

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

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L.M., Appellant)	
)	
and)	Docket No. 23-0560
)	Issued: February 16, 2024
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Kalaupapa, HI,)	
Employer)	
_____)	

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 March 1, 2023 appellant filed a timely appeal from a September 14, 2022 merit 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 14, 2022 decision, OWCP received additional evidence. 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 14, 2022, as she no longer had disability or residuals causally related to her accepted June 16, 2021 employment injury.

FACTUAL HISTORY

On July 3, 2021 appellant, then a 66-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on June 16, 2021 she injured both arms and elbows when operating a trimmer and blower while in the performance of duty. She advised that the injury had left her with limited use of both arms and elbows, especially the right arm. Appellant stopped work on June 22, 2021. OWCP accepted her claim for a strain of the muscles and tendons of the rotator cuff, left and right shoulders, and a strain of the muscle, fascia, and tendon of the long head of the biceps, left and right arms. It paid appellant wage-loss compensation on the supplemental rolls from October 18, 2021 through January 1, 2022, on the periodic rolls from January 2 through September 10, 2022, and on the supplemental rolls from September 11 through 13, 2022.

An August 13, 2021 magnetic resonance imaging (MRI) scan of appellant's right shoulder demonstrated moderate diffuse rotator cuff tendinopathy without a significant tear, subacromial subdeltoid bursitis, moderate edema in the rotator interval suggesting adhesive capsulitis, degeneration with chronic nondisplaced tearing at the biceps labral complex, intra-articular biceps tendinopathy, and moderate acromioclavicular joint (AC) arthropathy. An MRI scan of the left shoulder of even date demonstrated moderate diffuse rotator cuff tendinopathy without a significant tear, subacromial subdeltoid bursitis, chronic degeneration and nondisplaced tearing at the biceps labral complex extending posteriorly, intra-articular biceps tendinopathy, and moderate AC joint arthropathy.

In a December 16, 2021 operative note, Dr. Gary Okamura, a Board-certified orthopedic surgeon, performed a left shoulder arthroscopic superior labrum anterior and posterior (SLAP) repair, left shoulder arthroscopic biceps tenodesis, and left shoulder arthroscopic decompression. He noted that appellant had sustained a "work-related injury to [appellant's] shoulder" that caused continued symptoms despite physical therapy. Dr. Okamura noted his findings on MRI scan of a nondisplaced SLAP tear with intraarticular biceps tendinitis and partial tears of the subscapularis and supraspinatus tendons.

In notes dated December 16, 2021 through August 30, 2022, Dr. Okamura held appellant off work from December 16, 2021 through August 30, 2022.

On January 17, 2022 Dr. Okamura ordered physical therapy and massage therapy and diagnosed status post left shoulder arthroscopic rotator cuff repair, SLAP repair, and biceps tenodesis.

In a March 17, 2022 visit note, Dr. Okamura noted that appellant lacked normal mobility in her arms and experienced pain with movement and difficulty driving. He diagnosed status post left shoulder repair, referred her to a physical therapist, and performed a physical examination,

noting forward flexion in her left shoulder of 160 degrees, external rotation of 35 degrees, and internal rotation to L5.

In an April 7, 2022 note, Dr. Okamura ordered physical therapy and massage therapy and reiterated his prior diagnoses.

In a May 5, 2022 visit note, Dr. Okamura noted that appellant continued to experience weakness in her hand and constant pain, which she rated 5 out of 10. He performed a physical examination and noted the range of motion in her left shoulder, finding forward flexion of 170 degrees, external rotation of 35 degrees, and internal rotation to L5. Dr. Okamura assessed a superior glenoid labrum lesion of the left shoulder and a strain of muscle, fascia, and tendon of the long head of biceps, left arm. He indicated that appellant should remain off work through June 10, 2022.

On June 14, 2022 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF), and a series of questions, to Dr. Michael J. Battaglia, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of her accepted conditions and her disability and residuals due to her accepted June 16, 2021 employment injury.

In a June 21, 2022 visit note, Dr. Okamura indicated that appellant continued to experience pain that she rated 7 out of 10, with additional pain during activity. He related that her range of motion had improved, but she reported weakness and her supraspinatus tendon was weak. Dr. Okamura reiterated his prior diagnoses and noted left shoulder forward flexion of 170 degrees, external rotation of 35 degrees, and internal rotation to L5. He advised that appellant should not work through July 30, 2022.

On July 21, 2022 Dr. Okamura ordered a functional capacity evaluation (FCE).

In a July 22, 2022 report, Dr. Battaglia noted appellant's history of injury on June 16, 2021 and his review of the SOAF and medical evidence of record. On physical examination, he found that she had excellent range of motion in her cervical spine and still experienced lateral shoulder tenderness. Dr. Battaglia recorded upper bilateral extremity measurements of 33 centimeters in appellant's bilateral arms and 29 centimeters in her forearms while performing Phalen's maneuver. Appellant's strength testing was five out of five supraspinatus, five out of five external rotation strength, and she was able to perform lift-off maneuvers on each side. Dr. Battaglia noted mildly positive impingement on the right side and found a negative Spurling's maneuver, mildly positive Speed's and Yergason's tests, and a positive Hawkins test on the left side. He provided range of motion measurements for the bilateral shoulders. Dr. Battaglia diagnosed bilateral shoulder strain as the accepted condition and related that the condition was stable and fixed with no continued objective findings. He related that the objective findings consisted only of inflammation noted on the MRI scan and noted that appellant did not want further treatment on the right shoulder. Dr. Battaglia related that her "subjective complaints did not necessarily correspond with the objective findings, as [appellant] really has only vague lateral shoulder pain." He opined that appellant's work-related condition had resolved as she had received therapy for over seven months and had not had a rotator cuff repair. Dr. Battaglia further opined that there was no need for further treatment as her "right shoulder MRI scan does not support objective evidence that [appellant] needs surgery" and as she did not have findings of carpal tunnel syndrome. He opined that

appellant was medically capable of returning to her date-of-injury position as a maintenance mechanic and that there was no objective basis for limitations. Dr. Battaglia noted that any limitations on a FCE would be more related to her age and general capabilities. In a work capacity evaluation (Form OWCP-5c) of even date, he indicated that appellant could resume her date-of-injury position without restrictions.

By notice dated August 10, 2022, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Battaglia's July 22, 2022 report, finding that the June 16, 2021 accepted conditions had ceased without residuals or disability. It afforded her 30 days to submit additional evidence and/or argument challenging the proposed termination.

OWCP subsequently received a July 21, 2022 visit note from Dr. Okamura, relating that appellant was seven months postsurgery and that her movement and strength had improved. Dr. Okamura noted that she rated her pain 7 out of 10 and was unable to perform activities for as long as she could before. He performed a physical examination, observing a range of motion in appellant's left shoulder of 170/170 degrees forward flexion, 40/40 degrees external rotation, and internal rotation to L4/L4. Dr. Okamura indicated that impingement signs were negative and rotator cuff strength appeared normal. He assessed status post left shoulder repair, requested a functional capacity evaluation, and related that appellant's improvement appeared to have plateaued. Dr. Okamura advised that she should remain off work through August 30, 2022.

On August 23, 2022 the employing establishment offered appellant her date-of-injury position as a full-time maintenance worker, effective August 29, 2022, with no restrictions. Appellant rejected the position on August 25, 2022 and noted that she disagreed with Dr. Battaglia's opinion that she had sufficiently recovered so as to carry out her duties in a safe manner. She also questioned the accuracy of his examination, asserting that it was brief, incomplete, and did not consider her input.

In a September 1, 2022 note, Dr. Okamura provided work restrictions of lifting no more than 10 pounds, no overhead work, and working for four hours per day, five days per week, as of September 12, 2022.

By decision dated September 14, 2022, OWCP terminated appellant's wage-loss compensation and medical benefits, effective on that date. It found that the weight of the medical evidence was represented by Dr. Battaglia's July 22, 2022 report.

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.³ 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

³ See *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ 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.⁷

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 14, 2022.

OWCP referred appellant to Dr. Battaglia for a second opinion evaluation to determine the status of her accepted conditions and her work capacity. In a July 22, 2022 report, Dr. Battaglia noted her history of a June 16, 2021 injury and his review of the SOAF and medical evidence of record. On physical examination, he observed that appellant had excellent range of motion in her cervical spine. However, Dr. Battaglia also noted that she still experienced lateral shoulder tenderness and that she had mildly positive impingement on the right side, a negative Spurling's maneuver, mildly positive Speed's and Yergason's tests, and a positive Hawkins test on the left side. Furthermore, he noted that the objective findings of an MRI scan indicated inflammation. Dr. Battaglia's report, was therefore contradictory and did not explain with sufficient rationale, how or why appellant no longer had employment-related disability or residuals due to the accepted employment injury.

The Board, thus, finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 14, 2022, as the medical evidence of record is insufficient to establish that she no longer has disability or residuals causally related to her accepted June 16, 2021 employment injury.⁸

⁴ See *D.G., id.*; *R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *K.W.*, *supra* note 5; see *A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

⁸ See *N.R.*, Docket No. 23-0019 (issued November 17, 2023); *C.G.*, Docket No. 23-0013 (issued April 24, 2023); *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *A.G.*, Docket No. 20-0187 (issued December 31, 2020); see *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 14, 2022.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 16, 2024
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