

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 14, 2021, as she had no further disability or residuals causally related to her June 17, 2003 employment injury.

FACTUAL HISTORY

This case has previously been before the Board regarding another issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 19, 2003 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 17, 2003 she strained her right rotator cuff when she was involved in a motor vehicle accident while in the performance of duty. On August 12, 2003 OWCP accepted the claim for cervical strain. It subsequently expanded the acceptance of the claim to include left shoulder contusion and other afflictions of left shoulder region, aggravation of brachial neuritis or radiculitis, cervical sprain, sprain of the right shoulder and rotator cuff, and aggravation of degenerative cervical intervertebral and lumbar intervertebral disc disease.

OWCP paid appellant wage-loss compensation on the supplemental rolls, effective August 4, 2003, and on the periodic rolls, effective August 8, 2004, based on her loss of wage-earning capacity.

In a March 5, 2021 progress report, Dr. M. Stephen Wilson, a specialist in orthopedic surgery and pain medicine, noted that appellant was seen for follow up and was experiencing additional mechanical low back pain. He reviewed her May 30, 2019 magnetic resonance imaging (MRI) scan and opined that her pain likely was due to facet disease. Dr. Wilson noted that his examination of the cervical spine revealed that range of motion (ROM) was mildly restricted in all planes; weakness against resistance was demonstrated in the cervical flexors and extensors; decreased sensation to monofilament testing was noted over the bilateral C7 through C8 dermatomes; and no radicular symptoms were found. He noted that his examination of the lumbar spine revealed ROM was restricted in all planes, especially flexion and extension; decreased sensation to monofilament testing was within normal limits; weakness against resistance was mildly demonstrated in the bilateral L5 through S1 lumbar flexors and extensors, left greater than right; straight leg raising test was negative on the right and positive on the left; deep tendon reflexes were 2+ and equal bilaterally; and no radicular symptoms were found. Dr. Wilson found positive facet loading pain with extension and lateral bending. His examination of the right shoulder revealed ROM was restricted in all planes, there was mild tenderness to palpation over the anterior subacromial joint, weakness was present in the shoulder with ROM testing, and weakness against resistance was demonstrated in all major muscle groups of the right shoulder. Dr. Wilson diagnosed sprain of neck; degeneration of cervical intervertebral disc; degeneration of lumbar or lumbosacral intervertebral disc and brachial neuritis or radiculitis not otherwise specified; sprain of back, lumbar region; other afflictions of shoulder region; contusion of shoulder and upper arm;

³ Docket No. 21-0485 (issued December 10, 2021).

and sprain of shoulder and upper arm, rotator cuff. He noted that appellant was retired and opined that she was at maximum medical improvement (MMI).

On March 16, 2021 OWCP referred appellant, together with the case record and a statement of accepted facts (SOAF), to Dr. J. Marcus Heim, an osteopath Board-certified in orthopedic surgery, for a second opinion examination to determine whether her accepted medical conditions had resolved. The SOAF described the employment injury and set forth the accepted conditions.

In a May 12, 2021 report, Dr. Heim noted appellant's history of injury and medical treatment. He related that appellant had multilevel cervical, thoracic, and lumbar degenerative spondyloarthropathy and rheumatoid arthritis. Dr. Heim opined that appellant's aggravations of the accepted conditions had resolved. He determined that appellant's disabling conditions were not due to the work injury and were degenerative, based upon an MRI scan performed three months following her injury. Dr. Heim opined that appellant's medical conditions caused by the mechanism of the work injury had resolved. In a May 15, 2021 work capacity evaluation (Form OWCP-5c), he indicated that appellant reached MMI and could work full-time light duty with restrictions, due to cervical, thoracic and lumbar spondyloarthropathy with rheumatoid arthritis.

On June 30, 2021 OWCP found a conflict in the medical opinion evidence between Dr. Heim, the second opinion physician, and Dr. Wilson, the treating physician, with regard to whether appellant had any continuing residuals or disability causally related to the accepted employment injury, and whether the accepted conditions had resolved. It referred appellant, together with a SOAF, the medical record, and a list of questions, to Dr. Robert J. Tomlinson, Jr., an orthopedic surgeon, to resolve the conflict.⁴

In an October 7, 2021 report, Dr. Tomlinson related appellant's history of injury and medical treatment. He also noted his review of the SOAF, and he noted appellant's accepted conditions. Dr. Tomlinson opined that appellant no longer had any disability or residuals related to the work injury. He explained that "her current symptoms are related to a natural progression of her preexisting condition and her current condition of rheumatoid arthritis." Dr. Tomlinson further explained that appellant's MRI studies of her cervical and lumbar spine two months following the injury showed chronic changes that were unrelated to her injury. He opined that appellant's aggravation of her preexisting nonwork-related medical conditions had resolved and that her disability from work was not due to the work injury. In an October 13, 2021 Form OWCP-5c, Dr. Tomlinson indicated that appellant could not return to work due to her nonwork-related conditions of cervical and lumbar spondylosis, bilateral shoulder replacement, and rheumatoid arthritis.

On November 4, 2021 OWCP notified appellant of its proposed termination of her compensation and medical benefits, as the weight of the medical evidence established that she no longer had any employment-related disability or residuals of her accepted employment injury. It

⁴ The case record contains an MEO23 appointment schedule notification dated August 17, 2021, which indicates that Dr. Tomlinson was selected as the impartial medical examiner (IME).

afforded her 30 days to submit additional evidence or argument, if she disagreed with the proposed termination.

No additional evidence was received.

By decision dated December 14, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the special weight of the medical evidence rested with the opinion of Dr. Tomlinson, the IME, who opined in his October 7, 2021 report that appellant had no disability or residuals due to her accepted June 17, 2003 work injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁵ 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.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer had residuals of an employment-related condition, which would require further medical treatment.⁹

Section 8123(a) 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.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

⁵ *Y.A.*, Docket No. 21-0698 (issued February 3, 2022); *R.V.*, Docket No. 20-00005 (issued December 8, 2020); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *Id.*

⁷ *D.G.*, *id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁹ *R.V.*, *id.*; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁰ 5 U.S.C. § 8123(a); *see R.M.*, Docket No. 21-1150 (issued April 5, 2022); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309 (1994).

¹¹ 20 C.F.R. § 10.321.

Regarding selection of an IME, OWCP's procedures provide: "A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the scheduler must document the reasons for the selection in the case record."¹²

ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective December 14, 2021, based upon the IME's report from Dr. Tomlinson.

In this case, Dr. Tomlinson is not identified as being Board-certified. As noted, when a physician who is not Board-certified is used for an impartial medical examination, the scheduler must document the reasons for the selection in the case record. In this case, the record does not contain any documentation that Dr. Tomlinson is Board-certified, or to explain the referral of appellant to a physician who is not Board-certified. OWCP, therefore, improperly referred appellant to Dr. Tomlinson for the resolution of the conflict in the medical evidence.¹³ As such, OWCP has not met its burden of proof.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective December 14, 2021.

¹² Federal (FECA) Procedure Manual, Part 3 -- Office Directed Medical Examinations, *Referee Examinations*, Chapter 3.500.4b(6)(f) (July 2011).

¹³ *Supra* note 10; *see Lazarus E. Jackson*, 53 ECAB 256 (issued June 19, 2001).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 8, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board