

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOUGLAS E. SCHMIDT and SOCIAL SECURITY ADMINISTRATION,  
OFFICE OF HEARINGS & APPEALS, Fort Lauderdale, FL

*Docket No. 00-662; Submitted on the Record;  
Issued March 29, 2001*

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DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability on or after August 5, 1999, causally related to his August 12, 1998 work injury; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits effective November 29, 1999.

On August 12, 1998 appellant, then a 51-year-old hearing clerk, filed a traumatic injury claim alleging that he injured his right shoulder when a coworker bumped into him at work.<sup>1</sup> The Office accepted the claim for a contusion of the right shoulder. Appellant received appropriate compensation for wage loss from August 12, 1998 until July 26, 1999, when he returned to regular duty.<sup>2</sup> He stopped work on August 5, 1999 and has not returned.

In a CA-20 attending physician's report dated August 17, 1998, Dr. Louis F. Donaghue, a Board-certified orthopedic surgeon, noted that appellant injured his right shoulder at work on August 12, 1998 when someone bumped into him. He diagnosed local tenderness on palpation of the right shoulder joint. Dr. Donaghue indicated that appellant was totally disabled for work due to the August 12, 1998 work injury.

In treatment notes dated August 18 and 25, 1998, Dr. Donaghue reported physical findings and appellant's history of injury. He diagnosed contusion of the right shoulder for which he prescribed physical therapy.

In a September 18, 1998 letter, the Office requested information from Dr. Donaghue regarding appellant's capacity for work.

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<sup>1</sup> At the time of the August 12, 1998 incident, appellant was performing his work duties in a wheelchair due to a nonwork-related fracture of his tibia.

<sup>2</sup> On May 12, 1999 appellant fell down while shopping and sustained an additional injury to his right shoulder.

On October 23, 1998 Dr. Donaghue prepared an OWCP-5 form indicating that appellant should be able to return to full duty since he was 10 weeks post-injury. He noted that he had not seen appellant since August 23, 1998.

In a report dated November 10, 1998, Dr. John M. Russell, a Board-certified orthopedic surgeon, advised that he treated appellant on October 24, 1998 for an orthopedic injury to the right shoulder. He diagnosed "acute shoulder impingement with bursitis and right shoulder AC joint arthritis, acute and chronic." Dr. Russell reported physical findings, including limited range of motion and limited strength in the AC joint and subacromial area. He stated that appellant had no potential for light duty due to his upper extremity pain and other limitations. Dr. Russell predicted that appellant would reach maximum medical improvement in the two months.

In a January 6, 1999 treatment note, Dr. Russell diagnosed right shoulder AC arthritis and impingement syndrome. He prescribed physical therapy and ordered a magnetic resonance imaging (MRI) scan of the right shoulder.

An MRI scan on January 19, 1999 was interpreted as showing "some mild bony degenerative changes surrounding the right shoulder joint" and "mild impingement of the supraspinatus tendon without evidence of a complete rotator cuff tear."

A computerized tomography (CT) scan of the cervical spine on February 11, 1999 demonstrated degenerative disc disease at multiple levels, C2-C7.

By letter dated March 10, 1999, the Office referred appellant for a second opinion evaluation with Dr. Michael J. Charles, a Board-certified orthopedic surgeon.

In a May 7, 1999 report, Dr. Charles noted that appellant developed a pain syndrome and weakness of his right arm and shoulder following a work injury on August 12, 1998. He discussed appellant's medical history and described him as being "a bit difficult, with a chip on the shoulder type of attitude." Dr. Charles noted physical findings and opined that appellant suffered from some sort of psychological problem, probably somatization syndrome. He noted that appellant was not a good candidate for any type of work due to psychological problems. However, Dr. Charles concluded that appellant could perform sit-down work with no use of his right arm.

On May 12, 1999 Dr. Russell reported that appellant had reached maximum medical improvement on March 31, 1999 and rated his permanent partial impairment for the right shoulder as 18 percent. He stated that a portion of appellant's impairment was attributable to underlying impingement problems and degenerative changes in the cervical spine. Dr. Russell opined that appellant could return to work with a five-pound lifting restriction, no overhead activity with the right shoulder and no pushing or pulling.

In an (OWCP-5) work evaluation form dated May 19, 1999, Dr. Charles noted that appellant could work eight hours per day as far as his contusion to the right shoulder was concerned, but still had restrictions such as no walking, lifting or reaching due to his nonambulatory status.

In a May 24, 1999 letter, the Office inquired whether the employing establishment could accommodate appellant's return to work with the restrictions outlined by Dr. Russell.

In a June 9, 1999 report, Dr. Ronald Bathaw, a Board-certified orthopedic surgeon, noted that appellant "fell down at Wal-Mart on [May 12] and landed on the right shoulder." He stated that appellant's range of motion was restricted and that a right shoulder MRI scan showed either a partial tear or strain of the supraspinatus.<sup>3</sup>

In a June 22, 1999 letter, the Office found that a conflict existed on whether appellant had any continuing disability or residuals due to his work injury. The Office scheduled appellant for an impartial medical evaluation on July 20, 1999 with Dr. Marc Harr, a Board-certified orthopedic surgeon.

On June 29, 1999 Dr. Bathaw released appellant to work with no restrictions.

In a report dated July 20, 1999, Dr. Harr noted appellant's history of injury and reviewed his medical records. He reported that appellant had full range of motion in the right shoulder and that an x-ray of the right shoulder revealed some mild narrowing of the subacromial space, but no evidence of degenerative disease. He diagnosed possible mild bicipital tendinitis of the right shoulder with secondary minimal adhesive capsulitis, which he attributed to appellant's chronic use of a wheelchair and the requirement that appellant propel himself with his upper extremities. Dr. Harr concluded that appellant's work-related contusion of the right shoulder had resolved and that he was able to return to his prior job as a clerk.

On July 26, 1999 appellant returned to work as a hearing clerk.

On August 5, 1999 appellant filed a claim alleging that he sustained a recurrence of disability on that date. He noted that he had a "hard time lifting files" and "moving my wheel chair."

On September 7, 1999 the Office advised appellant of the factual and medical evidence required to establish his claim.

In an October 19, 1999 decision, the Office denied compensation on the grounds that the evidence was insufficient to establish that appellant's claimed recurrence of disability was causally related to his August 12 1998 work injury.

On October 22, 1999 appellant requested reconsideration.

In support of his reconsideration request, appellant submitted an August 9, 1999 MRI scan of the right shoulder, which revealed a "partial tear vs. strain involving the supraspinatus tendon" and a small joint effusion.

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<sup>3</sup> An MRI scan dated June 3, 1999 revealed a "partial strain vs. strain involving the supraspinatus tendon" and a small joint effusion.

Appellant submitted a September 15, 1999 report from Dr. Mark G. Gillespie, an orthopedist who stated that the MRI scan revealed evidence of a rotator cuff tendon which “may represent a rotator cuff tendinopathy from impingement.”

Appellant also submitted an October 11, 1999 report by Dr. Don J. Alfonso, a Board-certified family practitioner, which stated: “This letter is to inform you that [appellant] sustained (R) shoulder supraspinatus tendon tear. He is unable to sustain any work activity at this time and has been partially disabled as of August 6, 1999.”

On October 28, 1999 the Office issued a notice of proposed termination of medical benefits and compensation. The Office advised appellant that the medical evidence of record established that his disability had resolved and that he no longer had any residuals from his August 12, 1998 work injury. He was given 30 days to submit evidence or argument relevant to the proposal.

In a November 5, 1999 decision, the Office denied modification of its October 19, 1999 decision denying appellant’s recurrence of disability claim.

In a decision dated November 29, 1999, the Office terminated appellant’s compensation and medical benefits effective that date.

The Board finds that appellant failed to establish that he sustained a recurrence of disability on or after August 5, 1995, causally related to his August 12, 1998 work injury.

As used in the Federal Employees’ Compensation Act,<sup>4</sup> the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>6</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>7</sup> An award of compensation may not be

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<sup>4</sup> 5 U.S.C. §§ 8101-8193; *see also* 20 C.F.R. § 10.104.

<sup>5</sup> *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Eldon H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.57(17). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of the injury, has no disability as that term is used in the Act and is not entitled to disability compensation; *see Gary L. Loser*, 38 ECAB 673 (1987); *Cf.* 5 U.S.C. § 8107 (entitlement to schedule compensation for loss or permanent impairment of specified members of the body).

<sup>6</sup> *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

<sup>7</sup> *Bernard Snowden*, 49 ECAB 144 (1997); *Nicolea Brusco*, 33 ECAB 1138 (1982).

made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relationship.<sup>8</sup>

In this case, the Board finds that appellant has not submitted a reasoned medical opinion to establish that his disability from work on or after August 5, 1999 is causally related to his August 12, 1998 shoulder contusion. In an October 11, 1999 report, Dr. Alfonso indicated that appellant had been partially disabled since August 6, 1999 due to a right shoulder supraspinatus tendon tear, but did not explain appellant's diagnosed condition in terms of the August 12, 1998 work injury. Dr. Alfonso also did not mention that appellant injured his right shoulder in a nonwork-related fall on May 12, 1999.

Similarly, although Dr. Gillispie noted in a September 5, 1999 report that appellant's MRI scan findings on August 9, 1999 revealed "rotator cuff tendinopathy from impingement," he did not discuss the etiology of appellant's diagnosed condition or whether appellant was totally disabled on or after August 5, 1999 due to the August 12, 1998 work injury. Because appellant has failed to meet his burden of proof to establish that he sustained a recurrence of disability, the Board concludes that the Office properly denied his claim for compensation.

The Board finds that the Office properly terminated appellant's compensation and medical benefits effective November 29, 1999.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability casually related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.<sup>9</sup>

Because a conflict existed between appellant's treating physician, Dr. Russell, and the Office referral physician, Dr. Charles, as to whether appellant was capable of returning to light-duty work, the Office properly referred appellant to an impartial medical specialist, Dr. Harr, to resolve that conflict.<sup>10</sup> In a July 20, 1999 report, Dr. Harr opined that appellant's contusion of the right shoulder had completely resolved and that appellant had no further residuals related to his August 12, 1998 work injury. He also found that appellant was able to return to his last job as a hearing clerk.<sup>11</sup>

When a case is referred to a impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>12</sup> The Board finds

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<sup>8</sup> *Ausberto Guzman*, 25 ECAB 362 (1974).

<sup>9</sup> *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

<sup>10</sup> Section 8123 provides that, if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve that conflict. See 5 U.S.C. § 8123; *Robert D. Reynolds*, 49 ECAB 5651 (1998).

<sup>11</sup> The Board notes that appellant was seen for his nonwork-related right shoulder injury by Dr. Barthow who also opined on June 29, 1999 that appellant could return to work with no restrictions.

<sup>12</sup> *Wiley Richey*, 49 ECAB 166 (1997).

Dr. Harr's report is sufficiently well rationalized to conclude that appellant was no longer disabled from his August 12, 1998 work injury as of the date he returned to work on July 26, 1999. Accordingly, the Board finds that, based on the impartial medical report of Dr. Harr, the Office properly terminated appellant's wage-loss compensation effective November 29, 1999.

With respect to appellant's entitlement to medical benefits, Dr. Harr is the only physician to address whether appellant had any continuing residuals due to the August 12, 1999. Dr. Harr specifically stated that appellant's right shoulder contusion was resolved as of the July 20, 1999 examination. Since the Office properly obtained a reasoned medical opinion to support termination of appellant's medical benefits and the Office followed proper procedures in notifying appellant of its intent to terminate his medical benefits, the Board concludes that appellant no longer has any residuals due to the August 12 1998 work injury.

The decisions of the Office of Workers' Compensation Programs dated November 29 and November 5, 1999 are hereby affirmed.

Dated, Washington, DC  
March 29, 2001

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member