



first week following surgery, she developed lymphedema in the right upper extremity with pain radiating down the arm to the elbow. Appellant underwent physical therapy for lymphedema and began wearing a compression sleeve. The Office accepted her claim for right shoulder and upper arm strain on January 8, 2002.

By decision dated May 8, 2002, the Office denied appellant's claims for compensation. Appellant requested reconsideration on November 12, 2003. By decision dated January 12, 2004, it denied her request, finding that it was untimely filed and did not establish clear evidence of error. The Office began paying compensation on July 31, 2001. It entered appellant on the periodic rolls on April 6, 2007.

Appellant's attending physician, Dr. Margaret Forgette, a Board-certified physiatrist, supported appellant's partial disability for work due to an employment-related repetitive strain injury of the right upper extremity. The Office referred appellant for a second opinion evaluation with Dr. David Smith, a Board-certified orthopedic surgeon. In a report dated September 12, 2006, Dr. Smith noted that appellant's right shoulder symptoms began within a week of her December 1999 surgery. He examined appellant and diagnosed myofascial pain right shoulder region. Dr. Smith opined that this condition was directly related to appellant's 1999 surgery rather than to her employment duties. He opined that appellant could perform her date-of-injury position without restrictions.

Dr. Forgette completed reports on September 7 and 8, 2006 and a work capacity evaluation on September 22, 2006. She diagnosed right shoulder repetitive strain injury with intermittent impingement and stated that appellant was capable of returning to modified work and had been capable of performing some work since August 17, 2001. Dr. Forgette opined, however, that appellant was not capable of performing her date-of-injury position. She restricted appellant's repetitive movements, reaching, pushing, pulling and lifting. In a report dated October 6, 2006, Dr. Forgette disagreed with Dr. Smith's conclusions and stated that appellant had a repetitive strain injury due to repetitive reaching and lifting in the performance of duty.

The Office found a conflict of medical opinion between Drs. Smith and Forgette regarding appellant's diagnoses, whether her condition was employment related and the extent of her disability. It referred her to Dr. William Thieme, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated January 2, 2007, Dr. Thieme reviewed the medical records as well as the statement of accepted facts and examined appellant. He found that appellant had limited range of motion in the right shoulder and diagnosed right shoulder pain related to repetitive lifting and reaching activities with mild limitation of range of motion and mild weakness in the right hand "not work related." Dr. Thieme noted that appellant related her current shoulder pain to heavy activities, reaching, stretching and sleeping in the wrong positions. He noted that appellant stated activities at home such as caring for her sick mother and caring for her mother-in-law reproduced the symptoms that occurred with her work activities. Dr. Thieme noted that appellant had not worked for over five years. He opined that appellant's preexisting right shoulder condition was aggravated by work activities. Dr. Thieme stated, "It is my opinion that [appellant's] right upper extremity condition is the consequence of the operation to excise the lipoma in the axilla. Her condition is aggravated by work activities as well as activities at home. [Appellant's] present condition is not the consequence of her work activities." He stated that appellant's condition had plateaued and opined that appellant could

return to limited-duty work accommodating her nonwork-related right shoulder condition. Dr. Thieme completed a work capacity evaluation and indicated that appellant should not work above her head.

Dr. Forgette completed a report on February 6, 2007 and indicated that appellant's symptoms had improved. She diagnosed right shoulder repetitive strain injury and impingement.

The Office proposed to terminate appellant's compensation and medical benefits based on Dr. Thieme's report in a letter dated July 12, 2007. It allowed appellant 30 days to respond. On August 7, 2007 appellant stated, "I disagree with your July 12, 2007 Notice of Proposed Reduction. I still have pain and limitations and I believe those limitations are due to my job."

By decision dated October 25, 2007, the Office terminated appellant's compensation and medical benefits effective October 27, 2007. It stated, "[Y]our right upper extremity condition is preexisting and the consequence of a nonwork-related right axillary lipoma resection conducted in December 1999 and not the consequence of any factors of your employment."

### **LEGAL PRECEDENT**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>2</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>3</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>4</sup>

The Federal Employees' Compensation Act provides that, if there is a 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.<sup>5</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.<sup>6</sup> It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a

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<sup>1</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>2</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>3</sup> *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

<sup>4</sup> *Mary A. Lowe*, *supra* note 2.

<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8123.

<sup>6</sup> 20 C.F.R. § 10.321.

conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.<sup>7</sup>

### ANALYSIS

The Office accepted appellant's claim for right shoulder and upper arm strain. Appellant's attending physician, Dr. Forgette, a Board-certified physiatrist, supported that appellant was partially disabled due to this condition and that this condition was due to her employment duties of repetitive reaching and lifting in the performance of duty. The Office referred appellant for a second opinion evaluation with Dr. Smith, a Board-certified orthopedic surgeon. In a September 12, 2006 report, Dr. Smith opined that appellant's right shoulder condition was not caused or aggravated by her employment, but was attributable to her 1999 surgery and resulting lymphedema. He found that appellant could return to her date-of-injury position with no work restrictions. Due to the disagreement between appellant's physician, Dr. Forgette and the Office referral physician, Dr. Smith regarding the nature of appellant's condition, whether it was employment related and the extent of her disability, the Office properly found a conflict of medical opinion evidence. It referred appellant to Dr. Thieme, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve this conflict.

Dr. Thieme reviewed appellant's medical history, the history of injury and statement of accepted facts. He examined appellant and noted that she lacked full range of motion in her right shoulder and that she had weakness in her right hand. Dr. Thieme diagnosed right shoulder pain related to repetitive lifting and reaching activities and opined that appellant's current condition was not work related noting that she had not worked for over five years. He stated that appellant's preexisting right shoulder condition had been aggravated by work activities. Dr. Thieme noted that her current activities at home also aggravated her right shoulder condition. He opined that appellant's right shoulder condition was not caused by her employment, but was the consequence of the operation to excise the lipoma. Dr. Thieme stated that appellant's current condition was not due to her employment. He indicated that appellant could return to work and that her current restrictions were not due to her accepted employment injury.

As an impartial medical examiner, Dr. Thieme's report is entitled to special weight if based on a proper factual and medical background and supported by medical rationale. The Board finds that Dr. Thieme's opinion cannot be accorded such weight. Dr. Thieme made statements that were clear and unequivocal, but he offered little if any medical explanation to support his conclusion. He opined that appellant's right shoulder condition was due to her 1999 surgery rather than her accepted employment activities, but did not explain how he reached this conclusion. The Board has held that medical conclusions unsupported by rationale are of little probative value.<sup>8</sup> A physician's opinion on causal relationship must be one of reasonable medical certainty, but it must also be supported with affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background.<sup>9</sup> In this case,

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<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

<sup>8</sup> *Willa M. Frazier*, 55 ECAB 379, 384 (2004).

<sup>9</sup> *Connie Johns*, 44 ECAB 560 (1993). See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

the certainty with which Dr. Thieme expressed his opinion cannot overcome the lack of medical rationale.

Also, Dr. Thieme's opinion is not in keeping with the statement of accepted facts. The Office provided Dr. Thieme with a statement of accepted facts to use as a frame of reference in forming his opinion. The statement of accepted facts provides that the Office accepted appellant's claim for a right shoulder and upper arm strain. As a medical professional, Dr. Thieme is entitled to reject such a diagnosis, but if he does so without convincing medical rationale, his opinion is of diminished probative or evidentiary value. The Office's procedure manual states that, when the impartial physician 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> For these reasons, the Board finds that the Office did not meet its burden of proof.

### CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3(10) (October 1990); see *Jurelle M. Vanderhoff*, 37 ECAB 152, 157 (1985) (finding that the report of the impartial medical specialist could not be used to resolve the conflict at issue because it deviated from the statement of accepted facts and went beyond the field of his medical expertise).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 24, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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