

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

M.E., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
NATIONAL GUARD, Fort Dix, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-0877
Issued: August 2, 2021**

Appearances:

Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 12, 2020 appellant, through counsel, filed a timely appeal from a September 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted additional evidence to the Board on appeal. However, the Board's *Rules of Procedures* 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 April 30, 2019, as he no longer had residuals or disability causally related to his accepted May 14, 1999 employment injury.

FACTUAL HISTORY

On May 15, 1998 appellant, then a 29-year-old heavy mobile equipment repairer, filed a traumatic injury claim (Form CA-1) alleging that on May 14, 1998 he sustained an injury when he was breaking down tires while in the performance of duty. OWCP accepted his claim for chest contusion, cervical and thoracic sprains, tendinitis, bursitis, and internal derangement of the right shoulder. It authorized right shoulder acromioplasty surgery that was performed on October 12, 1998. Appellant stopped work on the date of injury and OWCP paid him compensation for disability from work.

In September 26 and 28, 2017 reports, Dr. Mark Reiner, an attending osteopath Board-certified in orthopedic surgery, opined that employment-related chronic pain in appellant's right shoulder girdle/arm, as well as employment-related cervical problems, rendered appellant totally disabled from work. In a January 18, 2018 report, Dr. Andrew Newman, a Board-certified orthopedic surgeon, serving as an OWCP referral physician, determined that appellant's May 14, 1998 employment injury had resolved and opined that an employment-related condition did not prevent appellant from returning to modified-duty work.

OWCP determined that there was a conflict in the medical opinion evidence regarding employment-related residuals and disability and referred appellant and the case record to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter. In a report dated April 29, 2018, Dr. Fries discussed appellant's factual and medical history and reported physical examination findings. He opined that appellant did not have the clear objective findings expected if he had a serious right upper extremity neurological disorder present for about two decades. Dr. Fries indicated that appellant did not have any measurable residuals of injuries sustained or accepted in a work-related May 14, 1998 employment injury. He did note a history of cerebrovascular accidents, but indicated that he had not been provided with sufficient documentation to assess this condition and determine if it was responsible for some or all of appellant's right upper extremity complaints. Dr. Fries noted that appellant's 1998 right shoulder surgery identified neither tendinitis nor bursitis and indicated that the only findings were a Type II acromion, a developmental condition, and impingement. He opined that there was no support for a firm diagnosis other than symptom magnification or malingering as some physicians had suggested. Dr. Fries opined that appellant's accepted conditions had resolved and found that appellant was able to return to regular duty, noting that he should have returned to full duty in early 1999.

In an August 17, 2018 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits as he no longer had residuals or disability causally related to his accepted May 14, 1998 employment injury. It indicated that the special weight of the medical opinion evidence with respect to this matter rested with the opinion of Dr. Fries, the impartial medical examiner. OWCP provided appellant 30 days to submit evidence or argument

challenging the proposed termination action. In response, appellant argued that Dr. Fries' opinion was insufficiently well rationalized to constitute the special weight of the medical evidence.

In response to an October 23, 2018 request from OWCP for clarification of his opinion, Dr. Fries provided an October 29, 2018 report in which he indicated that appellant had been diagnosed with right shoulder impingement prior to his 1998 surgery, but that he no longer had that diagnosis. He opined that appellant's right shoulder impingement was relieved by the 1998 surgery. Dr. Fries indicated that, therefore, the only residual diagnosis that might be considered due to appellant's May 14, 1998 employment injury was mild adhesive capsulitis of the right shoulder. He noted, "This diagnosis is compatible with return to work." Dr. Fries indicated that he could not determine how much of appellant's limited right shoulder motion was due to adhesive capsulitis and how much was voluntary limitation. He noted that no such limitation was documented at the time of the 1998 surgery and found that "[v]oluntary exaggeration is clearly a concern raised by others as well by me." With respect to the fact that appellant had less grip strength on the right side, Dr. Fries asserted that appellant voluntarily influenced the result. He further cited the lack of appellant's forearm atrophy, and found that "at most [appellant] has slight disability."

By decision dated April 29, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 30, 2019, as he no longer had residuals or disability causally related to his accepted May 14, 1998 employment injury.

Appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the oral hearing held on August 21, 2019, counsel argued that Dr. Fries' opinion was insufficient to constitute the special weight of the medical evidence. By decision dated September 23, 2019, OWCP's hearing representative affirmed the April 29, 2019 decision.

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.⁴ 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.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

⁴ *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).

⁵ *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ 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.⁸

Section 8123(a) of FECA provides in pertinent part: “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.”⁹ In situations where 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.¹⁰

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits, effective April 30, 2019.

OWCP properly determined that there was a conflict in the medical opinion evidence regarding employment-related residuals/disability and referred appellant, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to Dr. Fries for an impartial medical examination and an opinion on the matter. The Board finds, however, that Dr. Fries’ opinion on employment-related residuals/disability is not sufficiently rationalized to constitute the special weight of the medical opinion evidence.¹¹

The Board finds that Dr. Fries’ opinion on employment-related residuals/disability, expressed in his April 29 and October 29, 2018 reports, is of limited probative value because he did not provide adequate medical rationale explaining why all of appellant’s accepted conditions had resolved, particularly with regard to the right shoulder. In fact, Dr. Fries suggested in his October 29, 2018 report that appellant continued to have an employment-related right shoulder condition. He indicated in that report that the only residual diagnosis that might be considered due to appellant’s employment injury was mild adhesive capsulitis of the right shoulder. In addition, Dr. Fries opined in his April 29, 2018 report that appellant’s accepted conditions had resolved and found that appellant was able to return to regular duty, noting that he should have returned to full duty in early 1999. However, he did not adequately explain the medical process through which appellant’s accepted conditions would have resolved at that time. Moreover, Dr. Fries provided a contradictory opinion on his October 29, 2018 report when he noted that “[a]t most [appellant] has

⁷ *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).

⁸ *See A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹¹ *See supra* notes 8 and 9.

slight disability.” The Board has held that a report is of limited probative value regarding a given medical matter if it does not contain medical rationale explaining that matter.¹² The Board, therefore, finds that Dr. Fries’ reports are insufficient to meet OWCP’s burden of proof to terminate appellant’s wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits, effective April 30, 2019.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2019 decision of the Office of Workers’ Compensation Programs is reversed.

Issued: August 2, 2021
Washington, DC

Janice B. Askin, Judge
Employees’ Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees’ Compensation Appeals Board

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

¹² See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).