

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

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**B.C., Appellant**

**and**

**U.S. POSTAL SERVICE, CIRCLE BRANCH  
POST OFFICE, Trenton, NJ, Employer**

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**Docket No. 18-0661  
Issued: September 20, 2019**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 7, 2018 appellant, through counsel, filed a timely appeal from an October 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish continuing residuals or employment-related disability on or after December 14, 2014 due to her accepted September 24, 2009 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On October 5, 2009 appellant, then a 54-year-old modified letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 24, 2009 she experienced pain in her right hand and wrist that went up to her shoulder and neck when she unloaded parcels off pallets while in the performance of duty. She stopped work in November 2009.

OWCP accepted appellant's claim for tear of the supraspinatus tendon of the right shoulder. It paid wage-loss compensation and placed her on the periodic rolls effective February 2, 2010.

On January 28, 2010 appellant underwent authorized right shoulder rotator cuff repair by Dr. John M. Fenlin, an orthopedic surgeon. Dr. Fenlin continued to provide postoperative treatment and, in a September 1, 2010 progress note, indicated that appellant could work without restrictions.

OWCP referred appellant's case, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon and second opinion examiner, to determine whether she still suffered residuals of her September 24, 2009 employment injury and remained disabled due to her work-related injury. In a September 25, 2014 report, Dr. Didizian discussed appellant's history of injury and reviewed her medical records. He explained that the January 28, 2010 right shoulder surgery was successful and that she had clinically recovered. Dr. Didizian related that appellant could work with no restrictions as related to her right shoulder. He noted that she may have some restrictions due to an accepted bilateral carpal tunnel condition and completed a Form OWCP-5.<sup>4</sup>

On October 17, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her September 24, 2009 work-related injury had resolved. It afforded her 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

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<sup>3</sup> Docket No. 16-0978 (issued November 21, 2016).

<sup>4</sup> The record reveals that under File No. xxxxxx198 OWCP accepted that appellant sustained bilateral carpal tunnel syndrome as a result of her employment. The case remained open for ongoing medical treatment, but is not presently before the Board.

In a letter dated October 29, 2014, appellant, through counsel, disagreed with the October 17, 2014 proposal to terminate benefits.

By decision dated November 18, 2014, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective December 14, 2014, finding that the weight of medical evidence rested with Dr. Didizian, the second opinion examiner.

On November 25, 2014 appellant, through counsel, requested an oral hearing before a hearing representative from OWCP's Branch of Hearings and Review, which was held on March 27, 2015.

In a report dated November 17, 2014, received by OWCP on December 1, 2014, Dr. Scott M. Fried, an osteopathic orthopedic surgeon, accurately described the September 24, 2009 employment injury and discussed the medical treatment that appellant had received for both her accepted right shoulder rotator cuff tear and bilateral carpal tunnel conditions. Upon physical examination of appellant's right shoulder, Dr. Fried observed tenderness anteriorly and posteriorly and limited range of motion to 140 degrees abduction on the right. He noted his disagreement with Dr. Didizian's opinion that appellant had fully recovered from her torn right shoulder rotator cuff injury explaining that, while she experienced some relief with the surgery and treatment, she still had ongoing evidence of capsulitis of the shoulder as well as rotator cuff weakness. Dr. Fried opined that any attempts at increased activities with her right shoulder, including regular lifting, pulling, pushing, grasping, or overhead activity would result in severe ongoing pain and discomfort. He concluded: "[appellant] remains with ongoing dysfunction and disability, and these are directly and causally related to her accepted work-related injuries about her right shoulder and the shoulder musculature ... as well as her right carpal tunnel and left carpal tunnel syndrome."

By decision dated May 29, 2015, OWCP's hearing representative affirmed the November 17, 2014 termination decision.

OWCP subsequently received a report dated June 3, 2015 by Dr. Fried in which he noted that appellant continued to have residual impairment with respect to her right shoulder injury and brachial plexus nerve injury and remained symptomatic and dysfunctional.

On July 13, 2015 appellant, through counsel, requested reconsideration.

By decision dated December 10, 2015, OWCP denied modification of the May 29, 2015 termination.

Appellant filed an appeal to the Board.

By decision dated November 21, 2016, the Board affirmed in part that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 14, 2014, based on the medical opinion of Dr. Didizian, OWCP's second opinion examiner. The Board also found, however, that the case was not in posture for decision as to whether appellant had continuing disability after December 13, 2014 causally related to her accepted employment injury. The Board determined that, following the termination of wage-loss compensation and medical benefits, OWCP had received new medical evidence from Dr. Fried who opined that appellant had not fully recovered from her accepted right shoulder injury and was

unable to work and therefore a conflict in medical opinion existed between Dr. Fried, appellant's treating physician, and Dr. Didizian, the second opinion physician, regarding whether appellant had continuing disability. The Board remanded the case for referral to an impartial medical examiner in order to resolve the conflict, to be followed by a necessary further development and a *de novo* decision.

Following the Board's November 21, 2016 decision, OWCP referred appellant to Dr. Donald Leatherwood, a Board-certified orthopedic surgeon and impartial medical examiner, in order to resolve the conflict regarding whether appellant was entitled to wage-loss compensation for continuing residuals or disability due to her September 24, 2009 employment injury. In a June 22, 2017 report, Dr. Leatherwood accurately described the September 24, 2009 employment injury and noted that appellant's claim had been accepted for right shoulder rotator cuff tear. He indicated that she had not worked since the 2009 injury and that she underwent right shoulder surgery in 2010. Dr. Leatherwood reviewed appellant's medical records and provided a detailed discussion of the medical treatment appellant received. He related that she continued to complain of right shoulder pain radiating up to the neck. Upon physical examination of appellant's right shoulder, Dr. Leatherwood observed tenderness anteriorly, superiorly, and posteriorly, but no specific acromioclavicular joint tenderness. He indicated that cross body testing, instability, and drop arm tests were negative. Impingement sign was equivocal. Examination of appellant's upper extremities revealed normal capillary refill and intact sensation to light touch.

Dr. Leatherwood opined that, based on his physical examination and review of appellant's history, appellant had fully recovered from her right shoulder rotator cuff tear as of Dr. Didizian's September 25, 2015 examination. He indicated that she could return to any and all activities that she engaged in prior to her work-related injury.

In a letter dated July 20, 2017, counsel contended that Dr. Leatherwood's June 22, 2017 report could not carry the special weight of the medical evidence. He asserted that Dr. Leatherwood simply agreed with the opinion of Dr. Didizian and had not provided any medical rationale for his conclusion that appellant had fully recovered from her work-related injury. Counsel also noted that Dr. Didizian failed to note appellant's history of preexisting carpal tunnel syndrome.

In a supplemental August 3, 2017 report, Dr. Leatherwood indicated that his conclusion that appellant had recovered from her work-related right shoulder rotator cuff tear was supported by multiple factors. He noted that the January 28, 2010 operative report showed that an excellent surgical repair of her full-thickness rotator cuff tear was completed. Dr. Leatherwood related that Dr. Didizian's clinical examination was consistent with showing full recovery. He also indicated that he reviewed reports from Dr. Fenlin dated November 10, 2009 through September 1, 2010, which documented appellant's right shoulder surgery and indicated that she could return to work without restrictions on September 1, 2010. Dr. Leatherwood further explained that he disagreed with Dr. Fried's opinion because he found no objective finding on clinical examination or on any of the studies that she had an ongoing significant injury.

By decision dated October 23, 2017, OWCP denied modification of the December 10, 2015 decision, finding that the special weight of medical evidence rested with Dr. Leatherwood as the impartial medical examiner who opined in his June 22 and August 3, 2017 reports that

appellant had no employment-related residuals or disability after December 13, 2014 due to her September 24, 2009 employment injury.

### **LEGAL PRECEDENT**

Once OWCP properly terminates compensation benefits, the burden shifts to appellant to establish that he or she has continuing disability causally related to the accepted employment injury.<sup>5</sup> To establish causal relationship between the disability claimed and the employment injury, appellant must submit rationalized medical evidence or opinion based on a complete medical and factual background supporting causal relationship.<sup>6</sup>

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>7</sup>

### **ANALYSIS**

The Board finds that appellant has not met her burden of proof to establish continuing residuals or employment-related disability on or after December 14, 2014 due to her accepted September 24, 2009 employment injury.

Following remand of this case, OWCP properly referred the case record and a SOAF to Dr. Leatherwood for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a), to resolve a conflict in medical opinion between Dr. Fried and Dr. Didizian regarding the issue of whether appellant had continuing residuals or disability causally related to the accepted September 24, 2009 employment injury. Dr. Leatherwood issued reports dated June 22 and August 3, 2017 in which he opined that appellant no longer had residuals of her September 24, 2009 employment injury and was able to return to work. He accurately described appellant's history and reviewed her medical records. Dr. Leatherwood performed a thorough, clinical examination and provided findings on examination. He opined that there were no objective findings to support that appellant continued to experience residuals of her accepted right shoulder condition. Dr. Leatherwood explained that appellant had undergone successful surgery in January 2010 to repair her right shoulder rotator cuff tear and that clinical examination was consistent with showing a full recovery. He reported that she could return to any and all activities that she engaged in prior to her work-related injury.

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<sup>5</sup> See *D.M.*, Docket No. 17-1052 (issued January 24, 2019); *J.R.*, Docket No. 17-1352 (issued August 13, 2018).

<sup>6</sup> See *D.M.*, *id.*; *A.C.*, Docket No. 16-1670 (issued April 6, 2018); *R.D.*, Docket No. 16-0892 (issued December 20, 2016).

<sup>7</sup> 5 U.S.C. § 8123(a) provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination. See also *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

The Board finds that Leatherwood's opinion was based on a proper factual and medical history and he had thoroughly reviewed the relevant factual and medical evidence.<sup>8</sup> Accordingly, the Board finds that Dr. Leatherwood's medical opinion is entitled to special weight as the impartial medical examiner and was sufficient to establish that appellant no longer had continuing disability or residuals causally related to her September 24, 2009 employment injury on or after December 14, 2014.

There is no remaining contemporaneous medical evidence of record to establish that appellant required further medical care or remained disabled due to her September 24, 2009 employment injury on or after December 14, 2014. Appellant has not submitted objective rationalized medical evidence to establish that she continued to suffer from or require medical treatment for conditions causally related to her September 24, 2009 employment injury, which is sufficient to overcome the special weight given to Dr. Leatherwood as the impartial medical examiner. Therefore, the Board finds that she has not met her burden of proof.

On appeal counsel alleges that Dr. Leatherwood's opinion could not carry the special weight of the medical evidence because he ignored appellant's physical findings of tenderness in the right shoulder and did not demonstrate any knowledge of the physical requirements of her letter carrier position. As explained above, however, Dr. Leatherwood's opinion was based on an accurate history and clinical examination and constitutes the special weight of the medical evidence.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish continuing disability on or after December 14, 2014 due to her accepted September 24, 2009 employment injury.

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<sup>8</sup> The opinion of an impartial medical examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Id.*; see also *D.T.*, Docket No. 10-2258 (issued August 1, 2011); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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