



gradually worked up to her neck. Appellant stopped work on July 18, 2003 and did not return. On December 10, 2003 the Office accepted her claim for right elbow lateral epicondylitis and right forearm strain. In a decision dated December 10, 2003, it denied continuation of pay as appellant's claim was actually for an occupational disease as it occurred over more than one shift. The Office paid wage-loss compensation and medical benefits.

Appellant began treatment with Dr. Mark Bernhard, an osteopath and Board-certified physiatrist on January 9, 2004. Dr. Bernhard diagnosed right lateral epicondylitis related to her employment and continued to treat her for multiple symptoms. In a March 29, 2006 report, he noted that appellant complained that her left wrist "popped" over the back of her wrist. On June 23, 2004 Dr. Bernhard diagnosed right wrist pain and strain of the proximal carpal row with traumatic arthritis and right lateral epicondylitis and traumatic degenerative arthritis with chronic, symptomatic, post-traumatic derangement of the right wrist. Appellant was found totally disabled and Dr. Bernhard recommended vocational rehabilitation. In an April 26, 2006 report, Dr. Bernhard diagnosed her with left volar wrist tenosynovitis, volar forearm overuse tendinitis, degenerative arthritis in the right wrist and degenerative arthritis in the right elbow. He reiterated that she was totally disabled. On August 4, 2006 Dr. Bernhard diagnosed bilateral wrist tenosynovitis and right de Quervain's disease. On December 19, 2006 he repeated the diagnoses of tenosynovitis to the right wrist with de Quervain's disease. Dr. Bernhard advised that appellant needed surgery. In a September 10, 2007 report, he diagnosed lumbar myoligamentous sprain/strain and iliopsoas strain.

On January 21, 2008 the Office referred appellant to Dr. Bunsri T. Sophon, an orthopedic surgeon, for a second opinion on the residuals due to her accepted conditions. In a report dated February 7, 2008, Dr. Sophon diagnosed right elbow lateral epicondylitis and right forearm strain; however, he noted normal objective findings on examinations. He found that appellant's disability ceased as of February 7, 2008, the date of his report. Although appellant's diagnosed conditions were medically connected to the work injury, she no longer had any physical limitations. Dr. Sophon advised that there were no abnormal objective findings in her right wrist or elbow to substantiate her subjective complaints. Dr. Bernhard found that further medical treatment was not indicated.

By letter dated April 8, 2008, the Office asked Dr. Bernhard to comment on Dr. Sophon's examination of appellant and whether she could return to work without restriction. Dr. Bernhard did not file a timely response.

On May 13, 2008 the Office advised appellant that it proposed to terminate her compensation benefits based on the opinion of Dr. Sophon. Appellant was provided 30 days to respond.

In a May 27, 2008 report, Dr. Bernhard noted on physical examination that appellant had some tenderness on the lateral elbows, but no swelling or deformity. He diagnosed bilateral upper extremity muscle strains, forearm strains and tenosynovitis. Dr. Bernhard recommended that appellant return to work with a restriction of no lifting over 40 pounds at the waist on occasion. He also recommended physical therapy. However, in a report also dated May 27, 2008, received by the Office on June 13, 2008 Dr. Bernhard advised that appellant remained totally disabled.

By decision dated June 16, 2008, the Office terminated appellant's compensation and medical benefits effective July 8, 2008.

On June 25, 2008 appellant requested review of the written record by an Office hearing representative. In a June 25, 2008 report, Dr. Bernhard advised that she had bilateral tendinitis and overuse syndrome of the forearms with no evidence of carpal tunnel syndrome. He stated that appellant was permanent and stationary. On July 15, 2008 appellant, through her attorney, requested a telephonic hearing.

At the hearing held on October 15, 2008 appellant testified that she had pain in her wrists, swelling, twitching in her baby finger and difficulty with her grip.

By decision dated January 6, 2009, the hearing representative affirmed the June 16, 2008 decision terminating benefits. She found that the weight of the medical evidence was represented by the opinion of Dr. Sophon.

### **LEGAL PRECEDENT**

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>1</sup> Having determined that an employee has a disability causally related to her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.<sup>3</sup>

Section 8123(a) 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>4</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the second opinion physician, 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 no prior connection with the case.<sup>5</sup> In situations where there exist 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

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<sup>1</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>3</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey* 49 ECAB 166 (1997).

<sup>4</sup> 5 U.S.C. § 8123(a).

<sup>5</sup> 20 C.F.R. § 10.321.

specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

### ANALYSIS

The Office accepted that appellant sustained right elbow lateral epicondylitis; right forearm strain; and sprain of the right elbow and forearm as a result of the duties of her federal employment. It terminated her compensation benefits effective July 8, 2008 on the basis that she had no residuals from her accepted employment injury. It accorded determinative weight to the opinion of Dr. Sophon, the second opinion specialist.

The Board finds that there is a disagreement between Dr. Bernhard, appellant's treating physician, and Dr. Sophon, the second opinion examiner, regarding whether she remains totally disabled as a result of her work injuries. Dr. Bernhard, in a June 23, 2004 report, indicated that appellant was permanently totally disabled from her preinjury employment as a result of her work injuries. He continued to find that she had symptoms and total disability in subsequent reports. In a December 19, 2006 report, Dr. Bernhard indicated that appellant needed surgery on her right wrist. In a May 27, 2008 report, he noted that she had bilateral upper extremity muscle strain, forearm strains and tenosynovitis. Dr. Bernhard indicated that appellant was totally disabled. However, on February 7, 2008, the second opinion physician, Dr. Sophon, indicated that she had no objective findings to support her subjective complaints; that she no longer had any physical limitations resulting from her work-related disability, concluding that the employment-related disability ceased as of February 7, 2008; and that no further medical treatment was indicated. Accordingly, there was an unresolved conflict between appellant's treating physician and the second opinion physician with regard to whether appellant still had any disability associated with her accepted work condition and as to whether appellant still needed treatment. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a referee physician, also known as an impartial medical examiner, to resolve the conflict.<sup>7</sup> The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits due to an unresolved conflict in medical opinion.

### CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits effective July 8, 2008.

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<sup>6</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Barry Neutuch* 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>7</sup> 5 U.S.C. § 8123(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 6, 2009 and June 16, 2008 are reversed.

Issued: December 14, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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