



extremity.<sup>1</sup> Appellant stated that he wished to seek review by the Board of not only the March 21, 2006 decision, but also the Office's April 12, 2006 decision which was issued after his appeal to the Board. The April 12, 2006 decision denied appellant's claim for wage-loss compensation for total disability for the period November 9, 2004 through March 13, 2005. A brief history of the case is set forth below.

On September 26, 2003 appellant, then a 47-year-old mail handler group leader, filed a traumatic injury claim alleging that on September 4, 2003 he hurt his right shoulder and left elbow while loading heavy cans onto a trailer at work. By letter dated November 25, 2003, the Office accepted appellant's claim for temporary exacerbation of preexisting acromioclavicular (AC) joint arthropathy of the right shoulder. It authorized right shoulder arthroscopy surgery, which was performed on December 4, 2003 by Dr. Richard A. Boiardo, an attending Board-certified orthopedic surgeon.

On July 8, 2004 Dr. Boiardo performed surgery on appellant's left shoulder. Appellant returned to limited-duty work at the employing establishment on March 14, 2005.

On April 13, 2005 appellant filed a claim for wage-loss compensation (Form CA-7) for the period May 22, 2004 through March 13, 2005. He submitted Dr. Boiardo's undated form report which stated that appellant sustained elbow epicondylitis and a rotator cuff rupture due to the September 4, 2003 employment injury. Dr. Boiardo opined that appellant was totally disabled from September 16, 2004 through March 14, 2005. He stated that he could return to limited-duty work on March 14, 2005.

On June 24, 2005 the Office found a conflict in the medical opinion evidence between Dr. Alan R. Miller, an Office referral physician, and Dr. Boiardo regarding appellant's alleged employment-related disability. In a May 27, 2004 report, Dr. Miller opined that appellant could return to work with restrictions due to his employment-related right shoulder condition and there was no need for further medical treatment for the left elbow. Dr. Boiardo opined that appellant continued to be totally disabled. In a May 17, 2004 disability certificate, he stated that appellant sustained a rotator cuff tear and tendinitis in the left elbow. Dr. Boiardo opined that appellant was totally disabled until further notice. His March 11, 2005 disability certificate stated that appellant had tennis elbow and a rotator cuff tear. Dr. Boiardo opined that appellant was disabled from that date through April 1, 2005.

By letter dated September 27, 2005, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Gregory J. Menio, a Board-certified orthopedic surgeon, for an impartial medical examination. In an October 6, 2005 report, Dr. Menio opined that appellant sustained impingement syndrome of the right shoulder with AC joint arthropathy and lateral epicondylitis of the left elbow. He stated that the right shoulder diagnoses were an exacerbation of a 2001 work-related injury. Dr. Menio stated that the tendinitis and osteonecrosis of the left elbow were related to appellant's September 4, 2003 employment-related injury. He noted that appellant only experienced occasional bouts of right shoulder pain. Appellant's left elbow was fully functional and he had no complaints. Dr. Menio further noted that he had returned to work in his

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<sup>1</sup> Docket No. 06-990 (issued May 25, 2006).

previous capacity. Appellant's prognosis was good and he currently required no medical treatment. Dr. Menio opined that, based on the authorized December 4, 2003 right shoulder surgery, appellant was able to return to work with restrictions at the time of Dr. Miller's April 27, 2004 examination. He believed that the temporary total disability for the December 4, 2003 surgery was three months. Dr. Menio further opined that the July 8, 2004 left elbow surgery was medically necessary and causally related to the September 4, 2003 employment injury. He concluded that appellant had no residuals, noting that he had full range of motion of both shoulders and elbows and no tenderness in either his right shoulder or left elbow. Dr. Menio further concluded that appellant had no physical limitations and that he was capable of performing his regular work duties.

On November 9, 2005 the Office authorized the July 8, 2004 left shoulder surgery based on Dr. Menio's October 6, 2005 report. The Office accepted appellant's claim for lateral epicondylitis and a ganglion cyst of the left elbow.

By letter dated November 15, 2005, the Office advised appellant that the medical evidence of record was insufficient to establish that he was totally disabled from May 22, 2004 to March 13, 2005 due to his accepted employment-related conditions. It addressed the medical evidence he needed to submit to establish his claim.

On March 28, 2006 an Office medical adviser reviewed appellant's medical records to determine his estimated recovery period and total disability following his July 8, 2004 left elbow surgery. The medical adviser noted Dr. Menio's October 6, 2005 findings of no left elbow pain and a fully functional left elbow. He stated that total disability for this type of surgery should not be greater than three months. The medical adviser indicated that Dr. Boiardo's operative notes revealed that some bone of the lateral epicondyle was removed which was appropriate for this operation. He stated that his postoperative notes indicated the sequence of events but the specific stages of appellant's recovery were not included. Further, they did not indicate any complications or other intervening events that would have delayed his return to work. The medical adviser opined that, based on the evidence of record, three months would be the expected period of estimated recovery and total disability. He also opined that appellant could have returned to light-duty work in three months and in all likelihood full-duty work at the end of four months. The medical adviser concluded that a period of disability greater than four months would be considered excessive.

By decision dated April 12, 2006, the Office found the evidence of record sufficient to establish that appellant was totally disabled from May 22 through November 8, 2004 causally related to his September 4, 2003 employment injuries, but insufficient to establish that he had any employment-related total disability from November 9, 2004 through March 13, 2005. The Office found that the medical adviser's March 28, 2006 opinion constituted the weight of the medical opinion evidence.

The Office received several medical records from Dr. Boiardo. In a May 28, 2004 report, Dr. Boiardo noted appellant's complaints of left elbow pain and restricted range of motion. In a March 11, 2005 report, he indicated that appellant was still experiencing discomfort in the area of the lateral epicondyle. Dr. Boiardo stated that appellant believed he had to return to work. He made a partially illegible statement regarding his return to light-duty work at that time. In a

May 17, 2004 report, Dr. Bioardo stated that appellant had a ganglion cyst, capitellar osteonecrosis and lateral epicondylitis of the left elbow. His July 7 and August 6, 2004 reports revealed that appellant's left elbow was evaluated on those dates. In an April 1, 2005 report, Dr. Boiardo provided essentially normal findings on physical examination of the right shoulder and left elbow. He indicated that appellant had returned to light-duty work. Dr. Boiardo's September 28, 2004 report revealed that appellant experienced left elbow pain but good range of motion and pain and restricted range of motion in the left shoulder. In a December 3, 2004 disability certificate, he found that appellant had tennis elbow and rotator cuff tendinitis. Dr. Boiardo opined that appellant was disabled for work from that date through January 4, 2005.

On April 17, 2006 appellant requested reconsideration of the Office's April 12, 2006 decision. In a February 15, 2006 disability certificate, James Silvestri, Ph.D., a Board-certified psychotherapist, stated that appellant had been under his care for acute stress reaction, anxiety, difficulty with concentration and sleeping and a cardiac condition. In an undated letter, received by the Office on May 2, 2006, Dr. Boiardo noted appellant's December 8, 2003 and July 8, 2004 surgeries. He stated that appellant was unable to work until he was released to light-duty work on March 15, 2005. Dr. Boiardo opined that he sustained a rotator cuff rupture and epicondylitis lateral elbow.

By decision dated July 24, 2006, the Office denied modification of the April 12, 2006 decision. The evidence submitted by appellant was insufficient to establish that he was totally disabled from November 9, 2004 through March 13, 2005 due to his accepted employment-related injuries.

### **LEGAL PRECEDENT**

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.<sup>2</sup> For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>3</sup> Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>4</sup> The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>5</sup> The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific

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<sup>2</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>3</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>4</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>5</sup> *Manuel Garcia*, 37 ECAB 767 (1986).

dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.<sup>6</sup>

### ANALYSIS

The Office accepted that appellant sustained temporary exacerbation of preexisting AC joint arthropathy of the right shoulder, lateral epicondylitis and a ganglion cyst of the left elbow on September 4, 2003 in the performance of duty. On April 13, 2006 appellant sought compensation for wage loss for total disability from May 22, 2004 through March 13, 2005. The Office, by decision dated April 12, 2006, found that appellant was totally disabled for work only during the period May 22 through November 8, 2004 due to his September 4, 2003 employment-related injuries. For the period subsequent to September 8, 2004, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed disability and the accepted condition.<sup>7</sup>

Appellant submitted several medical records from Dr. Boiardo, an attending physician, in support of his claimed employment-related disability. In an undated form report, Dr. Boiardo stated that appellant sustained elbow epicondylitis and a rotator cuff rupture due to the September 4, 2003 employment injury. He opined that appellant was totally disabled from September 16, 2004 through March 14, 2005. Dr. Boiardo stated that he could return to limited-duty work on March 14, 2005. In a December 3, 2004 disability certificate, he found that appellant had tennis elbow and rotator cuff tendinitis. Dr. Bioardo opined that appellant was disabled for work through January 4, 2005. His undated letter noted appellant's December 8, 2003 and July 8, 2004 surgeries. Dr. Bioardo stated that appellant was unable to work until he was released to light-duty work on March 15, 2005. He, however, failed to provide any medical rationale explaining how or why the accepted employment-related injuries caused appellant's disability for work from November 9, 2004 through March 14, 2005. The Board finds that his report, disability certificate and letter are insufficient to establish that appellant had any employment-related disability during the claimed period.

Dr. Boiardo's May 17, 2004 report found that appellant sustained a ganglion cyst, capitellar osteonecrosis and lateral epicondylitis of the left elbow. In a May 28, 2004 report, he found that appellant experienced left elbow pain and restricted range of motion. Dr. Boiardo's September 28, 2004 report revealed that appellant experienced left elbow pain but good range of motion and pain and restricted range of motion in the left shoulder. In an April 1, 2005 report, he provided essentially normal findings on physical examination regarding appellant's right shoulder and left elbow. Dr. Boiardo noted that appellant had returned to light-duty work. He did not address causal relation or identify any period of disability. The Board finds that Dr. Boiardo's reports do not support appellant's claimed total disability from November 9, 2004 through March 13, 2005.

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<sup>6</sup> *Amelia S. Jefferson*, 57 ECAB \_\_\_\_ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>7</sup> *Alfredo Rodriguez*, 47 ECAB 437 (1996).

In a March 11, 2005 report, Dr. Bioardo stated that appellant was still experiencing discomfort in the area of the lateral epcondyle. He noted his desire to return to work but made a partially illegible statement regarding his ability to do so. The Board finds that Dr. Boiardo's report is of diminished probative value as it is not clear whether he opined that appellant was totally disabled during the claimed period.

Dr. Silvestri's February 15, 2006 disability certificate which stated that appellant had acute stress reaction, anxiety, difficulty with concentration and sleeping and a cardiac condition, does not constitute probative medical evidence inasmuch as a psychotherapist is not considered a physician under the Act.<sup>8</sup>

Appellant failed to submit rationalized medical evidence establishing that his total disability during the period November 9, 2004 through March 13, 2005 resulted from the residuals of his accepted September 4, 2003 temporary exacerbation of preexisting AC joint arthropathy of the right shoulder, lateral epicondylitis and a ganglion cyst of the left elbow. The Board finds that he has not met his burden of proof.

### **CONCLUSION**

The Board finds that appellant has failed to establish that he was totally disabled from November 9, 2004 through March 13, 2005 due to his accepted employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 25 and April 12, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 17, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> 5 U.S.C. § 8101(2).