

U.S. DEPARTMENT OF LABOR  
Office of Workers' Compensation Programs

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DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of [REDACTED] [REDACTED] Claimant; Employed by the Department of Homeland Security, Transportation Security Administration in Sarasota, Florida. Case No. 062114125. Hearing was held on January 24, 2008 in Tampa, Florida.*

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The issue for determination is whether the Office met its burden of proof in terminating the claimant's entitlement to medical compensation benefits for her cervical spine condition, effective July 19, 2007.

The claimant, date of birth, August 4, 1959, was employed as a Transportation Security Screener with the Department of Homeland Security, Transportation Security Administration in Sarasota, Florida. She filed a timely claim for a traumatic injury to her right shoulder and arm occurring on May 11, 2004 while loading checked baggage into a screening machine.

An EMG was performed on July 8, 2004.

In a medical report dated July 14, 2004, the claimant's then attending physician, Dr. S. Aull indicated that,

This 44-year old, right hand dominant female was seen today for follow up of her neck and right upper extremity pain, which the patient injured while performing her duties at work on May 11, 2004. The patient's MRI is reviewed today with significance of partial thickness tear of the supraspinatus tendon. The patient did have a cervical MRI performed, which showed disk osteophyte complex encroaching the C7 nerve root on the right with C7-C8 root irritation but no active denervation noted per MRI. The patient has been taking Celebrex with some effect. She has not been on other medication as she has been unable to obtain same. She continues to have pain in the neck and down the shoulder with tingling into the hand especially with shoulder mobilization and abduction.

After physical examination, Dr. Aull diagnosed right supraspinatus partial tear, MRI verified; right C7-8 nerve root irritation without active denervation per electrodiagnostics; and myofascial dysfunction of the cervical paravertebrals and shoulder mantle secondary to same, all as a result of her work related injury on May 11, 2004.

The claim was originally accepted for a partial tear of the right supraspinatus and later expanded to include cervical nerve irritation at C7-8. The claimant stopped work on the date of injury and, to date, has not returned in any capacity. She has received appropriate compensation for wage loss.

On June 16, 2005, the claimant underwent a right shoulder arthroscopic subacromial decompression and acromioplasty with distal clavicle resection and debridement of bursal sided grade I supraspinatus partial rotator cuff and posterior labral tears.

On July 27, 2005, the claimant's attending physician, Dr. Powel Crosley, Physiatrist, maintained that the claimant was totally disabled for all employment.

On August 8, 2005, the claimant was evaluated by Dr. James D. Shortt, orthopedic specialist, during a second opinion orthopedic examination that was scheduled in accordance with the Office's procedures. In his report of the same date, Dr. Shortt provided an accurate factual and medical history, review of medical records and diagnostic test results, and findings on physical examination. In conclusion Dr. Shortt indicated that,

I do feel that her current symptoms are causally related to her accident of 05/11/04. In answer to the specific questions - 1) Is the diagnosed condition of right supraspinatus partial tear and right nerve irritation of C7-8 medically connected to the work injury of 05/11/04 by direct cause, aggravation, precipitation of acceleration? My answer is yes. This woman denies any prior history of right shoulder or neck pain and there was evidence of failure to respond to an adequate course of conservative treatment of both conditions and an MRI report confirming neck pathology at C5-6 and C6-7. 2) Does she have any increased discomfort in the right shoulder or cervical joints? She has discomfort in both. It was not increased, because she had no prior pain. 3) Does she show right shoulder tear, Bankart lesion or recurrent instability. The MRI actually did not show a tear. The diagnosis of a superficial Grade I bursal tear was made at surgery by Dr. Schofield. She does not have the other conditions queried. 4) Her physical limitations from the work related disability will be noted in the enclosed OWCP-5 forms - This woman would be limited to lifting and carrying 5 pounds. No overhead work and no climbing, 5) Does the patient have temporary or permanent restrictions? The answer is yes, she certainly has temporary and they may be permanent if she does not improve range of motion and strength in her right shoulder. 6) Is she able to return to the position of a transportation security screener without restrictions? The answer is no. 7) Anticipated date of return - would be pending response to her shoulder surgery and therapy and this woman may require a manipulation of her shoulder in the future. 8) Has her right supraspinatus partial tear and right nerve irritation fully reached? The answer is no. 9) Does the patient have evidence of abnormalities of posture or atrophy? The answer is no. 10) What is the nature and extent of any deformity and potential for long term treatment? On the right shoulder this woman may require periodic therapy for her right shoulder and neck with use of analgesics and anti-inflammatories and possibly even muscle relaxants for her neck injury. She may be a candidate as well for an anterior cervical discectomy and fusion in the future at two levels. 11) Her prognosis at present time would be fair to good. 12) Is she totally disabled from her Federal duties as a transportation security screener? The answer is yes. I believe I have answered that question about five questions above this. I think her total disability due to this injury has stemmed from the date of injury 05/11/04 through to the present time. I do not believe she has reached MMI at present time. It is my opinion that she will likely require a manipulation of her shoulder under anesthesia and steroid

injection and possibly return assessment by Dr. Glasser regarding the possibility of neck surgery and eventually when she is at MMI she would require a Functional Capacity Evaluation and may require vocational rehabilitation.

On an attached OWCP-5 form, Dr. Shortt indicated that the claimant was capable of performing full-time, modified work within the following permanent restrictions: no reaching or lifting greater than five pounds for more than one hour per day; no pushing or pulling greater than five pounds for more than two hours per day; and no climbing or reaching above the shoulder.

On January 24, 2006, the claimant was evaluated by Dr. V. Daniel Kasscieh, neurologist, during a referee examination that was scheduled in accordance with the Office's procedures in order to resolve the conflict of medical opinion between Drs. Crosley and Shortt regarding the claimant's work tolerance capacity. In his report of the same date, Dr. Kasscieh provided an accurate factual and medical history, review of medical records and diagnostic test results, and thorough physical examination. He diagnosed status post right supraspinatus tear with labral tear with subsequent arthroscopic surgery for repair, chronic right shoulder pain, minimal right adhesive capsulitis, nonspecific tingling in the right fingertips, sensory loss in the left little and middle fingers - unrelated to 05/11/04 industrial accident, and chronic cervical myofascial pain without objective evidence of cervical spasm or limitation of range of motion. He indicated that there was no evidence on exam of right cervical radiculitis and concluded that,

This claimant suffers from chronic right shoulder myofascial pain syndrome associated with some cervical myofascial pain. Her neurologic examination does not reveal evidence of cervical radiculopathy on exam. Her complaints are not explained on the basis of her 2 cervical MRI studies, which showed chronic degenerative changes.

On the basis of my examination findings, this claimant is able to resume working full time, in a modified version of her previous position as a transportation security screener. I have reviewed the limited duty assignment that was included with the records. Based on my review of this report and job description, it is my medical opinion that this claimant could perform these job duties on a full time, 8-hour basis. Her restrictions would be limited to not reaching above the shoulder with the right arm. She could lift with her left arm, but would be limited to a 10-pound lifting restriction with the right arm, but could push or pull up to 15 pounds with the right arm. This would be unlimited on the left.

By letter date May 1, 2007, the District Office provided a copy of Dr. Kasscieh's report to Dr. Ryan Glasser for review and comment. Specifically, Dr. Glasser was asked to provide objective findings in support of the continued diagnosis of cervical nerve root irritation at C7-8 and to address whether or not such condition had resolved.

By undated response received by the Office on May 14, 2007, Dr. Glasser indicated only that, "I concur with his opinions." He did not respond to the Office's requests in regards to the accepted condition of cervical nerve root irritation at C7-8.

On June 13, 2007, the Office proposed to terminate the claimant's compensation benefits for her cervical spine condition on the basis that the weight of the medical

evidence of record as afforded to Drs. Kassicieh and Glasser established that such conditions had resolved without residual.<sup>1</sup>

In response the Office received a medical report from Dr. Myrdalis Diaz-Ramirez, dated June 13, 2007, in which she diagnosed a right supraspinatus partial tear, C5-C6 and C6-C7 spondylosis with C6-C7 annular tear, myofascial pain with muscle spasms, mild cervical spinal stenosis, and possible facetogenic pain in relation to the accepted employment injury; and her own narrative statement, dated July 10, 2007

By decision dated July 19, 2007, the Office finalized its proposal and terminated the claimant's medical compensation benefits for her cervical spine condition, effective July 19, 2007 on the basis that the weight of the medical evidence of record established that the claimant had no continuing disabling residuals of the cervical spine as a result of the accepted employment injury.

The claimant disagreed with the Office's decision and submitted a timely request for an oral hearing.

A hearing was held on January 24, 2008. At the hearing the claimant was represented by her attorney, Mr. Gordon Reiselt. The claimant did not appear or testify on her own behalf.

At the hearing the claimant's attorney indicated that the record was unclear as to exactly what cervical condition(s) had been accepted by the Office and argued that Dr. Shortt had opined that the claimant's cervical nerve root irritation at C7-8 was caused by the accepted injury, that Dr. Kassicieh's report neither specifically addressed the accepted condition of nerve root irritation at C7-8 nor indicated that such condition had resolved, and that while Dr. Glasser had agreed with Dr. Kassicieh's findings he also did not indicate that the accepted nerve root irritation had resolved. In support of his argument, Mr. Reiselt submitted an additional medical report from Dr. Glasser, dated July 18, 2007.

In his medical report of July 18, 2007, Dr. Glasser stated that,

I was asked to clarify the medical condition of [REDACTED]. She continues to have neck and shoulder pain and is presently undergoing treatment by physiatry. Several months ago, I was asked to review an independent medical evaluation by Dr. Kassicieh that was date January 24, 2006. The diagnosis rendered by Dr. Kassicieh included:

1. Right supraspinatus tear with subsequent arthroscopic surgery.
2. Right shoulder pain.
3. Right adhesive capsulitis.
4. Tingling in the fingertips.
5. Sensory loss.
6. Chronic cervical myofascial pain.

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<sup>1</sup> While the proposed decision indicated that the Office had additionally accepted the claim for the condition of cervical radiculopathy, there is no evidence of record which suggests that this condition was ever accepted by the Office and this diagnosis was specifically negated by the diagnostic EMG/NCV results of record. As such, the diagnosis of cervical radiculopathy is not an accepted condition in relation to the injury of May 11, 2004.

In summary, this patient has cervical spondylosis at C5-6 and C6-7, chronic cervical myofascial pain and chronic right shoulder pain. The spondylosis is not caused by the motor vehicle accident, but her need for cervical treatment, as well as right shoulder treatment is related to her work related injury. I apologize for any confusion I may have imposed in regards to my previous comments. These comments are unchanged and are consistent with all of my previous office notes.

A copy of the hearing transcript was provided to the employing agency and they were afforded twenty days within which to submit written comments. No response was received.

Post-hearing the claimant was held open for thirty days to allow for submission of additional evidence.

By letter dated March 3, 2008, Mr. Reisel submitted a medical report from Dr. Powell Crosley, dated February 29, 2008, and additionally indicated that,

There is another issue that needs to be resolved in this case. We are contending that the referee selection was unnecessary because there was no conflict in the medical opinion. The referee selection arose after the employing agency's representative, Michael McCain, told OWCP that the claimant had seen Dr. Shortt before, suggesting a prior relationship. Mr. McCain said that Dr. Shortt had performed a non-work-related surgery on the claimant and that the employing agency wanted to know why she was refusing surgery for a work-related injury. In fact, Dr. Shortt never performed any surgery on the claimant.

There was never a conflict in the medical opinion between Dr. Glassner and Dr. Shortt, the second opinion doctor. Dr. Glassner said on January 11, 2006, that the claimant was unable to perform the duties of a Transportation Safety Officer, but he also listed limitations, saying that she was not able to perform duties of lifting greater than ten pounds. Dr. Shortt also said that the claimant was not able to perform duties of a Screener, but like Dr. Glassner, listed restrictions indicating that she could perform some kind of work.

In its Memorandum to File dated June 20, 2006, OWCP incorrectly opined that Dr. Glassner said that [REDACTED] was unable to work. It said that Dr. Shortt indicated she was able to work modified duty, and therefore, there was a conflict. However, we contend that the only reason that the conflict came about was that the agency's urging and supplying false information to OWCP regarding the prior relationship and surgery of Ms. Reynolds.

Because there was no conflict in the medical evidence as to the claimant's ability to perform modified duty, the appointment of Dr. Kassiech was unnecessary.

Based on the evidence of record, I find that the decision of the District Office, dated July 19, 2007, should be reversed.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>2</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>3</sup> The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>5</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 analysis manifested and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given to each individual report.<sup>6</sup>

In the present case, the Office did not meet its burden of proof in terminating the claimant's compensation benefits for her cervical spine condition, effective July 19, 2007.

In his second opinion examination of August 8, 2005, performed at the Office's direction, Dr. Shortt opined that the claimant continued to exhibit residuals of the accepted cervical conditions of nerve root irritation at C7-8 and that such residuals were employment-related. Therefore, no conflict of opinion existed in regards to the accepted cervical spine condition. As no conflict in medical opinion truly existed, merely declaring a conflict and referring the claimant and case record out for supposed impartial examination will not accord that physician's opinion any special weight.<sup>7</sup>

As no true conflict of medical opinion existed, Dr. Kasscieh's report is not entitled to the special weight afforded to a referee examiner in regards to the claimant's cervical spine condition. His opinion may be considered as an additional second opinion examination, however, obtained in response to the reports of Drs. Glasser and Crosley.

In his report of January 24, 2006, Dr. Kasscieh indicated that there was no objective evidence of cervical radiculopathy but he did diagnose nonspecific tingling in the right fingertips and chronic cervical myofascial pain without objective evidence of cervical spasm or limitation so range of motion. Dr. Kasscieh did not specifically address the accepted condition of nerve root irritation at C7-8 or reference the EMG results of July 8, 2004 on which such diagnosis was based. Similarly, in his undated response in which Dr. Glasser concurred with the findings of Dr. Kasscieh, Dr. Glasser did not specifically respond to the Office's query regarding this accepted condition or provide any opinion that such condition had resolved.

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<sup>2</sup> *Paul L. Stewart*, 54 ECAB \_\_\_\_ (Docket No. 03-1107, issued September 23, 2003); *Jorge E. Sotomayor*, 52 ECAB 105 (2000).

<sup>3</sup> *Elsie L. Price*, 54 ECAB \_\_\_\_ (Docket No. 02-755, issued July 23, 2003); *Mary A. Lowe*, 52 ECAB 223 (2001).

<sup>4</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>5</sup> *James F. Weikel*, 54 ECAB \_\_\_\_ (Docket No. 01-1661, issued June 30, 2003).

<sup>6</sup> *Jean Cullition*, 47 ECAB 728 (1996).

<sup>7</sup> *Jordan M. Carter*, 32 ECAB 856.


In summary, there is no rationalized opinion from any of the physicians of record, including those to whom the Office referred the claimant for second opinion and referee examinations, which indicates that the claimant's accepted cervical spine condition of nerve root irritation at C7-8 resolved without residuals such that no further medical treatment would be required.

Additionally, the claimant's attorney has now submitted an additional medical report from Dr. Glasser, dated July 18, 2007 in which he concludes that the claimant's continues to suffer from residuals of the accepted cervical spine condition.

Consistent with the above findings, the Office's decision of July 19, 2007 is hereby REVERSED and the case returned for reinstatement of medical benefits for the accepted cervical condition of nerve root irritation at C7-8, with corrected ICD-9 code 353.2.

MAY 14 2008

DATED:  
WASHINGTON, D.C.



AMY C. DE ROCHER  
Hearing Representative  
For  
Director, Office of Workers'  
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