

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, FRED JOHN POST
OFFICE, Milwaukee, WI, Employer**

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**Docket No. 20-0134
Issued: October 8, 2021**

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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 22, 2019 appellant, through counsel, filed a timely appeal from an August 15, 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.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 August 15, 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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 15, 2017, as she no longer had disability or residuals causally related to her accepted employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after October 15, 2017, due to the accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 28, 2012 appellant, then a 19-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2012 she injured her right shoulder and upper back due to heavy lifting and carrying a heavy bag while in the performance of duty. On February 15, 2013 OWCP accepted her claim for right shoulder strain and right trapezius and rhomboid strain. It authorized wage-loss compensation beginning January 8, 2013.

On February 19, 2013 appellant's physician, Dr. Dean W. Ziegler, a Board-certified orthopedic surgeon, reviewed appellant's magnetic resonance imaging (MRI) scan and diagnosed partial thickness tearing of the supraspinatus tendon of the rotator cuff on the right. He opined that she could return to light-duty work lifting, pushing, and pulling up to five pounds, with no reaching above the shoulders.⁵

On May 22, 2013 Dr. Ziegler performed right shoulder arthroscopic rotator cuff repair due to partial thickness tear of a supraspinatus tendon. On June 11, 2013 he released appellant to work with the restriction of no use of her right arm or hand.

In a letter dated August 20, 2013, appellant informed OWCP that she had returned to part-time, private-sector employment on July 26, 2013. On February 19, 2014 OWCP requested information from her to determine her pay rate for wage-loss compensation purposes. It requested the amount of appellant's earnings in the previous year as she had not worked at the employing establishment for a full year or on a full-time basis at the time of her November 3, 2012 employment injury.

On April 22, 2014 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation with Dr. Mysore S. Shivaram, a Board-certified orthopedic surgeon. In his May 15, 2014 report, Dr. Shivaram diagnosed status post right shoulder rotator cuff repair with complaints of continued stiffness and pain in the right shoulder. He recommended additional physical therapy for three to four weeks and a home exercise program. Dr. Shivaram opined that after completing physical therapy appellant would be capable of eight hours of regular-duty work with no restrictions within three months. He listed her current

⁴ Docket No. 19-0001 (issued June 13, 2019).

⁵ On April 10, 2013 the employing establishment terminated a ppellant's employment.

restrictions as 10 pounds of lifting, pushing, and pulling with the right arm and no reaching above the shoulder.

By decision dated August 25, 2014, OWCP reduced appellant's wage-loss compensation benefits based on her actual earnings as a dispatcher in the private sector with wages of \$401.50 per week. It found that this position fairly and reasonably represented her wage-earning capacity.

On November 2, 2016 OWCP referred appellant for an additional second opinion evaluation with Dr. Shivaram. In a report dated December 5, 2016, Dr. Shivaram noted her history of injury and reviewed the SOAF. He further noted that appellant was attending nursing school and working part time in a dental office. Appellant continued to report limited range of motion in her right shoulder as well as numbness and tingling in her arms and hands. On physical examination, Dr. Shivaram found overreaction to light touch. He reported that appellant appeared to voluntarily restrict free range of motion in her shoulder and found incomplete effort and self-limiting behavior. Dr. Shivaram determined that she could return to regular-duty work without restriction on December 5, 2016. He further found that appellant had satisfactory recovery from her right shoulder surgery. Dr. Shivaram opined that she had no residuals of her injury.

On April 21, 2017 OWCP advised appellant of its notice of proposed termination of her wage-loss compensation and medical benefits based on Dr. Shivaram's December 5, 2016 report. It afforded her 30 days to submit evidence or argument if she disagreed with the proposed termination.

In a May 19, 2017 letter, appellant asserted that she was unable to return to work at the employing establishment due to a previous settlement and asked that her wage-loss compensation benefits continue. She argued that she had experienced a severe decline in right shoulder range of motion and provided a November 12, 2013 note from Dr. Ziegler which indicated that she continued to experience stiffness in her shoulder. Dr. Ziegler indicated that appellant had only 70 degrees of active elevation of the right shoulder. Appellant also submitted a November 7, 2013 physical therapy note.

By decision dated October 16, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 15, 2017 based on Dr. Shivaram's December 5, 2016 report.

On January 16, 2018 appellant requested reconsideration. In support thereof, she provided a November 14, 2017 report, wherein Dr. Anjum Razzaq, a Board-certified neurologist, noted his examination of her due to right shoulder pain and her history of injury. Appellant underwent a right shoulder MRI scan on November 17, 2017 which demonstrated tendinosis of the supraspinatus tendon. She also provided a December 19, 2017 wherein Dr. Ziegler noted her history of injury and medical history, and again reported that she had active elevation in her right shoulder of 70 degrees. Dr. Ziegler also noted that he found significant supraspinatus dysfunction in appellant's right shoulder following rotator cuff repair. He recommended additional physical therapy.

By decision dated March 30, 2018, OWCP denied modification of the October 16, 2017 termination decision, finding that appellant had not established continuing disability or medical residuals due to her November 3, 2012 employment injury.

On May 21, 2018 appellant requested reconsideration of the March 30, 2018 decision and submitted additional notes from Dr. Ziegler. On February 13, 2018 Dr. Ziegler reviewed her November 17, 2017 MRI scan and, on physical examination, found definite weakness with supraspinatus testing. He noted that the MRI scan was not useful and performed a limited diagnostic ultrasound which demonstrated that the anterior supraspinatus tendon was not intact at its attachment to the greater tuberosity. Dr. Ziegler reported that there was also abutment in attempting to clear the greater tuberosity and the acromion. He diagnosed right shoulder with tear of the anterior supraspinatus tendon of the rotator cuff. Dr. Ziegler noted, "It appears that this is an indication of non-healing of the tendon."

In a note dated April 17, 2018, Dr. Ziegler diagnosed right shoulder supraspinatus tendon tear and opined that it was work related. He further opined that appellant never improved from her original surgery, did not heal, and that therefore her current condition was related to her original work injury. Dr. Ziegler recommended additional right shoulder surgery.

By decision dated August 15, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It determined that Dr. Ziegler's February 13 and April 17, 2018 reports were substantially similar to those previously of record. Appellant appealed the August 15, 2018 decision to the Board and in its June 13, 2019 decision,⁶ the Board remanded the case for OWCP to conduct a merit review.

By decision dated August 15, 2019, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim 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 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

⁶ *Supra* note 3.

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

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

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

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

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 15, 2017, as she no longer had residuals or disability causally related to her accepted employment injury.

In his December 5, 2016 report, Dr. Shivaram, the second opinion physician noted appellant's history of injury, reviewed the SOAF, and provided findings on physical examination. He found overreaction to light touch and reported that she appeared to voluntarily restrict free range of motion in her shoulder. Dr. Shivaram opined that appellant had recovered from her right shoulder surgery and could return to regular-duty work without restriction. He based his opinion on a proper factual and medical history and provided physical examination findings in support of his opinion that she had no employment-related disability or medical residuals.¹² The Board thus finds that the weight of the medical evidence is represented by Dr. Shivaram.

In response to OWCP's notice of proposed termination, appellant provided a November 12, 2013 note from Dr. Ziegler wherein he found that she continued to experience stiffness in her shoulder. However, Dr. Ziegler did not address whether she continued to be disabled from work. As he did not provide an opinion regarding appellant's disability from work, his report has no probative value on this issue.¹³ The Board finds that this note is insufficient to establish her disability from work or continuing medical residuals in 2016 or to create a conflict with Dr. Shivaram's report.¹⁴

Appellant also submitted a November 7, 2013 physical therapy note. Physical therapists, however, are not considered physicians as defined under FECA and thus, this note does not constitute competent medical evidence.¹⁵

The Board therefore finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 15, 2017.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates compensation benefits, the burden of proof shifts to appellant to establish continuing disability or residuals causally related to his or her accepted employment injury.¹⁶

¹² *M.S.*, Docket No. 18-0283 (issued July 27, 2018).

¹³ *D.Q.*, Docket No. 17-0130 (issued March 12, 2018).

¹⁴ *V.D.*, Docket No. 19-0979 (issued February 5, 2020).

¹⁵ Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *H.K.*, Docket No. 19-0429 (issued September 18, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006); *see also S.K.*, Docket No. 18-1414 (issued April 29, 2020) (physical therapists are not considered physicians as defined under FECA).

¹⁶ *V.D.*, *supra* note 14. *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

To establish causal relationship between the claimed disability and the employment injury, the claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such causal relationship.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish continuing disability and residuals on or after October 15, 2017, causally related to her accepted employment injury.

Following the termination of her wage-loss compensation and medical benefits, appellant submitted reports from Dr. Zeigler dated December 19, 2017 and February 13 and April 17, 2018, wherein he diagnosed right shoulder rotator cuff tear of the anterior supraspinatus tendon. On April 17, 2018 Dr. Zeigler opined that this condition was work related. He concluded that appellant had never improved from her original surgery and that therefore her current condition was related to her original work injury. Dr. Zeigler, however, did not offer an explanation of how or why her condition had not improved from the original surgery in 2013, such that her current condition, five years later, was related to her original work injury. The Board has held that a medical report is of limited probative value regarding a period of disability or a medical condition, if it does not contain medical rationale explaining how such disability or medical condition was related to the accepted employment injury.¹⁸ Therefore, Dr. Zeigler's reports are insufficient to meet appellant's burden of proof.

On November 14, 2017 Dr. Razzaq, noted appellant's employment injury and examined her due to right shoulder pain. However, he did not address the issue of continuing residuals or disability. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁹ Moreover, the Board has also held that pain is a symptom and not a compensable medical diagnosis.²⁰ Therefore, this report is insufficient to establish appellant's claim.

Appellant underwent a right shoulder MRI scan on November 17, 2017, which demonstrated tendinosis of the supraspinatus tendon. The Board has held, however, that diagnostic studies, standing alone, lack probative value as they do not address whether the accepted employment injury caused any of the disability or residuals.²¹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

¹⁷ *T.W.*, Docket No. 18-1573 (issued July 19, 2019); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

¹⁸ *D.L.*, Docket No. 19-0900 (issued October 28, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁹ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁰ *See B.M.*, Docket No. 21-0198 (issued June 29, 2021); *S.L.*, Docket No. 19-1536 (issued June 26, 2020); *D.Y.*, Docket No. 20-0112 (issued June 25, 2020).

²¹ *M.A.*, Docket No. 19-1551 (issued April 30, 2020); *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 15, 2017, as she no longer had residuals or disability causally related to her accepted employment injury. The Board further finds that she has not met her burden of proof to establish continuing disability or residuals on or after October 15, 2017 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 8, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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