

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

T.N., Appellant)

and)

U.S. POSTAL SERVICE, FREDERICKSBURG)
MAIN POST OFFICE, Fredericksburg, VA,)
Employer)
-----)

**Docket No. 22-0721
Issued: September 14, 2022**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On April 11, 2022 appellant filed a timely appeal from October 21 and December 15, 2021 and March 15, 2022 merit decisions and an April 7, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective December 22, 2020, as she no longer had disability causally related to her accepted March 10, 2015 employment injury; (2) whether appellant has met her burden of

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 7, 2022 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.*

proof to establish continuing employment-related disability or residuals on or after December 22, 2020 due to her accepted employment injury; and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 19, 2015 appellant, then a 42-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she experienced pain in her right shoulder after finishing her route while in the performance of duty. OWCP accepted the claim for a closed fracture of the acromial end of the right clavicle. It subsequently expanded the acceptance of the claim to include an injury to the muscles/tendons of the right rotator cuff, a temporary aggravation of right shoulder bursitis, and a temporary aggravation of other specified arthropathies of the right shoulder. OWCP paid appellant wage-loss compensation for disability from work on the supplemental rolls, effective April 25, 2015, and on the periodic rolls, effective March 6, 2016.

In a report dated September 20, 2016, Dr. D. Burke Haskins, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed rotator cuff tendinopathy, biceps tendinitis, acromioclavicular degeneration, and subacromial subdeltoid bursitis aggravated by the accepted employment injury. He advised that appellant could work without using her right upper extremity. Dr. Haskins opined that surgery may be necessary if a steroid injection and physical therapy were inadequate.

On January 25, 2017 Dr. Kenneth J. Accousti, a Board-certified orthopedic surgeon and appellant's attending physician, found that appellant had continued complaints of AC joint pain. He advised that she could work with a five-pound weight restriction. Dr. Accousti indicated that it had been two years since appellant's March 10, 2015 employment injury and advised that she had reached maximum medical improvement (MMI).

In a progress report dated July 28, 2017, Dr. Accousti diagnosed right shoulder bursitis and advised that appellant could lift no more than 20 pounds below the waist or perform intermittent lifting for more than four hours per day pending the results of a functional capacity evaluation (FCE).

In a September 20, 2017 note to Dr. Accousti regarding the FCE, it was reported by a physical therapist assistant that the FCE failed to yield valid results as appellant was "very limited with performance of any activities."

On October 10, 2017 Dr. Accousti diagnosed right shoulder bursitis. He noted that appellant's FCE was invalid due to her poor effort. Dr. Accousti released her to resume work without restrictions. He related, "I explained that bursitis should not preclude her from working. I also suggested getting a more sedentary job if she cannot perform her regular duties at the [employing establishment]."

In a report dated December 18, 2018, Dr. Accousti diagnosed a closed fracture of the acromial end of the right clavicle with routine healing. On examination he found positive impingement and Hawkins tests with tenderness over the right biceps tendon, but no atrophy or instability. Dr. Accousti reviewed the findings from the July 10, 2015 MRI scan and opined that appellant had "no restrictions with her shoulder and can use it as normal as a postal carrier."

On April 9, 2019 Dr. Accousti provided similar examination findings and diagnosed a closed fracture of the acromial end of the right clavicle with routine healing. He opined that appellant would “benefit from another job that does not require extensive physical use of her right shoulder. Prolonged lifting will aggravate her right shoulder pain but will not damage her right shoulder.”

An MRI scan of the right shoulder, obtained on January 10, 2020, demonstrated subacromial subdeltoid bursitis, a healed displaced clavicle fracture deformity, and mild supraspinatus tendinopathy with a tiny partial-thickness tear of the supraspinatus, but no high-grade or full-thickness rotator cuff tear.

In a progress report dated January 21, 2020, Dr. Accousti discussed appellant’s complaints of continued pain in the biceps tendon and AC joint of the right shoulder. He found negative testing on examination, full strength, and normal sensation. Dr. Accousti reviewed the findings from the January 10, 2020 MRI scan and found no change from the previous 2015 MRI scan. He diagnosed a closed displaced fracture of the acromial end of the right clavicle with routine healing. Dr. Accousti advised that he had explained to appellant the risks and benefits of various treatment options, including injections, physical therapy, and surgery. He noted that she was considering a right shoulder biceps tenotomy versus a distal clavicle resection. Dr. Accousti related, “Structurally [appellant] can use her shoulder as best as she can. She has no restrictions with her shoulder.”

On November 4, 2020 OWCP notified appellant of its proposed termination of her wage-loss compensation based on Dr. Accousti’s opinion that she had no restrictions and that she could return to work. It found that the weight of the evidence established that she no longer had any employment-related residuals or disability due to her accepted March 10, 2015 employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

In a response received November 13, 2020, appellant advised that she was unable to provide medical evidence as her physician had requested that she undergo another FCE.

By decision dated December 22, 2020, OWCP terminated appellant’s wage-loss compensation and medical benefits effective that date. It found that the December 18, 2018 and January 20, 2020 reports from Dr. Accousti established that she had no disability causally related to her accepted employment injury.

On January 14, 2021 appellant requested reconsideration. She discussed medical evidence from 2015 and 2017 finding that she either had permanent work restrictions or required surgery. Appellant related that Dr. Accousti had told her to try light-duty work as a rural carrier for four weeks.

In a progress report dated January 8, 2021, Dr. Accousti noted that OWCP had denied his request for a second FCE. He indicated that a partially completed FCE had demonstrated that appellant had a three-pound lifting limitation. Dr. Accousti advised that appellant was “going back to work full time and would like to limit her lifting at work temporarily.” He recommended that she limit lifting to 50 pounds for 4 weeks and then return to her usual employment. In a duty status report (Form CA-17) of even date, Dr. Accousti found that appellant could lift 30 pounds

continuously and 50 pounds intermittently for up to eight hours per day. The form indicated that her job duties required continuous lifting of 35 pounds and intermittent lifting of 70 pounds.

In a report dated March 2, 2021, Dr. Satheesh Ramineni, a Board-certified orthopedic surgeon, discussed appellant's complaints of right shoulder pain that had begun on March 10, 2015 when she fell at work. He diagnosed a strain of the right rotator cuff tendon and a right rotator cuff tear and noted that x-rays obtained that date showed arthritis and degenerative joint disease.

By decision dated April 14, 2021, OWCP denied modification of its December 22, 2020 decision.

On April 23, 2021 appellant requested reconsideration.

Appellant submitted progress reports from Dr. Ramineni dated March 2 through June 16, 2021.³ In a Form CA-17 dated April 22, 2021, Dr. Ramineni diagnosed a rotator cuff strain and provided work restrictions, including no lifting or carrying.

In a work status report dated July 16, 2021, Dr. Rajeev Pandarinath, a Board-certified orthopedic surgeon, found that appellant should not work pending a follow-up appointment.

By decision dated July 21, 2021, OWCP denied modification of its April 14, 2021 decision.

In a report dated July 16, 2021, Dr. Pandarinath noted that appellant had sought treatment at the emergency department for numbness in the right arm after physical therapy. He found that the paresthesia following physical therapy had resolved. Dr. Pandarinath diagnosed a strain of the muscles and tendons of the right shoulder.

On July 23, 2021 appellant requested reconsideration.

Thereafter, OWCP received a November 15, 2019 report from Dr. Accousti, who diagnosed a displaced right clavicle fracture. In a November 10, 2020 report, Dr. Accousti opined that appellant had "no restrictions with her shoulder and lift what she is physically able to do." He recommended another FCE.

A September 4, 2021 MRI scan of the right shoulder showed mild tendinitis of the supraspinatus, infraspinatus, and subscapularis, moderate tendinosis and partial tearing of the intra-articular long head biceps, a healed displaced distal clavicle fracture deformity, and mild subacromial subdeltoid bursitis. A September 7, 2021 cervical MRI scan revealed multilevel mild central canal stenosis due to disc herniations and mild foraminal narrowing due to degenerative changes.

Electrodiagnostic testing of the upper extremities obtained on September 27, 2021 yielded normal findings.

In a progress report dated October 5, 2021, Dr. Warren Yu, a Board-certified orthopedic surgeon, evaluated appellant for pain in her right shoulder, neck pain, and numbness and pain in the right upper extremity. He noted that she had originally sustained an injury at work in 2015

³ Appellant continued to submit progress reports from Dr. Ramineni.

when she fell and fractured her right distal clavicle. Dr. Yu diagnosed cervical disc disorder at C5-6 with radiculopathy and osseous stenosis of the neural canal of the cervical region.

On October 12, 2021 appellant requested that OWCP expand the acceptance of her claim to include the diagnoses from Dr. Yu.⁴

By decision dated October 21, 2021, OWCP denied modification of its July 21, 2021 decision.

On October 28, 2021 appellant requested reconsideration.

By decision dated December 15, 2021, OWCP denied modification of its October 21, 2021 decision.

On December 15, 2021 appellant requested reconsideration.

In a report dated February 21, 2022, Dr. John A. Kuri, a Board-certified orthopedic surgeon, evaluated appellant for right shoulder pain that started in 2015 after she fell at work getting into her truck. He noted that she currently worked in childcare. Dr. Kuri indicated that appellant had a history of a prior distal clavicle fracture before her 2015 injury. He diagnosed right shoulder pain and opined that the 2015 injury likely exacerbated the prior right clavicle fracture. Dr. Kuri further diagnosed right AC joint arthritis, a right rotator cuff tear, cervical degenerative disc disease, and a labral tear of the long head of the right biceps tendon.

In a report dated March 3, 2022, Dr. Kuri advised that an MRI scan of the right shoulder showed “partial long of the biceps tendon tearing along with what appears is a full-thickness tear at the distal supraspinatus.” He diagnosed arthritis of the right AC joint, a labral tear of the long head of the right biceps tendon, an incomplete rotator cuff tear or rupture of the right shoulder, not specified as traumatic, and cervical degenerative disc disease. Dr. Kuri recommended right shoulder surgery after evaluation by a spinal surgeon.

By decision dated March 15, 2022, OWCP denied modification of its December 15, 2021 decision.

On March 28, 2022 appellant requested reconsideration. She related that the MRI scans showed increasing tears and degenerative changes. Appellant submitted a March 25, 2022 referral from Dr. Kuri for a computerized tomography (CT) scan and a March 25, 2022 progress report. She further resubmitted evidence previously of record.

By decision dated April 7, 2022, OWCP denied appellant’s request for reconsideration.

⁴ In a development letter dated October 21, 2021, OWCP advised appellant that the evidence was currently insufficient to support the expansion of her claim and requested that she submit a reasoned opinion from her physician addressing how the degenerative cervical condition was causally related to her accepted 2015 injury. It afforded her 30 days to submit the requested information.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination 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

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective December 22, 2020.

On December 18, 2018 Dr. Accousti diagnosed a closed fracture of the acromial end of the right clavicle. He found a positive impingement test and Hawkins test on the right with no atrophy or instability. Dr. Accousti opined that appellant had no shoulder restrictions and released her to return to her usual employment. However, in an April 9, 2019 report, Dr. Accousti opined that appellant would "benefit from another job that does not require extensive physical use of her right shoulder. Prolonged lifting will aggravate her right shoulder pain but will not damage her right shoulder." The Board has held that medical reports are of limited probative value if they are internally inconsistent.⁸ As Dr. Accousti offered inconsistent opinions regarding whether appellant could return to her date-of-injury position, OWCP improperly accorded him the weight of the medical evidence. Therefore, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation effective December 22, 2020.⁹

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation effective December 22, 2020.

⁵ *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁶ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁷ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁸ *S.H.*, Docket No. 19-0631 (issued September 5, 2019); *L.L.*, Docket No. 18-0861 (issued April 5, 2019).

⁹ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the October 21 and December 15, 2021 and March 15, 2022 decisions of the Office of Workers' Compensation Programs are reversed. The April 7, 2022 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: September 14, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board