

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

_____)	
B.W., Appellant)	
)	
and)	Docket No. 19-1023
)	Issued: June 16, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Lithia Springs, GA, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 10, 2019 appellant, through counsel, filed a timely appeal from a March 8, 2019 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 over the merits of this case.

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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 18, 2018, as she no longer had residuals or disability causally related to her accepted April 19, 2011 employment injury.

FACTUAL HISTORY

On April 21, 2011 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 19, 2011 she injured the right side of her neck when a car backed into the side of her vehicle while in the performance of duty. She stopped work on April 19, 2011 and returned to work on June 27, 2011 for four hours per day with restrictions. Appellant stopped work again on July 5, 2011 and did not return. OWCP accepted the claim for neck sprain. It subsequently expanded acceptance of the claim to include right brachial neuritis or radiculitis and right bicipital tenosynovitis. OWCP paid appellant wage-loss compensation on the periodic rolls beginning September 25, 2011.

By decision dated April 26, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 5, 2013. By decision dated October 30, 2013, an OWCP hearing representative affirmed the April 26, 2013 termination decision. She, however, remanded the case after finding a conflict in medical opinion evidence now existed between appellant's treating physician, Dr. Gregory S. Slappey, and a second opinion physician, Dr. Alexander N. Doman, both Board-certified orthopedic surgeons, on the issue of continuing residuals or disability. Following further development, OWCP reinstated appellant's compensation benefits.³

In letters dated August 11 and October 4, 2017, OWCP advised appellant that it had not received a medical report from her physicians within the past year. It requested that she submit a detailed report from her treating physician addressing whether she had continued objective findings, residuals of her employment-related condition, and her ability to work with or without restrictions.

In a report dated September 1, 2017, Dr. Douglas H. Murray, a Board-certified orthopedic surgeon, discussed appellant's complaints of right shoulder pain. He noted that the cause of her shoulder pain was multifactorial as she had biceps tendon subluxation, impingement, acromioclavicular (AC) arthritis, and secondary scapulothoracic pain. Dr. Murray noted that appellant had been diagnosed with rheumatoid arthritis since he last examined her on December 11, 2015. On examination of the right shoulder he found full shoulder motion with "a significant hitch and pain," tenderness of the bicep with subluxation of the tendon on specific maneuvers, intact, but painful cuff strength, positive impingement signs, and scapulothoracic pain. Dr. Murray found that appellant had right shoulder pain with a biceps tendon subluxation, partial thickness cuff tearing, impingement, and AC arthropathy with probable secondary scapula winging. He diagnosed shoulder pain, bicipital tenosynovitis, and subacromial impingement. Dr. Murray opined that appellant's diagnoses appeared related to her employment injury based on when they began and their failure to improve with treatment since that time. He noted that she had

³ By decision dated April 21, 2014, OWCP denied authorization for right shoulder arthroscopic surgery. On January 13, 2015 an OWCP hearing representative affirmed the April 21, 2014 decision.

periscapular pain, but that the shoulder condition seemed to cause the periscapular symptoms. Dr. Murray recommended surgery for biceps tendon management as well as a decompression, distal clavicle excision, and possible cuff treatment. He provided work restrictions, including no overhead work or lifting over 10 pounds.

On March 22, 2018 OWCP referred appellant, together with a statement of accepted facts, the medical record, and a list of questions, to Dr. Howard B. Krone, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she continued to have residuals and disability due to the accepted employment injury.

In an April 19, 2018 report, Dr. Krone reviewed the history of injury and the medical evidence of record. On examination he found no tenderness on palpation of the cervical spine or trapezius. Dr. Krone noted that appellant's motor examination was difficult to perform, as she pulled away with any movement of the right shoulder. On examination of the right shoulder he observed global tenderness on palpation without specific tenderness over the AC joint, bicipital tendon, and glenohumeral joint. Dr. Krone noted a sound with movement, which he attributed to scapulothoracic bursitis. He observed limited range of motion of the shoulders. Dr. Krone noted that appellant had problems with her right shoulder and neck that preexisted her employment injury. He advised that her neck sprain would have resolved within four weeks. Dr. Krone indicated that a physician had initially diagnosed brachial neuritis or radiculitis, which had not been demonstrated by a magnetic resonance imaging (MRI) scan, and right bicipital tenosynovitis. He related that any bicipital tendon tenderness should have resolved with injections and over time and found no evidence supporting a diagnosis of bicipital subluxation. Dr. Krone opined that appellant had no residuals of her employment-related conditions, noting that the findings on physical examinations and on functional capacity evaluations were inconsistent. He related, "The initial injuries have resolved and there are no residual injuries. [Appellant's] subjective complaints have not been borne out by imaging, history, or physical examination." Dr. Krone found that she could perform her usual employment duties. He advised that appellant had nonemployment-related rheumatoid arthritis, which would preclude her return to employment.

On July 3, 2018 OWCP provided appellant with a notice of proposed termination of her wage-loss compensation and medical benefits because the medical evidence of record established that she no longer had any residuals or continuing disability from her work injury. It determined that the weight of the medical evidence rested with the April 19, 2018 report of Dr. Krone. OWCP afforded appellant 30 days to submit additional evidence or argument. No additional evidence or argument was received within this time frame.

By decision dated August 23, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits effective August 18, 2018. It found that the opinion of Dr. Krone constituted the weight of the medical evidence and established that she had no further residuals or disability causally related to her accepted employment injury.⁴

⁴ The August 23, 2018 termination decision superseded an August 14, 2018 termination decision. OWCP paid appellant compensation through August 18, 2018.

On August 29, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative regarding the August 23, 2018 termination decision.

A telephonic hearing was held on January 9, 2019. The record was held open for 30 days for the submission of additional medical evidence. No additional medical evidence was received within this time frame.

By decision dated March 8, 2019, an OWCP hearing representative affirmed the August 23, 2018 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ 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.⁸

Section 8123(a) of FECA provides, in pertinent part, 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.⁹

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits as there is an unresolved conflict in the medical evidence between appellant's treating physician, Dr. Murray, and the second opinion physician, Dr. Krone.¹⁰

⁵ *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *L.H.*, Docket No. 17-1859 (issued May 10, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁶ *M.C.*, *id.*; see *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *M.C.*, Docket No. 18-1199 (issued April 5, 2019); see *L.H.*, *supra* note 5; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *M.C.*, *id.*; see *L.H.*, *supra* note 5; *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁹ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁰ See *L.H.*, *supra* note 5.

In a report dated September 1, 2017, Dr. Murray evaluated appellant for complaints of right shoulder pain. On examination of the right shoulder he noted full motion with pain and a significant hitch, tenderness of the bicep with subluxation of the tendon on specific maneuvers, intact, but painful cuff strength, positive impingement signs, and scapulothoracic pain. Dr. Murray diagnosed right shoulder pain, bicipital tenosynovitis of the right shoulder, and subacromial impingement of the right shoulder. He further noted that appellant had a biceps tendon subluxation, partial thickness cuff tearing, impingement, and AC arthropathy with probable secondary scapula winging. Dr. Murray opined that her diagnoses were causally related to the employment-related motor vehicle accident of April 19, 2011 given when her problems began and as she had been treated since that time without improvement. He provided work restrictions.

In an April 19, 2018 report, Dr. Krone opined that appellant had no residuals specifically attributable to the work-related conditions, noting that examinations by multiple physicians had yielded inconsistent findings on physical examination. He explained that appellant's neck sprain resolved in four weeks in his experience with conservative treatment, that her right brachial neuritis or radiculitis had never been demonstrated by a MRI scan revealing nerve root involvement, and that she received no apparent local injury to the right shoulder that would explain bicipital subluxation. Dr. Krone observed that appellant's subjective complaints had not been borne out by imaging, history, or physical examination. He found that she was able to perform her date-of-injury position as a rural carrier, but also advised that her symptoms of nonwork-related rheumatoid arthritis precluded her return to productive and suitable employment.

Accordingly, at the time OWCP terminated appellant's compensation on August 23, 2018, there remained an unresolved conflict in the medical opinion evidence as to whether appellant had residuals and disability from the accepted April 19, 2011 employment conditions.¹¹ Dr. Krone concluded that she had no residuals or disability and that the accepted conditions had resolved, or were misdiagnosed. Dr. Murray, in his September 1, 2017 report, discussed appellant's continuing symptomatology, including for the accepted condition of bicipital tenosynovitis, and opined that she continued to have employment-related residuals and disability.

It is well established that when there exists opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹² OWCP should have properly resolved the conflict prior to termination of compensation.¹³ As OWCP failed to resolve the conflicting medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate benefits.¹⁴

¹¹ See *J.S.*, Docket No. 15-0872 (issued September 28, 2016).

¹² *Supra* note 10.

¹³ *L.H.*, *supra* note 5; *R.R.*, Docket No. 15-0380 (issued April 10, 2015); *S.J.*, Docket No. 14-1821 (issued January 23, 2015).

¹⁴ See *J.S.*, *supra* note 11; *V.Y.*, Docket No. 14-0828 (issued November 14, 2014).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 18, 2018, as she no longer had residuals or disability causally related to her April 19, 2011 accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 16, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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