefits only, effective that date.<sup>3</sup> It found that the weight of medical evidence rested with Dr. Millheiser, OWCP's second opinion examiner, who concluded in his January 22 and April 18, 2018 reports that appellant was no longer disabled due to his accepted January 6, 2017 employment injury.

Subsequent to the decision, OWCP received a July 14, 2018 letter from counsel who alleged that Dr. Millheiser did not have the benefit of a recent MRI scan, which showed the need for additional surgery. Counsel also asserted that Dr. Millheiser failed to consider the repetitive, if not constant, use of the right upper extremity which was required to fulfill the administrative duties of appellant's job as a TSA manager.

Appellant submitted a July 4, 2018 right shoulder magnetic resonance imaging (MRI) scan report, which revealed moderate tendinopathy/tendinitis of the subscapularis tendon and full-thickness re-tear and retraction of the supraspinatus tendon. OWCP also received a mental

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<sup>3</sup> OWCP informed appellant that this decision did not terminate his medical benefits.

impairment questionnaire from Dr. Maximiliano Cardozo, a psychologist, who noted diagnoses of PTSD, insomnia, and major depressive disorder. He also completed psychiatric evaluation records dated February 13, 2018 and January 13, 2019.

In a July 11, 2018 examination report, Dr. Shaw noted that he evaluated appellant for follow-up of a work-related right shoulder injury. He conducted an examination of appellant's right shoulder and reiterated his previous diagnoses. Dr. Shaw completed a state workers' compensation form report and checked a box indicating that appellant's functional limitation and restrictions were of such severity that appellant was unable to perform activities, even at a sedentary level.

Appellant continued to receive medical treatment from Dr. Shaw and provided reports dated December 5, 2018 and January 14 and May 29, 2019. Dr. Shaw reiterated his examination findings and diagnoses. He also indicated that appellant complained of left ankle and low back pain that affected his activities for daily living. Dr. Shaw reported additional diagnoses of left ankle pain and low back pain.

On March 29, 2019 appellant, through counsel, requested reconsideration. Counsel argued that Dr. Millheiser's supplemental report was of limited probative value since there was insufficient evidence to demonstrate that he was aware of the physical requirements of the TSA manager position. He contended that appellant's position as a TSA manager required repetitive movements of his right upper extremity in performing his administrative functions.

In a March 29, 2019 statement, appellant alleged that his position as a TSA manager required extensive use of his right arm. He explained that approximately 50 percent of his time was spent writing notes, typing or keying, and using a laptop to review closed-circuit television (CCTV) and reports. Appellant indicated that approximately 40 percent of his time was spent supporting the security team in expediting passengers, including lifting, grabbing, and pushing luggage.

By decision dated June 10, 2019, OWCP denied modification of the June 25, 2018 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.<sup>4</sup> It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

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<sup>4</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>6</sup> *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

## ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 25, 2018.

The Board finds that Dr. Millheiser's opinion was conclusory in nature and did not contain sufficient medical reasoning to establish that appellant was no longer disabled due to his accepted January 6, 2017 employment injury.<sup>7</sup> The factors that determine the probative value of medical evidence include the opportunity for and thoroughness of examination performed by the physician, the accuracy or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed by the physician on the issues addressed to him by OWCP.<sup>8</sup>

Although Dr. Millheiser opined in his April 18, 2018 supplemental report that appellant could perform the duties of his date-of-injury job, his opinion was not based on a thorough physical examination. In his January 25, 2018 report, he indicated that he did not remove appellant's shoulder from the immobilizer because appellant was one week postsurgery, and that appellant's right shoulder would need to be reevaluated once therapy was completed. Furthermore, in his April 18, 2018 supplemental report, Dr. Millheiser did not provide any examination findings nor refer to any objective evidence to explain the change in his opinion regarding appellant's ability to work. He concluded that, based on a review of the case file and current position description, appellant was able to perform the duties of his usual position. The Board finds that Dr. Millheiser's opinion was essentially based on a review of appellant's work duties and not a thorough examination. As Dr. Millheiser did not conduct a thorough examination for his January 22 or April 18, 2018 reports, his opinion is of diminished probative to establish termination of appellant's wage-loss compensation benefits.<sup>9</sup>

In addition, it is unclear from the record whether Dr. Millheiser's opinion was based on an accurate history of appellant's job duties. It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate history are of limited probative value.<sup>10</sup> In his April 18, 2018 supplemental report, Dr. Millheiser explained that he had received clarification by the employing establishment that the position of a TSA manager was primarily an administrative/sedentary position with no physical requirements. However, the Board notes that the only job description provided by the employing establishment was received on February 24, 2018. While the position description received on February 24, 2018 described appellant's duties and responsibilities as a TSA manager, it did not list the specific physical requirements of his position. It did not address whether the position was primarily a sedentary position or whether he would be required to repetitively use his right arm. Furthermore, the January 4, 2018 SOAF specifically noted that appellant's job duties as a TSA manager required repetitive use of his right arm. The Board

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<sup>7</sup> See *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

<sup>8</sup> *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *James T. Johnson*, 39 ECAB 1252 (1988).

<sup>9</sup> See *B.J.*, Docket No. 15-1961 (issued September 7, 2016); *V.G.*, 59 ECAB 635 (2008).

<sup>10</sup> *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

therefore finds that it is unclear from the record which job description Dr. Millheiser reviewed and thus the Board cannot determine whether appellant was able to return to his date-of-injury-position. As such, OWCP has not met its burden of proof to establish that appellant was no longer disabled from his date-of-injury position.<sup>11</sup>

The Board therefore finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 25, 2018, as the medical evidence of record is insufficient to establish that he no longer has residuals or disability causally related to his accepted January 6, 2017 employment injury.<sup>12</sup>

**CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 25, 2018.<sup>13</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 27, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> See *D.A.*, Docket No. 18-0476 (issued October 10, 2018).

<sup>12</sup> See *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>13</sup> In light of the disposition of Issue 1, Issue 2 is rendered moot.