

On September 5, 1996 appellant, then a 48-year-old casual clerk, injured her left shoulder when a cage gate fell, causing a pulling sensation in her left shoulder. She stopped work on November 13, 1996. The Office accepted appellant's claim for cervical and left shoulder strains

and psychogenic pain disorder. Appellant was placed on the periodic rolls and appropriate compensation was paid.<sup>1</sup>

In a March 17, 1997 report, Dr. Thomas J. O’Laughlin, a Board-certified physiatrist, noted the September 5, 1996 work injury and diagnosed left cervicospinal strain with residual myofascial irritability and myofascial pain syndrome, cervical strain with muscle spasm and muscular tightness contributing to headaches, possible upper thoracic or lower cervical disc injury and possible underlying disc disease or muscular derangement. He explained that appellant’s condition was primarily myofascial but that her condition was not yet permanent and stationary. Dr. O’Laughlin opined that appellant had significant disability but would likely be able to return to a limited duty status. He submitted follow-up reports on appellant’s status and found that she could work part-time limited duty. The Office also began developing the evidence to determine if appellant could work as a hotel-motel manager.

In an April 19, 2000 second opinion report, Dr. Dwight W. Sievert, a Board-certified psychiatrist and neurologist, diagnosed adjustment disorder with anxiety and disturbance of mood, chronic cervical and left shoulder pain, hypertension and allergic rhinitis and psychosocial stressors. He opined that appellant’s depression and anxiety were related to her 1996 work injury but would resolve with treatment.

In a November 3, 2000 report, Dr. Craig MacClean, a Board-certified orthopedic surgeon and an Office referral physician, noted that appellant had not worked since November 13, 1996. He diagnosed chronic cervical strain, chronic left shoulder strain and fibromyalgia, all related to her September 5, 1996 work injury. Dr. MacClean determined that she was capable of working eight hours per day in a light-duty assignment. He noted that appellant had residuals of her work injury and that her prognosis for complete recovery was poor.

On December 13, 2001 the Office referred appellant to Dr. Robert Mochizuki, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict in the medical evidence between Dr. O’Laughlin and Dr. MacClean concerning appellant’s residuals and capacity for work. In a May 13, 2002 report, Dr. Mochizuki noted examining appellant on May 7, 2002. He reviewed appellant’s work injury and noted that she had attempted to return to work for various employers. Dr. Mochizuki diagnosed chronic cervical strain with anterolisthesis of C3 on C4, chronic left shoulder strain and myofascial syndrome involving the neck and upper back. Appellant’s examination and x-ray testing were normal and a magnetic resonance imaging (MRI) scan revealed mild degenerative changes of the acromioclavicular joint. Dr. Mochizuki noted that appellant’s condition was work related, that she was totally disabled from September 5 through November 13, 1996, but her disability ended when she was allowed to return to light duty on November 13, 1996. He concluded that appellant could work light duty for six hours per day. On July 31, 2002 the Office requested that Dr. Mochizuki clarify his opinion on appellant’s work capacity. In an August 22, 2002 supplemental report, he advised that appellant was capable of working light duty for six hours per day and, eventually, to an eight-hour day.

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<sup>1</sup> The record indicates that appellant performed some private sector work after her work injury. On January 8, 2001 the Office granted appellant a schedule award for six percent impairment of the left arm.

On March 10, 2003 Dr. O'Laughlin diagnosed chronic anxiety and pain syndrome and fibromyalgia and advised that appellant was unable to manage employment of any kind. He noted tenderness over fibromyalgia points on appellant's neck and explained that she had already attempted to return to work with poor results. Dr. O'Laughlin's subsequent reports indicated that appellant could not work or could only work on a limited basis.

On May 5, 2003 the Office reduced appellant's compensation benefits effective May 18, 2003 based on her ability to work as a hotel/motel manager.

By decision dated January 5, 2004, an Office hearing representative determined that the Office had not met its burden of proof in reducing appellant's compensation benefits and directed reinstatement of benefits. The hearing representative found that the opinion of Dr. Mochizuki was insufficient to resolve the medical conflict. The hearing representative also directed appellant's referral for a second opinion regarding whether she had continuing residuals of her accepted emotional condition.

On February 13, 2004 the Office referred appellant to Dr. Paul Markovitz, a Board-certified psychiatrist and neurologist, for an opinion on whether she was presently disabled by an employment-related emotional condition. On March 30, 2004 it referred appellant to Dr. James M. Glick, a Board-certified orthopedic surgeon, to resolve the medical conflict concerning her capacity for work.

On April 6, 2004 Dr. Markovitz diagnosed recurrent and severe major depression, dysthymia, generalized anxiety disorder, obsessive-compulsive disorder and somatization disorder. He stated that appellant's psychiatric conditions were preexisting and had been aggravated by her work injury. Dr. Markovitz stated that appellant's diagnosed conditions, such as fibromyalgia, were blamed on her "minor injury" at work. He opined that she would have developed her emotional condition regardless of any work injury. Dr. Markovitz opined that no disability arose from the work injury and that, if appellant was disabled, it was not due to her work injury. He explained that any type of stressful situation would aggravate appellant's emotional condition but opined that given appropriate treatment, she could return to full-time work with little or no functional impairment.

In an April 26, 2004 report, Dr. Glick reviewed the history of injury and provided a detailed review of the medical record. He advised that appellant reported current complaints of numbness, aches and pains. Dr. Glick noted full active range of motion with no tenderness and no spasm around the cervical spine. He stated that appellant sustained cervical and left shoulder strains at work on September 5, 1996 but had recovered sufficiently to work as a hotel/motel manager. Dr. Glick noted that, given appellant's work for private employers, she had worked since her 1999 work stoppage. He concluded that appellant's condition was attributable to stress rather than to any musculoskeletal condition and that, from an orthopedic or musculoskeletal standpoint, she was capable of working as a house/motel manager. On August 25, 2004 the Office requested clarification concerning appellant's diagnosis and ability to work.

On May 17, 2004 Dr. O'Laughlin diagnosed fibromyalgia, anxiety and nervousness following her work injury to the neck. He explained that appellant could work part time in a low stress position with frequent position changes and a restriction on lifting more than 10 pounds.

Dr. O'Laughlin advised that, although appellant completed vocational rehabilitation for a hotel/motel manager, she was unable to handle the stress of the job. On August 25, 2004 he noted that appellant was unsuccessful in several attempts to return to work and would likely remain totally disabled due to her stress sensitivity.

In a September 12, 2004 supplemental report, Dr. Markovitz advised that appellant's emotional condition had been temporary and resolved with appropriate medication and treatment. He noted that he did not believe appellant's work injury was the primary cause of her condition, noting that she handled stress poorly and would likely have been depressed even had the incident not occurred. Dr. Markovitz opined that appellant's condition was not caused by her employment. He explained that he could not determine when appellant's psychiatric condition did or did not cease in relation to her employment injury because he did not believe the employment injury had caused her condition. Dr. Markovitz opined that, while appellant had fibromyalgia, it would resolve if she had appropriate treatment.

On October 22, 2004 Dr. O'Laughlin diagnosed fibromyalgia, chronic myofascial pain, cervicospinal soft tissue tightening and underlying mild degenerative joint disease. He stated that appellant's chronic pain disorder was persistent and would never improve. Dr. O'Laughlin opined that appellant was unable to participate in any meaningful work activity and was still aggravated even by minimal activities of daily living.

In a November 3, 2004 supplemental report, Dr. Glick advised that appellant's original cervical and left shoulder strains were work related but that she no longer had physical limitations due to her work injury. On examination, he found no objective findings to support appellant's current symptoms and subjective complaints, which he noted were not consistent with the September 1996 injury. Dr. Glick advised that he was unable to find objective findings sufficient to confirm appellant's diagnoses or continuation of the accepted conditions. He explained that appellant's prognosis was good and that he was unable to explain from an orthopedic standpoint why she was experiencing so much pain. Dr. Glick stated that her period of total disability should have ceased approximately three months after the September 5, 1996 accident. He concluded that appellant was capable of working as a hotel/motel manager and that she currently had no physical limitations related to her injury.

On March 9, 2005 the Office proposed termination of appellant's compensation benefits on the grounds that she no longer had disabling residuals of her work-related condition. Appellant disagreed with the proposed termination and submitted a March 23, 2005 report from Dr. O'Laughlin, who diagnosed chronic pain syndrome in the cervicospinal region, chronic myofascial pain, muscular hardening and associated frequent headaches, left ankle sprain and fibromyalgia. He explained that she had enough reserve and functional capacity to manage her self-care but not enough to manage employment. Although, Dr. O'Laughlin indicated that appellant might occasionally be able to work in a limited capacity, he explained that her inability to manage stress and repetitive tasks would render her unable to perform even the lightest job.

By decision dated April 26, 2005, the Office finalized its termination of appellant's compensation benefits effective May 15, 2005.

Appellant requested an oral hearing that was held on October 18, 2006. In a July 25, 2006 report, Dr. O’Laughlin reiterated his opinion that appellant remained totally disabled. He explained that appellant had made several attempts to return to work but was unsuccessful due to stress and upper body repetitive activity which caused appellant’s neck and shoulder pain to flare. Dr. O’Laughlin stated that appellant’s condition had improved since she was removed from stress and repetitive strain. On January 5, 2007 he advised that appellant would be at risk if she attempted to return to any work, noting recent emotional turmoil concerning appellant’s disability had exacerbated her physical symptoms. Although appellant’s cervical range of motion was good, she was unable to tolerate employment that required management of stress or repetitive use of an arm at any level.

By decision dated January 23, 2007, the hearing representative affirmed the termination of appellant’s compensation benefits.

### **LEGAL PRECEDENT**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> It 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 includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

Section 8123(a) of the Federal Employees’ Compensation Act provides that if there is 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> When the case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist will be given special weight when based on a proper factual and medical background sufficiently well rationalized on the issue presented.<sup>6</sup>

### **ANALYSIS**

The Board finds that the Office met its burden of proof in terminating appellant’s compensation benefits. The record reflects that appellant sustained cervical and left shoulder strains and psychogenic pain disorder resulting from a September 5, 1996 injury sustained when she caught a falling gate. She stopped work on November 13, 1996. The Office referred appellant for second opinion and impartial medical examinations to determine her residuals and capacity for work.

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<sup>2</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>5</sup> 5 U.S.C. § 8123(a); *see Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>6</sup> *See Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

In a November 3, 2000 second opinion report, Dr. MacClean determined that appellant was capable of working eight hours per day in a light-duty job. The Office found a conflict of medical opinion between Dr. MacClean and appellant's treating physician, Dr. O'Laughlin, who found on September 11, 2000 that appellant could work for no more than four hours per day in a significantly restricted capacity. It properly referred appellant to Dr. Mochizuki for an impartial medical examination to resolve the conflict. In May 13 and August 22, 2002 reports, Dr. Mochizuki found that appellant was capable of working light duty six hours per day and that she may be able to increase her workload in the future. However, a hearing representative found his report insufficient to resolve the conflict. Consequently, the Office properly referred appellant to a second impartial medical examiner to resolve the conflict.<sup>7</sup> The hearing representative also directed appellant's referral for a second opinion examination to determine whether she had continuing residuals of her emotional condition.

In an April 26, 2004 impartial medical report, Dr. Glick noted that appellant had full range of motion with no tenderness and no spasm around the cervical spine and that she was now capable of working. He concluded that appellant's condition was attributable to stress rather than to any musculoskeletal condition and that, from an orthopedic or musculoskeletal standpoint, she was capable of working as a house/motel manager. In a November 3, 2004 supplemental report, Dr. Glick advised that appellant no longer had physical limitations from her work injury. He noted that examination revealed no objective findings to support appellant's symptoms and subjective complaints. Dr. Glick also found that her symptoms and subjective complaints were not consistent with the September 1996 injury. He found no objective basis on which to confirm appellant's diagnoses or continuation of the accepted conditions. Dr. Glick found that appellant had no physical limitations related to her injury.

The Board finds that Dr. Glick's reports were based on a thorough physical examination and record review and that his opinion is sufficiently well-rationalized to be entitled to special weight in establishing that residuals of her accepted physical conditions resolved.<sup>8</sup> Accordingly, Dr. Glick's opinion represents the weight of the medical evidence and the Board finds that the Office properly relied upon it in terminating appellant's compensation benefits.

Subsequent to Dr. Glick's reports, appellant submitted additional reports from Dr. O'Laughlin.<sup>9</sup> On May 17, 2004 Dr. O'Laughlin diagnosed fibromyalgia<sup>10</sup> in addition to

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<sup>7</sup> When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect. However, when the supplemental report is also insufficient, the Office must refer the matter to a second impartial specialist to obtain a proper opinion on the issue. *See V.G.*, 59 ECAB \_\_\_\_ (Docket No. 07-2179, issued July 14, 2008).

<sup>8</sup> *Supra* note 5.

<sup>9</sup> On appeal, appellant submitted additional medical evidence. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

<sup>10</sup> The Board notes that fibromyalgia was not accepted by the Office as being employment related. The Board notes that, for conditions not accepted by the Office as employment related, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

appellant's other conditions and concluded that she could work only part time. In subsequent reports, he opined that appellant could not work at all and that any attempt to work would not be successful.<sup>11</sup> Dr. O'Laughlin also opined that appellant had increased pain due to stress from her disability being denied.<sup>12</sup> The Board notes that he did not provide any new findings or rationale concerning appellant's ability to work or the continuation of her accepted orthopedic conditions. Furthermore, as Dr. O'Laughlin was on one side of the conflict which was resolved by Dr. Glick, his additional report is insufficient to overcome the weight accorded Dr. Glick's report as the impartial medical specialist's report or to create a new conflict with it.<sup>13</sup>

The Board finds that the Office also met its burden of proof in terminating appellant's compensation for her accepted psychogenic pain disorder. In an April 6, 2004 second opinion report, Dr. Markovitz stated that appellant's psychiatric conditions were preexisting and were aggravated by her work injury. He stated that her diagnosed conditions would likely have developed regardless of any work injury. Dr. Markovitz opined that no disability arose from the work injury. In his September 12, 2004 supplemental report, he opined that appellant's work injury was not a primary cause of her psychiatric condition, noting that she likely have been depressed even had the work injury not occurred. Dr. Markovitz opined that appellant had no current psychiatric condition caused by her employment.

The Office properly relied upon Dr. Markovitz' reports in terminating appellant's compensation for her accepted emotional condition. The reports were based on a thorough examination and understanding of the history of appellant's diagnosed emotional conditions. Dr. Markovitz opined that appellant was capable of working full time with little or no functional impairment. His opinion was fortified by rationale and he explained that appellant's preexisting emotional conditions, which had at one time been aggravated by the work injury, were not disabling. The Board finds that the Office properly relied upon Dr. Markovitz' opinion in terminating appellant's compensation for her emotional condition.

Accordingly, the Board finds that the Office properly terminated appellant's compensation benefits effective May 15, 2005, as the weight of the medical evidence established that her work-related conditions had resolved.

### **CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective May 15, 2005.

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<sup>11</sup> To the extent that Dr. O'Laughlin restricted appellant from work for fear of a further injury, the Board has held that fear of future injury is not compensable. *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008).

<sup>12</sup> Stress from a claimant's pursuit of a claim before the Office is not compensable. *See John D. Jackson*, 55ECAB 465 (2004).

<sup>13</sup> *Dorothy Sidwell*, 41 ECAB 857 (1990); *Helga Risor*, 41 ECAB 939 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 23, 2007 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 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