

May 8, 2002. The Office subsequently accepted the conditions of strains to the cervical and thoracic spine and left shoulder and placed appellant on the periodic rolls.

The record reflects that appellant had a prior work injury on November 1, 1996 when she was working as a rural letter carrier. The Office assigned appellant's claim file number A06-0664581 and accepted the conditions of a cervical, thoracic, lumbar and left shoulder strain. Appellant was placed on limited duty and had periods of intermittent disability. By decision dated November 5, 1999, the Office found that her actual earnings as a modified distribution clerk position fairly and reasonably represented appellant's wage-earning capacity. Appellant was performing this modified job when she was injured on December 24, 2001. The Office subsequently combined both cases and made file number A06-0664581 the master file.

Dr. Payne submitted progress notes diagnosing fibromyalgia with anxiety, degenerative joint disease and degenerative disc disease in the cervical and lumbar spines and a left glenoid labral tear. He indicated that appellant's problems were persisting and her condition remained as before. Dr. Payne stated that appellant was permanently disabled from employment as a result of her work-related injuries, their refractory nature to treatment, incurability and continued long-term limitations.

In an effort to determine the relationship between appellant's current medical condition and disability for work, the Office referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Michael Goebel, a Board-certified orthopedic surgeon. In a June 23, 2004 report, Dr. Goebel noted the history of appellant's work injuries and that she had not worked in the last two years. He opined that the accepted cervical, thoracic, lumbar and left shoulder strains had healed and that appellant did not have any objective residual disability causally related to her work injuries. He further noted that appellant's symptoms were out of proportion to her clinical findings and imaging studies. Dr. Goebel stated that appellant's main diagnosis was chronic pain syndrome, which was likely secondary to fibromyalgia and that he did not believe that the minimal spondylosis changes of the cervical, thoracic or lumbar spine caused appellant any substantial symptoms. He additionally noted that the glenoid labral tear of the left shoulder was minimal and that a shoulder surgeon had established that surgery was not necessary.

In a letter dated August 9, 2004, the Office issued a notice of proposed termination, finding that the weight of the medical evidence was represented by Dr. Goebel and established that she had no disability or residuals due to her accepted work-related conditions.

In response, appellant submitted an August 18, 2004 letter from Dr. Payne and medical reports previously of record. Dr. Payne noted that he had treated appellant for approximately eight years and that she had documentation regarding the clinical course, evaluation and treatment of each of her conditions over the years. He opined that there was no evidence of malingering. Dr. Payne submitted additional progress reports, advising that he has continued her off-work status.

The Office found that a conflict in medical opinion was created between Dr. Payne, a treating physician, and Dr. Goebel, the second opinion examiner, as to whether appellant had any continuing disability. It referred her, together with a statement of accepted facts, a list of

questions and the case record, to Dr. Mather Fahim Habashi, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a November 2, 2004 report, Dr. Habashi reviewed the history of the work injuries and the medical records and set forth his examination findings. He provided historian of strained left shoulder; strained cervical, thoracic and lumbar spine; degenerative arthritis of the cervical, thoracic and lumbar spine aggravated by the work injury; and lumbar radiculitis on the left secondary to degenerative arthritis. Dr. Habashi stated that the sprains of the cervical, thoracic and lumbar spine had healed, but opined that the aggravation of appellant's degenerative arthritis resulted in the persistence of her pain as did her preexisting fibromyalgia and depression. He further stated that appellant's subjective complaints were consistent with the objective findings. He opined that appellant was able to perform her modified duties as a distribution clerk with sitting no more than 60 minutes, lifting no more than 15 pounds and no excessive reaching above shoulder level.

On February 17, 2005 the Office issued a notice of proposed termination finding that the weight of the medical evidence, as represented by Dr. Habashi's report, established that appellant no longer had any disability or restrictions from working as a result of her employment injury. The Office advised that appellant's medical benefits for her accepted injury would not be affected and accorded appellant 30 days in which to submit additional evidence and argument.

By decision dated March 21, 2005, the Office finalized the termination of appellant's wage-loss benefits effective the same day. The Office noted that no additional evidence or argument was received in response to the notice of proposed termination.¹

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² 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.³ Furthermore, 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.⁴

¹ The Board notes that the case record contains additional evidence which the Office received after the issuance of its March 21, 2005 decision. The Board, however, has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); see *Avalon C. Bailey*, 56 ECAB ____ (Docket No. 04-2178, issued December 23, 2004).

² *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ *Gloria J. Godfrey*, *supra* note 2.

ANALYSIS

The Office found that a conflict in medical opinion existed between the opinions of appellant's treating physician, Dr. Payne, a Board-certified internist and Dr. Goebel, who had provided a second-opinion examination for the Office, regarding whether appellant continued to suffer from residuals of her accepted work-related conditions. The Office then properly referred appellant to Dr. Habashi, a Board-certified orthopedic surgeon, for an impartial medical evaluation and an opinion on the matter to resolve the conflict.⁵

By report dated November 2, 2004, Dr. Habashi noted the history of injury and his review of the medical records. He opined that although the sprains of the cervical, thoracic and lumbar spine have healed, the aggravation of appellant's degenerative arthritis, which he opined was causally related to the work injuries, resulted in the persistence of her pain, as does her preexisting conditions of fibromyalgia and depression. He further opined that although appellant had residuals causally related to her work-related injuries, she could perform her modified duties as a distribution clerk with restrictions imposed in terms of sitting, lifting and reaching above shoulder level. The Office relied on Dr. Habashi's opinion in its March 21, 2005 termination decision, finding that appellant's accepted work injury no longer prevents her from returning to her modified position.

The Board finds that Dr. Habashi's referee opinion that appellant could perform her modified duties as a distribution clerk subject to specified work restrictions is sufficiently probative, rationalized and based upon a proper factual background. Dr. Habashi addressed both the accepted work injuries of 1996 and 2001, as well as the accepted conditions of lumbar strain, thoracic strain, cervical strain and left shoulder strain. He provided findings on examination for those areas, reviewed the diagnostic testing of record and concluded that although appellant had residuals from her employment injuries, she could perform modified duty subject to specified work restrictions. Therefore, the Office properly accorded Dr. Habashi's opinion as the special weight of an impartial medical examiner.⁶ Accordingly, the Board finds that Dr. Habashi's opinion constituted sufficient medical rationale to support the Office's March 21, 2005 decision terminating appellant's wage-loss compensation effective March 21, 2005.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate appellant's wage-loss compensation benefits effective March 21, 2004 based on the opinion of Dr. Habashi, the impartial medical specialist.

⁵ See *Jack R. Smith*, 41 ECAB 691, 701 (1990).

⁶ *Gary R. Sieber*, 46 ECAB 215 (1994).

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 5, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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