

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

L.G., Appellant

and

**U.S. POSTAL SERVICE, GENOA CITY POST
OFFICE, Genoa City, WI, Employer**

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**Docket No. 20-0611
Issued: February 16, 2021**

Appearances:

*Alan J. Shapiro, 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 January 27, 2020 appellant, through counsel, filed a timely appeal from a December 20, 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 The Board notes that following the December 20, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* 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.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2018; and (2) whether appellant has met her burden of proof to establish continuing residuals or disability on or after January 7, 2018.

FACTUAL HISTORY

On March 24, 2014 appellant, then a 59-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on March 21, 2014 she tripped and fell on an uneven sidewalk while in the performance of duty. She stopped work on March 21, 2014 and returned to limited-duty work on June 20, 2014. OWCP accepted the claim for right radial head fracture, right lunate fracture, contusion of left knee, sprain of left shoulder, and bruised ribs. It paid appellant intermittent wage-loss compensation on the supplemental rolls as of May 6, 2014 and on the periodic rolls as of February 8, 2015.

In a January 13, 2015 report, Dr. Thomas A. Niccolai, a Board-certified orthopedic surgeon, indicated that appellant was at the end of her healing subsequent to her work-related fall. He noted that appellant had a 10- to 20-pound lifting restriction from a prior work injury that had not been adequate for her return to work. Dr. Niccolai opined that appellant's prognosis was good if she did not work.

To determine the status of appellant's accepted conditions and disability, OWCP referred appellant, along with a February 18, 2015 statement of accepted facts (SOAF) and a list of questions, to Dr. Mysore S. Shivaram, a Board-certified orthopedic surgeon, for a second opinion evaluation. The February 18, 2015 SOAF noted appellant's March 21, 2014 employment injury and accepted conditions, and the physical requirements of her date-of-injury position as a rural letter carrier associate. It also noted that she returned to full-time modified work on June 20, 2014 and sustained a recurrence of her condition on October 14, 2014, and had been totally disabled since then.

In a March 24, 2015 report, Dr. Shivaram related that the accepted conditions of right wrist avulsion fracture, nondisplaced right radial head fracture of the elbow, knee contusion, and injury to the right shoulder had resolved as there were no objective findings. With regard to the left shoulder, he indicated that appellant still had pain, which she had prior to the March 21, 2014 work injury, and that he wanted to review the treatment records related to her left shoulder prior to the March 21, 2014 work injury. Dr. Shivaram opined that appellant was capable of returning to work with the same restrictions that were in place on June 20, 2014, when she initially returned to work following the March 21, 2014 work injury.

OWCP thereafter prepared an addendum to the SOAF. The May 12, 2015 addendum to SOAF provided a history of appellant's work-related injuries. Appellant's prior accepted claims included: right hip sprain, right knee contusion and lumbago under OWCP File No. xxxxxx597, date of injury of November 3, 2001; multiple dog bites on calves and lumbar sprain under OWCP

File No. xxxxxx657, date of injury of June 3, 2002;⁴ and a temporary aggravation of left shoulder impingement syndrome under OWCP File No. xxxxxx453, date of injury February 20, 2014.⁵

In a June 1, 2015 supplemental report, Dr. Shivaram set forth his review of the December 27, 2012 operative report of appellant's left shoulder surgery⁶ and a May 12, 2015 addendum to February 18, 2015 SOAF, which included a listing of appellant's work-related claims. He opined that appellant could return to work without restrictions.

On February 8, 2016 OWCP referred appellant, a December 11, 2015 SOAF, and a list of specific questions, to an impartial medical examiner (IME), Dr. Bradley M. Fideler, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence between Dr. Niccolai and Dr. Shivaram pertaining to appellant's current medical status and her ability to work. The December 11, 2015 SOAF mirrored the February 18, 2015 SOAF. This SOAF did not list appellant's prior accepted employment injuries or any surgical procedures appellant had undergone for her accepted injuries.⁷

In a March 11, 2016 report, Dr. Fideler noted his review of the December 11, 2015 SOAF and appellant's medical record. He reported her physical examination findings. Dr. Fideler opined that appellant's right radial head fracture and lunate avulsion fracture in the right wrist had healed and did not require any further treatment or any work restrictions. He indicated that there were no significant limitations or problems with regard to her right elbow, wrist, and hand. Dr. Fideler indicated that appellant had temporarily aggravated the impingement symptoms in both of her shoulders secondary to her March 2014 fall, noting that, in 2012, she had undergone surgery for impingement symptoms in her left shoulder. He opined that appellant's ongoing problems with left shoulder pain were related to her preexisting impingement and rotator cuff pathology and was unrelated to the March 2014 fall. Dr. Fideler noted that there were similar-type impingement problems in the right shoulder, which was also a degenerative condition and not related to the March 2014 fall. With regard to appellant's left knee complaints, he noted that she had some degenerative changes within her left knee, which preexisted her work injury, and had undergone a left knee arthroscopy in 2012, which documented a significant degenerative condition within her left knee. Dr. Fideler opined that she suffered a contusion and probably temporarily aggravated the underlying preexisting degenerative knee condition as a result of the March 2014 work injury. He opined that appellant's preexisting bilateral shoulder pain and left knee pain continued to limit

⁴ In OWCP File No. xxxxxx657, appellant returned to work on January 2, 2004 in a modified position answering telephones, performing miscellaneous office duties, and sorting mail. OWCP determined that this position reflected appellant's wage-earning capacity on April 28, 2004. OWCP File No. xxxxxx657 has not been administratively combined with the present claim.

⁵ Under OWCP File No. xxxxxx453, appellant filed an occupational disease claim (Form CA-2) on February 25, 2014 alleging that her work as a rural carrier associate/clerk for the past 12 years had aggravated her left shoulder and had caused a torn rotator cuff tear. OWCP accepted the claim for temporary aggravation of left shoulder impingement syndrome. OWCP File No. xxxxxx453 has not been administratively combined with the present claim.

⁶ Appellant underwent a debridement of the superior labral tear and anterior acromioplasty. The surgical report revealed evidence of a degenerative labral tear and subacromial impingement of the left shoulder. An October 9, 2014 magnetic resonance imaging (MRI) scan revealed no evidence of a rotator cuff tear.

⁷ The SOAF noted the March 21, 2014 work injury, appellant's accepted conditions, and the physical requirements of her date-of-injury position. It also noted that she returned to full-time modified work on June 20, 2014 and suffered a recurrence of her condition on October 14, 2014 and has been totally disabled from work since then.

appellant, but that her complaints were unrelated to the March 2014 work injury. Dr. Fideler, thus, opined that she could return to work without restrictions. He concluded that any restrictions or limitations imposed on appellant's knee or shoulders were for preexisting conditions unrelated to the March 2014 work injury.

On March 20, 2017 OWCP again referred appellant, a list of questions, and an updated SOAF dated August 12, 2016 to Dr. Fideler for a reevaluation and a clarification report. The August 12, 2016 SOAF indicated that it superseded all previous versions. It noted the March 21, 2014 work injury and the accepted conditions from that injury, as well as the physical requirements of appellant's date-of-injury position. The SOAF noted that she returned to full-time modified work on June 20, 2014, suffered a recurrence of her condition on October 14, 2014, and has been totally disabled since then. It also listed appellant's surgical history as: left knee surgery on December 27, 2012 and February 2, 2014, and a left shoulder surgery on December 27, 2012. The SOAF did not list appellant's prior accepted employment injuries or conditions.

In an April 26, 2017 report, Dr. Fideler noted his April 10, 2017 examination findings, his review of the August 12, 2016 SOAF, and a medical record review. He confirmed that appellant was not able to return to her regular work as a rural carrier assistant due to persistent symptoms in the left shoulder and left knee. Dr. Fideler reiterated his prior opinion that those conditions were preexisting and not directly related to the March 21, 2014 work-related fall.

On June 13, 2017 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Fideler's March 11, 2016 and April 26, 2017 reports. It afforded appellant 30 days to respond in writing if she disagreed with the proposed termination.

In letters dated June 6 and 23, and July 18, 2017, appellant disagreed with the proposed termination. She indicated that since 2002 she had permanent medical restrictions under OWCP File No. xxxxxx657 and that she had worked as a retail associate as there was no work available within her restrictions in her craft of rural carrier associate. Appellant noted that Dr. Fideler never mentioned her accepted work-related claims pertaining to her preexisting left shoulder and left knee conditions. She also denied undergoing a surgical procedure on February 2, 2014. Appellant submitted additional medical evidence.

In a March 30, 2017 disability certificate, Dr. Shaku Chhabria, a Board-certified neurologist, advised that, since 2002, appellant had permanent restrictions for sedentary work and no lifting greater than 10 pounds.

By decision dated March 28, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective January 7, 2018, based on the special weight of the medical evidence accorded Dr. Fideler's March 11, 2016 and April 26, 2017 reports as the IME.

On April 18, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a letter dated April 18, 2018, she continued to allege that there were several errors and discrepancies in Dr. Fideler's reports. Appellant noted that Dr. Fideler referred to a February 2, 2014 surgery, which would have occurred one month prior to her March 2014 fall, and which according to Dr. Fideler established a preexisting condition.

On April 14, 2018 appellant filed a notice of recurrence of medical treatment (Form CA-2a). She noted that she had permanent accepted injuries sustained in OWCP claim File No. xxxxxx657.

On June 11, 2018 OWCP expanded acceptance of the claim to include the additional medical condition of pain in right shoulder joint.

On June 20, 2018 appellant, through counsel, changed the request from an oral hearing to a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on November 19, 2019. In a December 5, 2019 statement, appellant reiterated that Dr. Fideler's reports contained medical and factual errors. She advised, in part, that OWCP had accepted her conditions from her 2002 dog-bite injury as work related, and that following that injury she could no longer work as a rural carrier.⁸ Appellant related that after her wage-loss compensation and medical benefits were terminated in March 2018 she returned to the employing establishment and was told that she could not return to the retail clerk position she had held since her 2002 injury, but that she would have to return to work as a rural carrier.

By decision dated December 20, 2019, OWCP's hearing representative affirmed the March 28, 2018 decision.⁹

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.¹⁰ 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.¹¹ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹²

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹³ To terminate authorization for medical treatment, OWCP must

⁸ Appellant reported that the date of injury for the accepted preexisting conditions was February 20, 2014.

⁹ The hearing representative noted that appellant's work with restrictions at the time of the March 21, 2014 injury was an issue for entitlement to compensation under OWCP File No. xxxxxx657. The hearing representative advised OWCP, by copy of the decision, that "both claims discussed herein should be combined for ease of reference in the future." The Board notes that to date OWCP has not administratively combined these files.

¹⁰ *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

¹¹ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹² *G.H.*, Docket No. 18-0414 (issued November 14, 2018); *Del K. Rykert*, 40 ECAB 294, 295-96 (1988).

¹³ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.¹⁴

Section 8123(a) of FECA provides that, 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.¹⁵ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.¹⁶

OWCP's procedures provide as follows:

"The [claims examiner] is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When the [medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."¹⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2018.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹⁸ As noted, OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁹

OWCP found a conflict in medical opinion evidence between appellant's treating physician, Dr. Niccolai, and OWCP's second opinion physician, Dr. Shivaram, as to whether appellant's disability had ceased. Dr. Shivaram had opined that appellant's accepted conditions had resolved and that she could return to her date-of-injury position without restrictions. The Board finds, however, that the SOAFs which Dr. Shivaram relied on were incomplete. Specifically, Dr. Shivaram was provided with SOAFs dated February 18 and May 12, 2015, which

¹⁴ *R.P.*, Docket No. 18-0900 (issued February 5, 2019); *Calvin S. Mays*, 39 ECAB 993 (1988).

¹⁵ 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

¹⁶ *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

¹⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see also R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁸ *A.M.*, Docket No. 19-1602 (issued April 24, 2020); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁹ *Supra* note 17 at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see L.J.*, Docket No. 14-1682 (issued December 11, 2015).

included a history of appellant's prior work injuries, but not her surgical history. As Dr. Shivaram based his report on an incomplete SOAF, the Board finds that the probative value of his opinion is diminished and not of equal weight to cause a conflict in medical opinion with Dr. Niccolai.²⁰

OWCP had referred appellant to Dr. Fideler for an impartial medical evaluation; however, as no true conflict existed in the medical evidence at the time of the referral to Dr. Fideler, the Board finds that his reports may not be afforded the special weight of an IME and should instead be considered for its own intrinsic value.²¹ The referral to Dr. Fideler is therefore considered to be for a second opinion evaluation.²²

While Dr. Fideler also opined that appellant's accepted conditions in this claim had resolved, and that her continuing disability was not related to her current claim, the Board finds that OWCP also provided Dr. Fideler with deficient SOAFs. He was provided with a December 11, 2015 SOAF and an August 12, 2016 SOAF, which related that she had undergone left knee surgery on December 27, 2012 and February 2, 2014, and left shoulder surgery on December 27, 2012. However, appellant has disputed that she underwent any surgical procedure on February 2, 2014. Furthermore, these SOAFs provided no history of her prior accepted employment injuries. In this regard, the Board specifically notes that appellant's February 2014 occupational disease claim, which was accepted for conditions, including a temporary aggravation of left shoulder impingement syndrome, would be pertinent to findings regarding her accepted left shoulder condition in the current claim. As Dr. Fideler based his opinion on incomplete and inaccurate SOAFs, the Board finds that the probative value of his opinion is diminished and insufficient to be afforded the weight of the medical evidence.²³ The Board thus finds that OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 7, 2018.²⁴

²⁰ See *S.M.*, Docket No. 19-1227 (issued August 28, 2020); *V.H.*, Docket No. 17-0439 (issued December 13, 2017); *A.A.*, Docket No. 15-0937 (issued August 17, 2015).

²¹ See *F.R.*, Docket No. 17-1711 (issued September 6, 2018).

²² See *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); see also *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

²³ See *supra* note 22.

²⁴ In light of the Board's disposition of issue 1, issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 16, 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