

File Number:  
HR13-D-H

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 50  
LONDON, KY 40742-8300  
Phone: (202) 693-0045

Date of Injury:  
Employee:

RECEIVED JAN 27 2020

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review was completed on the case. Based upon that review, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR  
OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL FELSER  
FELSER LAW FIRM  
7393 HODGSON MEMORIAL  
SUITE 102  
SAVANNAH, GA 31406

*If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.*

Washington DC, January 23, 2020



To further assess continuing injury related residuals, the Office referred the claimant for a second opinion evaluation which took place on [redacted] with board certified orthopedic surgeon [redacted] M.D. He documented the history of injury and performed a physical examination. The impression was a history of a right rotator cuff strain. Dr. [redacted] noted that while [redacted] complained of pain, the strain should have long resolved. He did not feel that the MRI findings were an acute process. Rather, he stated that this was "probably" normal for her age. He noted that she had fairly good strength on abduction against resistance. However, he felt that the rotator cuff strain, even with a pre-existing small tear should have resolved. Dr. [redacted] went on to state, "I am surprised that this was accepted as an on the job injury especially since it was repetitive use and no one traumatic event that caused her to have shoulder pain. If it was from repetitive use, this strain should have certainly resolved within a matter of weeks and therefore should be resolved by now." He stated that there were no objective findings, only tenderness in the anterior part of the shoulder. Again, he stated that the right shoulder condition should have resolved. However, he noted that the claimant was being kept out for her left shoulder, for which she had two arthroscopic surgeries. In an addendum report of [redacted] Dr. [redacted] acknowledged reviewing MRIs of the right shoulder and cervical spine. However, they did not suggest any significant lesions. He explained that the findings in her shoulder were normal for her stated age and there was no significant lesion on the cervical spine. With regard to the right shoulder and cervical spine, Dr. [redacted] opined that the claimant could return to regular duty.

On [redacted] the Office released a proposal to terminate medical and compensation benefits for the claimant's condition, affording thirty days for submission of evidence to stay the pending termination. The Office pointed to the report from Dr. [redacted] in support of this decision.

On [redacted] the Office issued a formal decision denying entitlement to wage loss compensation from [redacted] and continuing.

An OWCP-5c was completed by Dr. [redacted] on [redacted]. He noted that MRI testing revealed a bulging disc and the claimant was referred to a spine specialist. The claimant was said to be totally disabled.

In response to the proposed termination, a letter dated [redacted] was received from the claimant's attorney, Paul Felser, Esq. He took issue with the second opinion exam of Dr. [redacted] referencing his vaguely defined findings on physical exam. He also argued that the claimant had a history of injuries to the bilateral shoulders and it was unclear if the second opinion examiner was provided with sufficient records relative to those injuries. Mr. Felser specifically referenced the case, assigned file number [redacted] within which the claimant underwent left shoulder surgery. He argued that these cases should have been administratively combined.

Mr. Felser further stated that the second opinion examiner did not address the longstanding, heavy requirements of [redacted] position. Additionally, Dr. [redacted] had reported injuries in excess of the sprain that had been accepted by the Office. Specific reference was made to cervical radiculopathy and right rotator cuff syndrome and Mr. Felser stated that case expansion was indicated. It was noted that the claimant had a prior claim, accepted for a cervical strain, and there was no consideration given to what effects the subsequent injury had on this. At the very least, Mr. Felser argued that the claimant should be referred for an impartial examination.

By decision dated [redacted] the Office terminated entitlement to medical and wage loss benefits, effective the same date. They explained that the evidence received in response to the proposal was insufficient to alter the proposed termination. The weight of medical evidence was afforded to Dr. [redacted].

The claimant disagreed with this decision and an oral hearing was requested. In accordance with this request, I have conducted an initial review of the file and find that the case is not in posture for a hearing at this time.

The decision of the District Office dated \_\_\_\_\_ should be *REVERSED* for the reasons set forth below.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>1</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>3</sup>

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given each individual report.<sup>4</sup> The Board has held that a medical opinion that is not fortified by rationale is of diminished probative value.<sup>5</sup> In situations where there are 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 on a proper factual background, must be given special weight.<sup>6</sup>

The issue on appeal is whether the Office properly terminated entitlement to medical and wage loss benefits, by decision dated \_\_\_\_\_

On review, I find that the decision of the District Office must be reversed as the Office did not meet its burden in terminating benefits. As outlined above, \_\_\_\_\_ had been treating with Dr. \_\_\_\_\_ relative to her injury and it was his opinion that she remained totally disabled. In order to assess continuing injury related residuals, the Office had referred her for a second opinion evaluation which took place on \_\_\_\_\_ with Dr. \_\_\_\_\_. However, I find that his opinion can not be afforded the weight of medical evidence for the reasons outlined below.

First, I find that Dr. \_\_\_\_\_ opinion regarding residuals is inconsistent with the injury claimed in the instant case. In the Statement of Accepted Facts, the Office noted that on \_\_\_\_\_ the claimant was pulling down mail to bundle for delivery. When she picked up a tray, she felt and heard a pop in her right shoulder. At the time of referral, the second opinion examiner was advised that he must use the SOAF as the only factual framework for his opinion. Yet, the history of injury documented in his report is inconsistent with what was reflected in the Statement of Accepted Facts. On page 1 of his report, Dr. \_\_\_\_\_ stated that in \_\_\_\_\_ he claimant had some pain in her shoulder after repetitive

<sup>1</sup> Lawrence D. Price, 47 ECAB 120 (1995).

<sup>2</sup> Id; Patricia A. Keller, 45 ECAB 278 (1993).

<sup>3</sup> Furman G. Peake, 41 ECAB 361, 364 (1990).

<sup>4</sup> Connie Johns, 44 ECAB 560 (1993).

<sup>5</sup> Cecilia M. Corley, 56 ECAB 662 (2005).

<sup>6</sup> Gloria J. Godfrey, 52 ECAB 486 (2001).

use. However, he went on to state that the claimant denied one specific episode of a painful traumatic event. This is not consistent with what reported in her personal statement and with what has been accepted as factual. Again, she identified lifting a tray of mail and hearing/feeling a pop in her right shoulder. She immediately experienced a sharp, burning, tearing pain to the point that she could not continue working. An ambulance was called and she was taken to the hospital. Dr. report does not reflect this history of injury and as such, is of diminished probative value.

With regard to continuing residuals, Dr. stated that a strain, especially from repetitive use should have resolved long ago. Again, had filed a Traumatic Injury claim for a specific event which occurred on . Therefore, Dr. reference to "repetitive use" is inaccurate. Additionally, in response to question 2, he stated that he was surprised that the case was accepted as work related especially since it was repetitive use and "no one traumatic event" caused her to have shoulder pain. Again, this is not consistent with what has been claimed and reflected in the SOAF. Dr. proceeded to state that if it was from repetitive use, the strain should have certainly resolved within a matter of weeks. However, this conclusion is based upon an inaccurate factual history. Similarly, in response to question 3, he again stated that there was no significant traumatic event and that the work related condition should have resolved. However, medical conclusions based on inaccurate or incomplete histories are of little probative value.<sup>7</sup>

A SOAF is one of the most important documents a claims examiner prepares. The outcome of a claim and, ultimately, justice for the claimant may hinge on the completeness, conciseness and accuracy of the statement of accepted facts. The claims examiner thus has the responsibility to assure that the statement adequately covers the relevant points of information in a fair and clear presentation.<sup>8</sup> It is the Office's responsibility to provide a complete and proper frame of reference for a physician by preparing a statement of accepted facts.<sup>9</sup> *When the District Medical Adviser, second opinion specialist or referee physician renders a medical opinion based on a Statement of Accepted Facts which is incomplete or inaccurate or does not use the Statement of Accepted Facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.*<sup>10</sup>

In addition to the fact that Dr. opinion was not based upon a complete and accurate history, I find his responses to the questions posed by the Office to be insufficiently rationalized to constitute the weight. He stated multiple times that the claimant's right shoulder strain *should* have resolved but did not definitively state that it did nor did he provide a reasoned medical explanation to support how he arrived at this conclusion. This is especially important given Ms. continued complaints. In an addendum of , Dr. acknowledged reviewing MRI testing and stated that the "findings" in the shoulder were normal for the claimant's age. However, he provided no discussion of what those findings were and how he concluded that they were solely attributable to her age and not the work event of

Additionally, I find that further development should be initiated to assess whether the case should be expanded to include additional conditions. As outlined above, the case is presently approved for a right rotator cuff strain. However, in Mr. Felser's response to the proposed

<sup>7</sup> Beverly R. Jones, 55 ECAB (Docket No. 03-1210, issued March 26, 2004); Mary J. Summers, 55 ECAB (Docket No. 04-704, issued September 29, 2004).

<sup>8</sup> Doris A. Reed, Docket No. 00-35, issued February 4, 2002.

<sup>9</sup> Donald E. Ewals, 51 ECAB Docket No. 98-2180 issued April 3, 2000.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 – Medical, Requirements for Medical Reports, Chapter 3.600.3 (October 1990); Willa M. Frazier, 55 ECAB 379 (2004).

termination, he made specific reference to the fact that the claimant was suffering from additional diagnoses which warranted expansion of the claim. In particular, he made reference to cervical radiculopathy and right rotator cuff syndrome. Based upon this request, the Office should have initiated further development to assess whether expansion of the case was indicated. However, this was never actually developed to the claimant nor was a formal decision issued in this regard. This was improper as it deprived the claimant of due process. Expansion of the claim is directly related to the issue on appeal, therefore a formal decision may not be made relative to continuing injury related residuals until the Office determines whether the case should be expanded.

Chapter 2-1400(11) of the FECA Procedure Manual also addresses additional diagnoses and consequential injuries. After an initial claim is accepted, the claimant or the medical provider may request that an additional diagnosis be accepted as work-related, or claim that weakness or impairment caused by a work-related injury led to a consequential injury. This may affect the same part of the body as the original injury/illness or a different area altogether, and could be for a physical or psychological condition. If the medical evidence establishes that the additional diagnosis or consequential injury is not a result of the original injury/illness, a formal disallowance is needed, and usually a Letter Decision is sufficient.

This section goes on to address the responsibilities of the Office and states that *upon receipt of a request to amend the claim to include an additional diagnosis or consequential injury, the CE is responsible for reviewing the evidence of record and determining if sufficient documentation exists to support acceptance*. If, after any necessary development, the weight of medical evidence does not support the additional diagnosis or consequential injury, the CE is responsible for issuing a formal decision with appeal rights.

When an employee initially submits supportive factual and/or medical evidence which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof.<sup>11</sup>

Additionally, the claimant has several other workers' compensation claims which are relevant to the issue on appeal. As such, I find that these claims should be administratively combined. Cases should be combined where correct adjudication depends on cross-referencing between files.<sup>12</sup> Specifically, file number \_\_\_\_\_ was assigned for a \_\_\_\_\_ Traumatic Injury. It was approved for a chest wall muscle strain, left shoulder strain and left bicipital tendonitis. The claimant underwent arthroscopic surgery on \_\_\_\_\_ and \_\_\_\_\_ File number \_\_\_\_\_ was assigned for an \_\_\_\_\_ Traumatic Injury. Injuries were claimed to the bilateral shoulders, although the case was formally denied and upheld on appeal. File number \_\_\_\_\_ was assigned for a \_\_\_\_\_ Traumatic Injury. It is approved for a cervical sprain. Lastly, file number \_\_\_\_\_ was assigned for a \_\_\_\_\_ Traumatic Injury. A left shoulder condition was claimed however the case was formally denied.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>13</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.<sup>14</sup>

<sup>11</sup>James B. Bowers, III, 44 ECAB (Docket No. 92-542, issued October 8, 1992).

<sup>12</sup>(Thomas N. Rosa, docket No. 04-1346, issued October 29, 2004)..

<sup>13</sup> See Vanessa Young, 55 ECAB 575 (2004).

<sup>14</sup> See Richard E. Simpson, 55 ECAB 490 (2004).

Upon return of the case file, the District Office should immediately reinstate the claimant's medical benefits retroactive to the date of termination. No wage loss benefits have been paid in the instant case to date. To the contrary, the Office issued a formal decision on \_\_\_\_\_ denying entitlement to compensation from \_\_\_\_\_ and continuing. Therefore, if the claimant wishes to pursue wage loss entitlement, she must refer to the appeal rights which accompanied the wage loss denial.

Additionally, the Office should administratively combine the instant case with claims ending in \_\_\_\_\_. The Office should then update the Statement of Accepted Facts. Upon completion, the Office must write to the second opinion examiner for a supplemental opinion. He must be advised that the SOAF is to be used as the only factual framework for his opinion. If re-evaluation of the claimant is required, the Office should take the steps necessary to schedule a repeat exam. First, the examiner should be asked to address whether the evidence of record supports expansion of the claim to include additional right shoulder conditions and/or a cervical condition either by direct cause, aggravation, acceleration or precipitation. He should specifically be asked to address diagnoses of right rotator cuff syndrome and cervical radiculopathy. The examiner must provide a discussion of the objective evidence along with medical rationale to support his conclusions. The Office should supply the accepted definition of Causal Relationship as outlined in Chapter 2-0805(2) of the FECA Procedure Manual. Additionally, the Office must advise that it is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment-related for purposes of compensation under the Act.<sup>15</sup>

Once the issue of expansion is addressed, the examiner should then provide a well-reasoned opinion as to whether the claimant continues to suffer residuals of the work related conditions, thus warranting additional medical treatment and/or disability from work. Rationale and a discussion of the objective evidence of record must be supplied to support his conclusions. The examiner must also address \_\_\_\_\_ work capacity following the \_\_\_\_\_ injury and an OWCP-5c form should be completed. The examiner should be asked to provide rationale and reference objective findings to support his opinion. Upon completion of the above mentioned development, the Office should take further action as deemed appropriate to address continued entitlement to FECA benefits.

Consistent with the above findings, the decision of the District Office dated \_\_\_\_\_ is *reversed* and the case file is returned for further action as described above.

ISSUED:

WASHINGTON, D.C.

Hearing Representative  
Branch of Hearings and Review  
for  
Director, Office of Workers'  
Compensation Programs

<sup>15</sup> Arnold Gustafsan, 41 ECAB 7 (Docket No. 89-0438 issued October 30, 1989).