

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include the additional conditions as causally related to her accepted November 22, 2016 employment injury; (2) whether OWCP abused its discretion by denying authorization for left shoulder surgery; (3) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 6, 2018, as she no longer had residuals or disability causally related to the accepted November 22, 2016 employment injury; and (4) whether appellant has met her burden of proof to establish continuing employment-related residuals or disability after June 6, 2018, causally related to the accepted November 22, 2016 employment injury.

FACTUAL HISTORY

On November 22, 2016 appellant, then a 57-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she was involved in a motor vehicle accident and injured her wrists and sustained headaches while in the performance of duty.⁴ On December 27, 2016 OWCP accepted the claim for bilateral wrist sprains, sprain of the left shoulder, and sprains of the cervical, thoracic, and lumbar regions. Appellant did not immediately stop work. OWCP paid her wage-loss compensation on the supplemental rolls from January 17 to June 24, 2017 and placed her on the periodic rolls from June 25, 2017 to June 5, 2018.

Appellant treated with Dr. Laura E. Ross, a Board-certified orthopedist, from February 24 to August 11, 2017, for injuries sustained in a motor vehicle accident at work. Dr. Ross diagnosed cervical, thoracic, and lumbar sprain and strain; bilateral shoulder pain; bilateral wrist pain; and left scapular pain. She opined that appellant was disabled from work. In duty status reports (CA-17) dated February 16 to October 25, 2017, Dr. Ross diagnosed bilateral hip pain and bursitis and advised that appellant continued to be disabled from work.

A magnetic resonance imaging (MRI) scan of the cervical spine dated May 3, 2017 revealed multilevel cervical spondylosis, narrowing of neural foramen at C5-C6, and disc protrusion at C6-C7. On June 8, 2017 appellant underwent a thoracic spine, lumbar spine, and left shoulder MRI scans. The MRI scan of the thoracic spine revealed disc bulges at C5-C6, C6-C7, and T10-T11. The MRI scan of the left shoulder was normal and the MRI scan of the lumbar spine revealed disc bulges at L4-L5 and L5-S1 and neural foraminal narrowing at L4-L5 and L5-S1.

Appellant was treated by Dr. Vannette Perkins, a Board-certified anesthesiologist, who performed epidural steroid injections on August 30 and September 12, 2017. Dr. Perkins diagnosed lumbar radiculopathy at L5-S1.

A left shoulder arthrogram, performed on October 19, 2017, revealed a large tear of the anterior labrum and small tear of the posterior superior labrum. An electromyogram (EMG), dated November 6, 2017, revealed no abnormalities.

⁴ In response to OWCP's development letter, on December 15, 2016, appellant reported driving her postal truck when she heard a "pop" and lost control of the steering wheel and brakes, striking a fire hydrant and shrubs as her truck went down an embankment.

Dr. Ross treated appellant in follow up from October 25 to December 1, 2017 and diagnosed multilevel cervical, thoracic, and lumbar disc protrusions, left shoulder impingement syndrome with acromioclavicular (AC) joint arthrosis and labral tear, probable labral tear of the right shoulder with impingement, bilateral wrist contusions with possible carpal tunnel syndrome (CTS), and left lower extremity radiculitis. She indicated that appellant failed an adequate course of conservative treatment for the left shoulder and recommended arthroscopic surgery, labral repair, and arthroscopic subacromial decompression. In duty status reports (CA-17) dated October 25 and December 1, 2017, Dr. Ross advised that appellant remained disabled from work.

On December 27, 2017 Dr. Ross requested authorization to perform left shoulder arthroscopy.

On January 3, 2018 OWCP notified appellant that her request for authorization of the left shoulder arthroscopic surgery could not be approved. It indicated that the evidence was insufficient to authorize the proposed surgery, because the requested treatment did not appear to be medically necessary for and causally related to the accepted conditions.

In duty status reports (Form CA-17) dated January 12 and February 23, 2018, Dr. Ross diagnosed bilateral sprain of the cervical, thoracic, and lumbar spine and advised that appellant remained disabled from work.

On February 1, 2018 OWCP referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination. It requested his opinion on appellant's employment-related conditions, disability and whether she continued to suffer from residuals of her work-related injury, whether she was capable of returning to gainful employment, and whether the proposed left shoulder arthroscopic surgery was medically necessary.

In a February 16, 2018 report, Dr. Askin described appellant's November 22, 2016 employment injury, noting that there was a defect in the vehicle she was operating and she hit a fire hydrant before proceeding down an embankment. He recounted her medical history, reviewed diagnostic reports, and provided findings on physical examination. Dr. Askin diagnosed bilateral wrist sprain, left shoulder sprain, and cervical, thoracic, and lumbar sprains. He noted that appellant had age-appropriate degenerative changes without objectively determinable lingering effects of any of the accepted conditions. Dr. Askin concluded that the accepted conditions were totally resolved. He noted that appellant was diagnosed with multilevel cervical, thoracic, and lumbar disc protrusions, left shoulder impingement syndrome with AC arthrosis, left shoulder labral tear, probable right shoulder labral tear with impingement syndrome, bilateral wrist contusions, possible CTS, and left shoulder radiculitis. Dr. Askin opined that these diagnosed conditions were not considered to be related to, or a consequence of, the motor vehicle incident of November 22, 2016, but were age-appropriate imperfections for someone of appellant's age. He noted the labral tears detected by prior MRI scan were age-appropriate and accrued spontaneously independent of the accident described. Dr. Askin opined that there was no traumatically-induced imperfections evidenced by the appellant for which surgical treatment would be effective and the proposed surgical treatments were not medically reasonable or necessary services "for the reported injury." He explained, "In fact, surgery would be an injury that would likely cause unneeded harm to her." Dr. Askin concluded that no further medical treatment was necessary and that appellant could return to her date-of-injury position.

In a letter dated March 12, 2018, OWCP advised appellant that the evidence submitted was insufficient to establish that she sustained additional conditions causally related to the November 22, 2016 employment injury. It requested that she submit additional medical evidence to establish additional diagnosed conditions causally related to the November 22, 2016 employment injury.

In a February 23, 2018 progress report, Dr. Ross noted that appellant experienced minimal relief with physical therapy and again recommended that appellant undergo the proposed left shoulder surgery. She noted that appellant remained off work. A Form CA-17 report, dated March 16, 2018, diagnosed bilateral shoulder pain, cervical, thoracic, and lumbar spasms and noted that appellant could return to full-time light-duty work.

By decision dated April 2, 2018, OWCP denied authorization for the left shoulder arthroscopic surgery. It found that the weight of the medical opinion evidence rested with Dr. Askin, who concluded that the requested treatment was not medically necessary for appellant's accepted employment injury.

On March 16, 2018 Dr. Ross further evaluated appellant and noted complaints of constant pain in her knees and shoulders. She recommended a left shoulder arthroscopy and opined that this procedure was related to her work injury.

By decision dated April 13, 2018, OWCP denied expansion of the acceptance of appellant's claim, finding that the medical evidence of record was insufficient to establish that the additional conditions were causally related to the accepted November 22, 2016 employment injury. It noted that the second opinion report of Dr. Askin established that appellant had not developed multilevel cervical, thoracic, and lumbar disc protrusions, left shoulder impingement syndrome with AC arthrosis, left shoulder labral tear, probable right shoulder labral tear with impingement syndrome, bilateral wrist contusions, possible CTS, and left lower extremity radiculopathy as a consequence of her accepted injury.

On May 1, 2018 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits as she no longer had disability or residuals causally related to her accepted contusion of the sprain of the bilateral wrists, sprain of the left shoulder, and sprain of the cervical, thoracic, and lumbar regions. It found, based on Dr. Askin's report, that she had no current disability and no medical residuals requiring further treatment. OWCP allowed appellant 30 days to respond to the proposal.

On April 19 and May 18, 2018, Dr. Ross opined that the proposed surgery was causally related to the accepted employment injury and medically necessary. In letters of medical necessity dated May 3 and 10, 2018, she requested authorization for pain treatment.

On May 3, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative with respect to the April 2, 2018 decision denying her request for arthroscopic surgery of the left shoulder.

In a report dated May 10, 2018, Dr. Ross reviewed Dr. Askin's report and disagreed with his observations and conclusions. She opined that the labral tear was traumatically induced by the November 22, 2016 accident and that therefore the acceptance of appellant's claim should be

expanded to include impingement syndrome and labral tear of the left shoulder. With regard to Dr. Askin's opinion that tears of the labrum noted on appellant's MRI scan were ordinarily incidental findings, Dr. Ross agreed that labrum tears could be degenerative in nature, but stated that this was not ordinarily the case, especially following a traumatic motor vehicle accident like appellant had experienced on November 22, 2016. Dr. Ross disagreed with Dr. Askin's statement that there was no traumatically-induced imperfection for which surgical treatment would be effective. She concluded that appellant sustained injuries to her left shoulder were a direct result of the work accident. Dr. Ross considered appellant's objective medical findings, the history of her injury, her consistent and progressive symptoms, and failure to positively respond to conservative treatment and firmly concluded that the labral tear was traumatically induced by the accident on November 22, 2016. As such, she opined that surgical intervention for the left shoulder was medically necessary.

In response to the proposed notice of termination, on May 21, 2018 counsel asserted that Dr. Askin's report was not well reasoned and failed to provide medical rationale to support his conclusion that appellant's left shoulder condition was related to the aging process. He further asserted that there was a conflict of opinion between Dr. Askin and Dr. Ross regarding whether the labral tear was related to the motor vehicle accident and whether surgery was warranted.

By decision dated June 1, 2018, OWCP denied appellant's request for an oral hearing. It found that her request was not made within 30 days of OWCP's April 2, 2018 decision. As such, appellant was not entitled to an oral hearing or a review of the written record as a matter of right and determined that the case could equally be addressed by requesting reconsideration.

By decision dated June 6, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day.

On June 11, 2018 appellant, through counsel, requested an oral hearing, with regard to the June 6, 2018 decision, before an OWCP hearing representative. The hearing was held on November 29, 2018.

On June 13, 2018 appellant, through counsel, requested reconsideration of the April 2, 2018 decision which denied left shoulder surgery.

By decision dated September 11, 2018, OWCP denied modification of the decisions dated April 2 and 13, 2018.⁵

By decision dated February 13, 2019, an OWCP hearing representative affirmed the decision dated June 6, 2018, terminating appellant's wage-loss compensation and medical benefits.

OWCP received an operative report from Dr. Ross dated January 2, 2019, who performed arthroscopic left subacromial decompression with debridement of grade 3 labral tear and partial

⁵ Although the record does not contain a request for reconsideration of the April 13, 2018 decision, OWCP addressed both decisions and issues in its September 11, 2018 decision.

undersurface rotator cuff tear. She diagnosed impingement syndrome of the left shoulder with labral tear.

On March 27, 2019 appellant, through counsel, requested reconsideration of the decision dated September 11, 2018.

By decision dated July 16, 2019, OWCP denied modification of the decision dated September 11, 2018.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁶

To establish causal relationship, the employee must submit rationalized medical opinion evidence.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.⁸ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁹

Section 8123(a) of FECA provides, in pertinent part: "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."¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds this case not in posture for decision.

OWCP initially accepted that appellant sustained a sprain of the left and right wrists, sprain of the left shoulder, and sprain of the cervical, thoracic, and lumbar regions causally related to a November 22, 2016 employment injury.

⁶ See *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ See *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁸ See *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

OWCP referred appellant to Dr. Stanley Askin for a second opinion examination and opinion on appellant's employment-related conditions, disability, and request for left shoulder arthroscopic surgery. It specifically requested that Dr. Askin determine whether her claim should be expanded to include other diagnoses, whether appellant continued to suffer from residuals of her work-related injury, the need for surgery or further treatment, and whether she was capable of returning to gainful employment.

In his report dated February 16, 2018, Dr. Askin diagnosed bilateral wrist sprain, left shoulder sprain, and cervical, thoracic, and lumbar sprains, all totally resolved. He noted that appellant had age-appropriate degenerative changes without objectively determinable lingering effects of any of the accepted conditions. Dr. Askin noted that she was diagnosed with multilevel cervical, thoracic, and lumbar disc protrusions, left shoulder impingement syndrome with AC arthrosis, left shoulder labral tear, probable right shoulder labral tear with impingement syndrome, bilateral wrist contusions, possible CTS, and left shoulder radiculitis; however, these diagnosed conditions were not considered to be related or a consequence to the motor vehicle incident of November 22, 2016, but were age-appropriate imperfections for someone of appellant's age. He noted that labral tears detected by appellant's prior MRI scan were age-appropriate and accrued spontaneously independent of the accident described and opined that there was no traumatically-induced condition for which surgical treatment would be effective. Dr. Askin found no objective determinable findings that precluded her from returning to work without restrictions.

In a report dated May 10, 2018, Dr. Ross reviewed Dr. Askin's report and disagreed with his observations and conclusions. She opined that the labral tear was traumatically induced by the November 22, 2016 accident, and appellant's claim should be expanded to include impingement syndrome and labral tear of the left shoulder. Dr. Ross agreed that labrum tears could be degenerative in nature; however, she did not think this was ordinarily the case especially following a traumatic motor vehicle accident like appellant experienced on November 22, 2016. She further disagreed with Dr. Askin's opinion that there was no traumatically-induced imperfection for which surgical treatment would be effective. Dr. Ross asserted that appellant sustained injuries to her left shoulder as a direct result of the work accident. She considered appellant's objective medical findings, the history of her injury, her consistent and progressive symptoms and failure to positively respond to conservative treatment and firmly concluded that the labral tear was traumatically induced by the accident on November 22, 2016. As such, Dr. Ross opined that surgical intervention for the left shoulder was medically necessary.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.¹² The Board finds that a conflict remains in the medical opinions between Dr. Askin and Dr. Ross regarding whether the acceptance of appellant's claim should be expanded to include additional conditions causally related to the accepted November 22, 2016 employment injury.¹³

¹² See *C.S.*, Docket No. 19-0731 (issued August 22, 2019).

¹³ *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

The Board finds that, prior to determining whether OWCP abused its discretion by denying authorization for left shoulder surgery, the issue of whether appellant's claim should be expanded to include additional conditions must first be resolved.

The Board further finds that the termination of appellant's wage-loss compensation and medical benefits must be reversed as it was premature to address whether OWCP had met its burden of proof to terminate her wage-loss compensation and medical benefits, effective June 6, 2018, because she no longer had residuals or disability causally related to the accepted November 22, 2016 employment injury.

Therefore, the case must be remanded to OWCP for referral of appellant to an impartial medical examiner for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).¹⁴ After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision. The Board further finds that the termination of appellant's wage-loss compensation and medical benefits is reversed.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2019 decision of the Office of Workers' Compensation Programs is reversed.

IT IS FURTHER ORDERED THAT the July 16, 2019 decision is set aside and the case is remanded for further development consistent with the decision of the Board.

Issued: November 12, 2020
Washington, DC

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

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

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

¹⁴ *Id.*