

U.S. Department of Labor Employees' Compensation Appeals Board
200 Constitution Avenue, N.W.
Washington, D.C 20210



December 14, 2011

Paul Felser Esq.
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SAVANNAH, GA 31412

Docket Number: **2011-1017**

OWCP File No.: **062166930**

Dear Paul Felser:

Please note that the caption of any decision and/or order issued on or after August 1, 2006, will display only your initials, docket number and issue date for the decision. (This change in policy is prospective only and is not based upon any legal requirement.)

Enclosed is a copy of the Board's DECISION AND ORDER, which is self explanatory.

By direction of the Board,

A handwritten signature in cursive script, appearing to read "Thomas O. Shepherd, Jr.", written in black ink.

Thomas O. Shepherd, Jr.
Clerk of The Board

Enclosure(s)

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

J.W., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
ROBINS AIR FORCE BASE, GA, Employer)

Docket No. 11-1017
Issued: December 14, 2011

Appearances.
Paul Felser, Esq., for the appellant
Solicitor of Labor, for the Director

Oral Argument August 16, 2011

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 22, 2011 appellant, through her attorney, filed a timely appeal from a January 26, 2011 decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her wage-loss and medical compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective May 10, 2009 on the grounds that the accepted right shoulder injuries resolved without residuals; and (2) whether appellant established that she had continuing work-related residuals or disability after May 10, 2009.

On appeal, counsel asserts that the impartial medical specialist's opinion was insufficiently rationalized to terminate appellant's compensation.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that, on or before April 10, 2006, appellant, then a 54-year-old electronics technician, sustained a right shoulder and upper arm sprain and adhesive capsulitis of the right shoulder due to holding her right upper extremity at a 90-degree angle while boring 200 to 400 holes a day with a hand operated drill press over a five-and-a-half year period. Appellant had intermittent work absences from April 10, 2006 through May 2007.² She first sought care at the employing establishment health clinic.

Appellant was evaluated on November 2, 2006 by Dr. K. Scott Malone, an attending orthopedic surgeon, who diagnosed adhesive capsulitis of the right shoulder. A November 14, 2006 magnetic resonance imaging (MRI) scan arthrogram of the right shoulder showed tendinosis of the supraspinatus tendon.

Dr. P. Jeffrey Jarrett, an attending Board-certified orthopedic surgeon, treated appellant beginning on February 26, 2007. He noted her work duties and symptoms and diagnosed adhesive capsulitis with impingement. On May 10, 2007 Dr. Jarrett performed manipulation of the right shoulder under general anesthesia, an arthroscopic limited glenohumeral synovectomy and subacromial decompression. He listed postoperative diagnoses of developing osteoarthritis of the right shoulder and impingement syndrome. OWCP authorized the procedure. Dr. Jarrett obtained an August 13, 2007 MRI scan of the right shoulder demonstrating a prominent articular surface tear at the supraspinatus tendon with tendinosis and joint effusion. In August 26 and 31, 2007 reports, he noted that the May 13, 2007 surgery revealed developing osteoarthritis and grade 3 to 5 chondromalacia of the right shoulder. Dr. Jarrett held appellant off work.

On November 20, 2007 OWCP obtained a second opinion from Dr. Alexander N. Doman, a Board-certified orthopedic surgeon. A copy of the medical record and a statement of accepted facts were provided for his review. Dr. Doman opined that the accepted injury temporarily aggravated preexisting osteoarthritis of the right shoulder but did not cause or accelerate that condition. He found that the accepted injury should have resolved within a few months of when appellant stopped work.

In a December 19, 2007 report, Dr. Jarrett opined that a partial thickness rotator cuff tear shown on a recent MRI scan was "a progression of her previous problem."

Appellant returned to work in a full-time modified-duty position on December 27, 2007.

In December 20, 2007 and January 8, 2008 reports, Dr. Thomas Branch, an attending Board-certified orthopedic surgeon, recommended additional right shoulder surgery for severe osteoarthritic degenerative joint disease of the acromioclavicular and glenohumeral joints and rotator cuff tendinitis. He proposed acromioplasty with spur removal, anterior capsular reconstructions, repair of a biceps tendon lesion, a five millimeter (mm) distal clavicle resection and a rotator cuff repair.

² By decision dated March 28, 2007, OWCP denied appellant's claims for intermittent wage loss from April 13 to October 30, 2006, and on November 3 and 15, 2006 were denied due to insufficient medical evidence.

In a January 14, 2008 report, an OWCP medical adviser found that the proposed surgery was unrelated to the accepted injuries as Dr. Doman opined that the accepted right shoulder conditions had resolved.

On January 9, 2008 OWCP found a conflict between Dr. Branch, for appellant, and Dr. Doman, for the government, regarding appellant's work capacity. To resolve this conflict, it referred appellant to Dr. James W. Spivey, Jr., a Board-certified orthopedic surgeon. OWCP asked Dr. Spivey to determine any medical restrictions necessitated by the accepted conditions, list all diagnosed conditions, how findings established those diagnoses, and if the diagnoses were caused, aggravated or accelerated by work factors.

In a February 11, 2008 report, Dr. Spivey reviewed a statement of accepted facts and the medical record OWCP provided for his review. The statement of accepted facts noted the accepted right shoulder sprain, right shoulder adhesive capsulitis and May 10, 2007 surgery. OWCP noted that the diagnosis of right glenohumeral joint arthritis was not connected to the accepted injuries. Dr. Spivey noted that he could not ascertain if appellant had attained maximum medical improvement "because surgical intervention and subsequent restriction of movement in the shoulder as well as development of arthritic condition ha[d] made the evaluation of the shoulder very difficult." He opined that appellant had no residuals of the accepted conditions. Dr. Spivey characterized the osteoarthritis as a separate condition because it developed more than 20 months after the accepted injury. He stated that there was no indication that work factors aggravated the osteoarthritis. Dr. Spivey found appellant able to resume her date-of-injury job with no restrictions.

In April 28, May 12 and 29, 2008 reports, Dr. Jarrett opined that repetitively drilling rotors at work aggravated and precipitated the right shoulder osteoarthritis and subacromial bursitis visible during the May 10, 2007 surgery.

In November 17 and 21, 2008 reports, Dr. Jarrett diagnosed worsening osteoarthritis of the right shoulder, requiring a right shoulder hemiarthroplasty. In a March 18, 2009 letter, he opined that appellant developed left shoulder arthritis because the accepted right shoulder injury led to overuse of the left arm.

Appellant retired from federal employment effective April 1, 2009.

By notice dated March 23, 2009, OWCP advised appellant that it proposed to terminate her wage-loss and medical compensation benefits on the grounds that any work-related disability had ceased, based on Dr. Spivey's opinion as the weight of the medical evidence. OWCP afforded appellant 30 days to submit additional evidence or argument.

Appellant responded in an April 16, 2009 letter, asserting that Dr. Spivey's examination was cursory and incomplete. She submitted a March 18, 2009 report from Dr. Jarrett diagnosing worsening osteoarthritis of the right shoulder and consequential osteoarthritis of the left shoulder.

By decision dated April 28, 2009, OWCP finalized the proposed termination of compensation effective May 10, 2009, based on Dr. Spivey's opinion that work factors did not cause or aggravate appellant's right shoulder osteoarthritis.

In a May 7, 2009 letter, appellant requested an oral hearing, held October 15, 2009. At the hearing, appellant noted that she underwent right shoulder surgery on June 30, 2009. The hearing representative left the record open for 30 days for appellant to provide additional evidence. Following the hearing, appellant submitted a June 17, 2009 report from Dr. Jarrett, relating her symptoms of bilateral shoulder pain. Dr. Jarrett diagnosed worsening osteoarthritis of the right shoulder and developing osteoarthritis of the left shoulder "consequential to her right shoulder injury."

By decision dated and finalized December 8, 2009, an OWCP hearing representative affirmed the April 28, 2009 termination of compensation. The hearing representative found that appellant did not substantiate any misconduct by Dr. Spivey. The hearing representative found that Dr. Jarrett's and Dr. Branch's opinions were insufficiently rationalized to establish causal relationship.

In a December 7, 2010 letter, counsel requested reconsideration. He asserted that Dr. Doman's and Dr. Spivey's opinions were poorly rationalized. Counsel submitted October 29 and November 22, 2010 reports from Dr. Jarrett, explaining that repetitive right upper extremity motion as a drill press operator for five years caused or aggravated underlying osteoarthritis. He opined that appellant's shoulder complaints were "consistent with the mechanism of this type of repetitive injury and ultimately led to her need for shoulder surface replacement."

By decision dated January 26, 2011, OWCP denied modification of its prior decision on the grounds that the new evidence submitted was insufficient to outweigh Dr. Spivey's opinion.

LEGAL PRECEDENT – ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ 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.⁶

The fact that OWCP accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on OWCP to demonstrate an absence of employment-related disability during the period subsequent to the date when compensation is terminated or modified.⁷ OWCP's burden includes the

³ *Bernadine P Taylor*, 54 ECAB 342 (2003).

⁴ *Id.*

⁵ *Roger G Payne*, 55 ECAB 535 (2004).

⁶ *Pamela K Guesford*, 53 ECAB 726 (2002).

⁷ *Raymond W Behrens*, 50 ECAB 221 (1999).

necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

Section 8123(a) of FECA provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁹ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁰ The impartial medical specialist's report must actually fulfill the purpose for which it was intended; it must resolve the conflict in medical opinion. An impartial medical specialist's report is entitled to greater weight than other evidence of record as long as the conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning.¹¹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right shoulder sprain and adhesive capsulitis of the right shoulder. On May 10, 2007 Dr. Jarrett, an attending Board-certified orthopedic surgeon, performed an arthroscopic glenohumeral synovectomy, subacromial decompression and manipulation of the right shoulder. He diagnosed osteoarthritis and chondromalacia of the right shoulder, clearly visible during surgery. OWCP authorized this procedure.

Dr. Doman, a Board-certified orthopedic surgeon and second opinion physician, opined on November 20, 2007 that the accepted injuries temporarily aggravated preexisting osteoarthritis of the right shoulder but that all injury-related residuals had resolved. Appellant then submitted December 2007 and January 2008 reports from Dr. Branch, an attending Board-certified orthopedic surgeon, recommending additional surgery to address severe osteoarthritis of the right shoulder with rotator cuff tendinitis.

OWCP found a conflict of medical opinion between Drs. Branch and Doman and obtained an impartial opinion from Dr. Spivey, a Board-certified orthopedic surgeon. On February 11, 2008 Dr. Spivey stated that the accepted conditions had resolved and that work factors did not cause or aggravate osteoarthritis of the right shoulder. Based on his conclusions, OWCP terminated appellant's compensation benefits effective May 10, 2009. The Board finds that Dr. Spivey's opinion is not sufficient to establish that the accepted conditions had ceased.¹²

Dr. Spivey opined that the authorized May 2007 surgery caused a "subsequent restriction of movement in the shoulder as well as development of arthritic condition." This statement supports a causal relationship between the accepted conditions and continuing residuals. Yet,

⁸ *Id*

⁹ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁰ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹¹ *James P. Roberts*, 31 ECAB 1010 (1980).

¹² *Conard Hightower*, 54 ECAB 796 (2003).

Dr. Spivey stated that there were no objective findings of the accepted right shoulder conditions. His opinion is not clear as he found both that appellant had and did not have injury-related residuals. The equivocal nature of Dr. Spivey's opinion greatly diminishes its probative value.¹³

Additionally, Dr. Spivey did not provide sufficient medical rationale explaining whether any of the diagnosed conditions, including osteoarthritis of both shoulders, were caused or aggravated by work factors. The lack of rationale further reduces the probative quality of Dr. Spivey's opinion.¹⁴ The Board notes, however, that his lack of explanation appears related to OWCP's questions to him. OWCP asked Dr. Spivey to explain whether any clinical diagnoses were related to the accepted injuries, but did not request that he specifically address the causation of osteoarthritis of either shoulder. Also, the statement of accepted facts noted Dr. Jarrett's and Dr. Branch's diagnosis of arthritis of the right glenohumeral joint, with the proviso that the condition was "not connected to" the accepted injuries. However, Dr. Spivey was appointed to resolve this question. The statement of accepted facts made it appear that the issue was settled. This diminished the probative value of Dr. Spivey's opinion.¹⁵

The Board finds that Dr. Spivey's opinion was not sufficient to resolve the conflict of medical opinion between Dr. Branch, for appellant, and Dr. Doman, for the government. The conflict was still outstanding at the time OWCP issued its April 28, 2009 decision terminating appellant's compensation benefits. Therefore, OWCP did not meet its burden of proof. The termination was improper and is reversed.¹⁶

On appeal, counsel asserts that the impartial medical specialist's opinion was too poorly rationalized to have met OWCP's burden of terminating appellant's compensation. As stated, Dr. Spivey's opinion was not sufficient to have met OWCP's burden of proof and the termination will be reversed. The case will be returned to OWCP for prompt payment of all compensation due and owing from May 10, 2009 onward and reinstatement of appropriate medical benefits.

As OWCP's January 26, 2011 decision terminating appellant's compensation benefits will be reversed, the second issue regarding continuing disability on and after May 10, 2009 is moot.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss and medical compensation benefits effective May 10, 2009.

¹³ *D E*, 58 ECAB 369 (2007).

¹⁴ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹⁵ *E S*, Docket No 10-565 (issued December 21, 2010).

¹⁶ *Raymond W Behrens*, 50 ECAB 221 (1999).

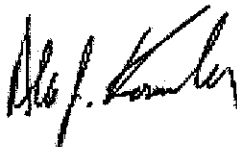
ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 26, 2011 is reversed and the case returned to OWCP for payment of all compensation due and owing and restoration of appropriate medical benefits.

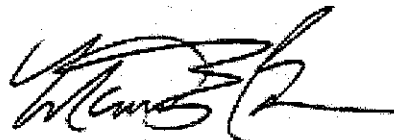
Issued: December 14, 2011
Washington, DC



Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board



Alec J. Koromilas, Judge
Employees' Compensation Appeals Board



Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

