



## **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 24, 2023, as she no longer had disability or residuals causally related to her accepted March 7, 2007 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after July 24, 2023, causally related to the accepted employment injury.

## **FACTUAL HISTORY**

On March 26, 2007 appellant, then a 38-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2007 she strained muscles in her right arm while delivering to frozen rural mailboxes in the performance of duty. She stopped work on March 26, 2007. OWCP accepted the claim for disorder of bursae and tendons in shoulder region, unspecified, right; and calcifying tendinitis of shoulder, right. It paid appellant wage-loss compensation on the supplemental rolls effective March 26, 2007, and on the periodic rolls effective May 11, 2008.

In an August 17, 2022 progress note, Dr. Anna M. Ward, an attending Board-certified family practitioner, noted a history of the March 7, 2007 employment injury and appellant's complaints of pain in the right side of the neck to fingertips on the right, upper back pain, and overuse and tenderness of the left upper extremity. She recounted appellant's current complaints that she had difficulty flipping a pancake, and turning a doorknob because of increased upper extremity pain, and that on physical examination appellant could only comfortably raise her right upper extremity to 45 degrees. Dr. Ward diagnosed chronic pain syndrome (primary) and pain of both shoulder joints. She advised that appellant's work-related conditions had not resolved, but they were stable. Dr. Ward further advised that appellant most likely would never return to her prework-related injury baseline. Additionally, she advised that appellant was unable to perform the duties of a rural carrier because fine manipulation was difficult for her to perform. Dr. Ward also advised that appellant was unable to work in any capacity due to her reported inability to operate a computer and increased neck burning and stinging while looking at a computer screen.

On December 12, 2022 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Jonathan Paul, a Board-certified orthopedic surgeon, for a second opinion examination regarding the extent and degree of any employment-related disability and prognosis.

In a January 6, 2023 report, Dr. Paul discussed the March 7, 2007 employment injury and appellant's complaints of tingling and numbness in her right arm and hand. On physical examination, he reported range of motion measurements for the right shoulder and cervical spine. Dr. Paul diagnosed neck pain, chronic pain syndrome, and fibromyalgia. He advised that appellant's complaints were primarily subjective, and that there were no objective findings present on his physical examination. Dr. Paul noted that based on repetitive motion-type activities as seen by a mail carrier, he would not expect anything close to what appellant had described. He maintained that she was disabled but, noted that a causal connection between her disability and employment was not clear, because the results of electromyogram (EMG) studies

performed in 2009, 2010, and 2016 were not available for his review. Dr. Paul indicated that appellant's pain was out of proportion. He advised he was unable to render a final conclusion as to whether the accepted employment injury had resolved until he reviewed the above-noted EMG studies. Dr. Paul opined that appellant was not capable of returning to her rural carrier position based on having zero active motion of the right shoulder and her diagnosed conditions. He further opined that appellant's disability was due to her fibromyalgia and not her employment injury. In an accompanying work capacity evaluation form (Form OWCP-5c) dated January 6, 2023, Dr. Paul reiterated his opinion regarding appellant's work capacity.

On February 16, 2023 OWCP requested that Dr. Paul review and comment on the enclosed 2009, 2010, and 2016 EMG studies. In an addendum report dated February 23, 2023, Dr. Paul noted review of appellant's November 19, 2009, June 9, 2010, and October 24, 2016 EMG studies. He reported that the November 19, 2009 and October 24, 2016 EMG studies were normal. The June 9, 2010 EMG study was positive, showing moderate right C7 radiculopathy, mild left C8-T1 radiculopathy, right carpal tunnel syndrome. Dr. Paul opined that the June 9, 2010 EMG study, which was performed by a chiropractor, could not be trusted based on a normal EMG performed seven months prior and six years post EMG. He advised that these EMG findings confirmed his prior opinions that appellant's disability was not related to her work-related injury, but rather was due to her fibromyalgia and other factors. Dr. Paul concluded that the work-related condition had resolved based on the normal EMG findings and appellant's pain being out of proportion to his examination.

On April 7, 2023 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits, as the evidence of record established that she no longer had employment-related disability or residuals causally related to her accepted March 7, 2007 employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

OWCP received additional medical evidence from Dr. Ward. In progress notes dated March 27 and June 14, 2023, Dr. Ward indicated that appellant reported ongoing pain. She discussed appellant's physical examination findings noting that she had limited right shoulder motion to 45 degrees, decreased right grip strength, and that right shoulder touch produced pain "like a toothache." Dr. Ward reiterated her prior diagnoses of pain of both shoulder joints and neck, and chronic pain syndrome. She concluded that appellant was 100 percent disabled. In the June 14, 2023 progress note, Dr. Ward noted that she did not see any objective records of fibromyalgia in both shoulder joints, and, thus, advised that this was probably not a valid diagnosis. She also advised that a diagnosis of complex regional pain syndrome was questionable. Dr. Ward concluded that appellant had moderate disability.

In a July 3, 2023 attending physician's report (Form CA-20), Dr. Ward diagnosed right shoulder pain and checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by an employment activity described to her one year ago. She advised that appellant was permanently disabled commencing March 7, 2007.

By decision dated July 24, 2023, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Paul, the second opinion

physician, represented the weight of the medical evidence and established that appellant no longer had disability or residuals due to her accepted March 7, 2007 employment injury.

OWCP continued to receive medical evidence. In a June 29, 2023 progress note, Dr. Tariq Hussein, an orthopedic surgeon, diagnosed superior glenoid labrum lesion of left shoulder, initial encounter (primary); fibromyalgia; and Raynaud's disease without gangrene.

In a February 19, 2024 progress note, Dr. Ward reiterated her prior assessments of pain in right shoulder joint and chronic pain syndrome. She also provided an assessment of Type 2 complex regional pain syndrome of the right upper extremity. Dr. Ward reviewed Dr. Paul's January 6, 2023 report and noted that she was unable to verify his opinion that appellant's disability was due to her fibromyalgia. She deferred to her rheumatologist who found that appellant did not have fibromyalgia.

On April 12, 2024 appellant, through counsel, requested reconsideration of the July 24, 2023 termination decision. In support of the request, counsel submitted an additional report from Dr. Ward dated February 14, 2024. In her February 14, 2024 report, Dr. Ward noted appellant's history of injury and medical treatment. She continued to diagnose chronic pain syndrome, and, also, diagnosed depression, cervical radiculopathy, and right shoulder impingement. Additionally, Dr. Ward reiterated her prior opinion that appellant was totally disabled from work. She further opined that appellant's diagnosed conditions and resultant disability were caused by the March 7, 2007 employment injury. Dr. Ward explained that appellant's cervical radiculopathy was caused by repetitive work activities performed over a period of several months, which placed significant pressure on the cervical spine from a different direction than the spine was meant to absorb pressure. The pressure to the spine was particularly intense in the many instances in which appellant had to pry, pull, and hammer frozen mailboxes over time, which caused the intervertebral discs in the cervical spine to deteriorate at an accelerated pace, making them more susceptible to breaking open or bulging out. The extreme pressure placed against the spine as appellant pried open the hundreds of frozen mailboxes caused her already weakened intervertebral discs in the cervical spine to bulge out and press against the nerves that travel through the spine, thereby causing cervical radiculopathy. Dr. Ward further explained that appellant's right shoulder impingement syndrome was caused by her repetitive job duties, which included opening hundreds of frozen mailboxes, sometimes hitting and banging them with a hammer overtime, which caused her right shoulder tendinitis. The inflammation and swelling caused by that injury caused the rotator cuff tendons to become intermittently trapped and compressed during shoulder movements. Dr. Ward noted that the continuous swelling caused the shoulder impingement syndrome. She concluded that appellant continued to have residuals of the accepted conditions of calcifying tendinitis of the right shoulder and disorder of bursae and tendons in the shoulder region. Dr. Ward further concluded that she continued to suffer from chronic pain syndrome, depression, shoulder impingement, and cervical radiculopathy as a direct result of her accepted injury.

By decision dated April 22, 2024, OWCP denied modification of its July 24, 2023 decision.

## LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>4</sup> 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.<sup>5</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

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

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."<sup>9</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>10</sup>

## ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 24, 2023.

Appellant's treating physician, Dr. Ward, in an August 17, 2022 progress note, recounted appellant's current complaints that she had difficulty flipping a pancake and turning a doorknob because of increased upper extremity pain. On physical examination appellant could only comfortably raise her right upper extremity to 45 degrees. Dr. Ward related that appellant had

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<sup>4</sup> See *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).

<sup>5</sup> See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>6</sup> *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).

<sup>7</sup> *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

<sup>8</sup> *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> 20 C.F.R. § 10.321.

chronic pain syndrome and pain of both shoulder joints, and that her work-related conditions had not resolved, but they were stable. She opined that appellant most likely would never return to her prework-related injury baseline and that she was unable to perform the duties of a rural carrier because fine manipulation was difficult for her to perform. In progress notes dated March 27, 2023, Dr. Ward again noted appellant's physical examination findings of limited right shoulder motion to 45 degrees, decreased right grip strength, and that right shoulder touch produced pain "like a toothache." She concluded that appellant was 100 percent disabled. In her June 14, 2023 progress note, Dr. Ward also noted that she did not see any objective records of fibromyalgia in both shoulder joints, and, thus, advised that this was probably not a valid diagnosis.

Dr. Paul, OWCP's second opinion physician, opined in his reports dated January 6 and February 23, 2023, that appellant's pain complaints were out of proportion. He opined that she was not capable of returning to her rural carrier position based on having zero active motion of the right shoulder, however, he opined that her disability was due to fibromyalgia and not her employment injury.

It is well established that, when there are opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical examiner (IME) for the purpose of resolving the conflict.<sup>11</sup> The Board finds that the medical reports of Dr. Ward and Dr. Paul were in equipoise on the issue of whether appellant had disability or residuals of her accepted conditions, and thus, are in conflict. The Board, therefore, finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 24, 2023 as it should have referred her to an IME, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict prior to a termination of wage-loss compensation and medical benefits.<sup>12</sup>

### CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 24, 2023.<sup>13</sup>

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<sup>11</sup> *A.N.*, Docket No. 24-0531 (issued September 4, 2024); *S.S.*, Docket No. 24-0773 (issued September 16, 2024); *A.E.*, Docket No. 23-0756 (issued December 14, 2023); *D.P.*, Docket No. 21-0534 (issued December 2, 2021); *N.A.*, Docket No. 21-0542 (issued November 8, 2021); *G.B.*, Docket No. 16-0996 (issued September 14, 2016); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>12</sup> *Id.*

<sup>13</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 22, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 20, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board