United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 21-0401**
	)	**Issued: September 14, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Portsmouth, VA, 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, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 28, 2021 appellant filed a timely appeal from a December 17, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective July 1, 2020, as he no longer had residuals or disability causally related to his accepted employment injury.

FACTUAL HISTORY

On October 25, 2006 appellant, then a 39-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an aggravation of degenerative joint disease

[1] 5 U.S.C. § 8101 *et seq*.

and impingement syndrome of both shoulders causally related to the repetitive duties of his federal employment. OWCP accepted the claim, assigned OWCP File No. xxxxxx639, for an aggravation of impingement syndrome of the right shoulder. It subsequently expanded acceptance of the claim to include bilateral shoulder impingement with rotator cuff tendinitis/bursitis and a tear of the left rotator cuff. On November 25, 2008 Dr. Felix Kirven, a Board-certified orthopedic surgeon, performed a left acromioplasty with open repair of the rotator cuff. OWCP paid appellant wage-loss compensation on the supplemental rolls, effective December 2, 2008, and then on the periodic rolls, effective January 18, 2009.[2]

A December 11, 2015 magnetic resonance imaging (MRI) scan demonstrated moderate tendinopathy in the supraspinatus and infraspinatus tendons of the rotator cuff superimposed on postsurgical changes, a possible partial rotator cuff tear in the area of the prior repair, and a loose orthopedic suture anchor in the glenohumeral joint.

In an investigative report dated December 30, 2015, F.M., the employing establishment's Office of Inspector General (OIG), advised that it had conducted surveillance that revealed that appellant was performing physical activities, including lifting weights at a fitness center, that were contrary to the work restrictions provided by his physician. It summarized its surveillance findings from 2015 and noted that it was maintaining the video surveillance footage in its investigative file.

OWCP subsequently determined that a conflict in medical opinion existed between Dr. Kirven and Dr. Lawrence I. Barr, an osteopath and OWCP referral physician, regarding whether appellant had continuing disability or a diagnosed condition causally related to his accepted employment injury. It referred him to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Fries' opinion, by decision dated June 27, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date.

Appellant, through then counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated December 5, 2017, OWCP's hearing representative reversed the June 27, 2017 decision. She found that OWCP had neither notified appellant that it was providing surveillance video to Dr. Fries, nor provided appellant an opportunity to request a copy of the video. OWCP's hearing representative further found that the statement of accepted facts (SOAF) provided to Dr. Fries failed to include a description of appellant's work duties. She instructed OWCP, upon return of the case record, to reinstate appellant's compensation benefits.

On April 22, 2019 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated May 10, 2019, Dr. Askin reviewed appellant's history of bilateral shoulder injuries from serving in the military and OWCP's acceptance of an aggravation of right shoulder

[2] OWCP previously accepted a 2005 occupational disease claim for an aggravation of bilateral olecranon bursitis, an aggravation of bilateral triceps tenosynovitis, and a nontraumatic bilateral rupture of the shoulder tendons, assigned OWCP File No. xxxxxx459. It has administratively combined OWCP File No. xxxxxx459 with the current file number, which serves as the master file.

impingement syndrome, bilateral shoulder impingement with rotator cuff tendinitis/bursitis, and a left rotator cuff tear. He found no objective findings relating to the shoulders other than age-related degenerative changes. Dr. Askin determined that appellant was "able to work out as reported in the surveillance videos, which suggests that he has retained capacity for the expected employment activities of a letter carrier." He indicated that further medical treatment was not applicable. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Askin found that appellant could return to work full time without limitations.

On May 22, 2019 OWCP provided appellant with a copy of the imaged portion of his case record.

In a report dated June 14, 2019, Dr. Kirven advised that appellant had continued pain and loss of use of the shoulders, particularly on the left side. He noted that a December 11, 2015 MRI scan had shown a recurrent tear and indicated that the "suture anchor that was used to repair the rotator cuff has subsequently pulled out." Dr. Kirven opined that appellant's left shoulder surgery on November 25, 2008 had failed and that he had a recurrent tear and failure of the suture anchor as a consequence of his accepted employment injury. He advised that he might require further surgery. Dr. Kirven opined that appellant was totally disabled from work due to his recurrent rotator cuff tear of the left shoulder. He noted that his diabetic condition complicated his ability to undergo surgery.

On June 20, 2019 OWCP provided Dr. Askin with an updated SOAF that included a description of appellant's job duties. In an addendum dated July 11, 2019, Dr. Askin reviewed the updated SOAF and advised that his opinion was unaltered.

On August 7, 2019 OWCP requested that Dr. Askin address whether the acceptance of appellant's claim should be expanded to include additional conditions diagnosed by Dr. Kirven on March 6, 2017.[3]

In an August 19, 2019 addendum, Dr. Askin attributed appellant's "diagnostic considerations" to aging. He found that he had no additional employment-related conditions.

OWCP determined that a conflict in medical opinion existed between Dr. Kirven and Dr. Askin regarding the issue of continuing disability. It referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 24, 2019, Dr. Stark discussed appellant's history of shoulder problems while serving in the military and then later working at the employing establishment. He noted that appellant had surgery on his rotator cuff in 2008 and that an x-ray of the shoulder performed on August 10, 2017 had revealed the "projection of an anchor over the left humeral diaphysis." Dr. Stark advised that appellant also had left knee and ankle and bilateral hip problems. On examination he found a negative impingement test of the shoulders bilaterally and

[3] On March 6, 2017 Dr. Kirven noted that appellant's shoulder and elbow conditions had been combined into the current OWCP file number. He diagnosed multiple employment injuries resulting in a rotator cuff tear of the left shoulder, shoulder impingement with tendinitis of the right shoulder, bilateral elbow chronic tendinitis/tendinopathy, a ganglion cyst of the left ankle, and left knee chondromalacia.

no apparent motor or sensory deficit of the upper extremities. Dr. Stark further found restrictive motion with tenderness to palpation of the left shoulder and slightly better motion of the right shoulder and tenderness to palpation of the elbows bilaterally. He provided his review of the medical evidence, noting that the record contained a report describing surveillance conducted by the OIG's office from January to April 2015. Dr. Stark opined that appellant had no objective findings of the accepted aggravation of impingement syndrome of the right shoulder, bilateral shoulder impingement with rotator cuff tendinitis/bursitis, and a left rotator cuff tear. He advised that appellant was not cooperative during the examination. Dr. Stark opined that he was no longer disabled due to the accepted injury or any condition and required no further medical treatment. He attributed the diagnoses of a bilateral incomplete rotator cuff tear and bilateral synovitis tendinitis to degenerative disease of the shoulders unrelated to appellant's employment. Dr. Stark related, "Following the surgery in 2008, the suture anchor got loose from the bone and the various studies shows that it is located with unchanged position in the inferior recess at the shoulder. It is my opinion that the anchor at this time does not produce any symptoms." He advised that the most recent MRI scan of the shoulders dated September 8, 2017 did not show a complete rotator cuff tear. Dr. Stark attributed appellant's loss of range of motion of the shoulders to degenerative disease. In a Form OWCP-5c of even date, he found that appellant could return to his usual employment without restrictions.

On April 8, 2020 OWCP notified appellant of its proposed termination of his wage-loss compensation and medical benefits as the special weight of the evidence established that he no longer had any employment-related residuals or disability due to his accepted employment injury. It afforded him 30 days to submit additional evidence or argument if he disagreed with the proposed termination.

In an April 14, 2020 statement, appellant asserted that the loose anchor in his left shoulder from his prior rotator cuff surgery constituted a residual of his employment injury. He noted that, while the loose anchor was not currently causing symptoms, it could cause severe joint damage if he did not have it repaired. Appellant advised that he had to control his diabetes prior to having the surgery.

Appellant submitted a March 25, 2016 report from Dr. Andrew F. Kuntz, a Board-certified orthopedic surgeon. Dr. Kuntz noted that appellant had an open rotator cuff repair in 2008 with excellent range of motion, with some lateral shoulder pain. He indicated that he had a metallic anchor next to the medial humeral head, but that his symptoms were currently consistent with tendinopathy of the rotator cuff "with no symptoms from the anchor." Dr. Kuntz advised that the anchor had the potential to cause "severe damage to the joint surface" if it was intra-articular and recommended either physical therapy or surgery.

By decision dated June 30, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 1, 2020. It found that Dr. Stark's opinion represented the special weight of the evidence and established that he had no further disability or residuals of his accepted employment injury.

On July 8, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He asserted that he had read that Dr. Askin had reviewed copies of the surveillance video.

A telephonic hearing was held on October 16, 2020. Appellant related that he had a loose implant and was attempting to get his blood sugar under control prior to surgery. Appellant's then-counsel asserted that Dr. Stark failed to provide rationale for his opinion, including why appellant required no further medical treatment. He maintained that Dr. Stark was biased and his opinion insufficiently reasoned to resolve the conflict in medical opinion. Appellant related that Dr. Askin and Dr. Stark had access to surveillance video and that he only received a copy of the video subsequent to the examinations.

By decision dated December 17, 2020, OWCP's hearing representative affirmed the June 30, 2020 decision.

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.[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]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would 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] Where a case is referred to an impartial medical examiner (IME) for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[10]

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

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

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

[7] *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

[8] *A.J.*, Docket No. 18-1230 (issued June 8, 2020); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

[9] 5 U.S.C. § 8123(a); *J.K.*, Docket No. 18-1250 (issued June 25, 2019).

[10] 20 C.F.R. § 10.321; *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective July 1, 2020, as he no longer had residuals or disability causally related to his accepted employment injury.

OWCP properly determined that a conflict in medical opinion existed between Dr. Kirven, appellant's treating physician, and Dr. Askin, a second opinion physician, regarding whether he had continued disability or need for medical treatment due to his accepted employment injuries. It referred him to Dr. Stark for an impartial medical examination in order to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently rationalized and based on a proper factual and medical background, must be given special weight.[11]

On October 24, 2019 Dr. Stark found that appellant had a negative impingement test of the bilateral shoulders, no motor or sensory deficit of the upper extremities, reduced motion of the shoulders bilaterally, worse on the left, and tenderness to palpation of the left shoulder. He further found tenderness to palpation of the bilateral elbows. Dr. Stark discussed appellant's history of rotator cuff surgery in 2008 and noted that an x-ray obtained in 2017 had shown a loose anchor over the left humeral diaphysis. He opined that he had no objective findings of the accepted aggravation of impingement syndrome of the right shoulder, bilateral shoulder impingement with rotator cuff tendinitis/bursitis, and a left rotator cuff tear, could resume his usual employment, and required no further medical treatment. Dr. Stark related the diagnosed conditions of a bilateral incomplete rotator cuff tear and bilateral synovitis tendinitis to degenerative disease of the shoulders unrelated to appellant's employment. He indicated that a suture anchor had come loose after appellant's 2008 surgery, but that its position had not changed and it was not producing symptoms. Dr. Stark noted that recent MRI scans of both shoulders failed to show a complete rotator cuff tear, but instead findings of degenerative joint disease. He related appellant's reduced shoulder motion to degenerative disease.

The Board finds that Dr. Stark provided insufficient rationale for his conclusion that appellant no longer had disability or required medical treatment for his accepted employment injury and, therefore, cannot constitute the special weight of medical evidence. While he found that appellant's continued shoulder symptoms were related to degenerative disease, Dr. Stark failed to explain medically how the physical examination findings and history supported this conclusion.[12] When an IME fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.[13]

[11] *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Roger Dingess*, 47 ECAB 123 (1995).

[12] *Id*.

[13] *M.P.*, Docket No 16-0551 (issued May 19, 2017); *James T. Johnson*, 39 ECAB 1252 (1988).

The IME's report must actually fulfill the purpose for which it was intended, it must resolve the conflict in medical opinion.[14] If the report is vague, speculative, incomplete, or not rationalized, it is OWCP's responsibility to secure a supplemental report from the IME to correct any defects.[15] Consequently, the Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective July 1, 2020, as he no longer had residuals or disability causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 14, 2021
Washington, DC

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

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

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

[14] *See S.T.*, Docket No. 16-1471 (issued August 18, 2017); *M.G.*, Docket No. 14-1361 (issued December 8, 2014).

[15] *S.T.*, *id*. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010).