

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID W. PICKETT and TENNESSEE VALLEY AUTHORITY,  
WIDOWS CREEK FOSSIL PLANT, Stevenson, AL

*Docket No. 01-1950; Oral Argument Held October 16, 2002;  
Issued December 26, 2002*

Appearances: *Edward A. Slavin, Jr., Esq.*, for appellant; *Miriam D. Ozur, Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

In the last appeal of this case,<sup>1</sup> the Board reversed the Office's February 26, 1999 decision terminating appellant's compensation benefits. Although the clear weight of the medical opinion evidence established that appellant had no disability for work as a result of his accepted psychological conditions, an unresolved conflict existed between Dr. Lynch, appellant's attending neurologist, and Dr. Littell, the orthopedic referral physician, on whether appellant continued to suffer disabling residuals of his accepted left shoulder strain. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Steven M. Smith, a Board-certified orthopedic surgeon.

In a report dated March 30, 2001, Dr. Smith related appellant's complaints and his findings on physical examination. Appellant was well developed, well nourished and in no acute distress. He was active in weight lifting. Appellant had no evidence of any atrophy in the left shoulder. He demonstrated crepitation with abduction and forward flexion of the left shoulder, but Dr. Smith noted identical crepitation on the right. Elevation was full. An apprehension test was negative. Appellant appeared to have a positive sulcus sign, but he described no episode of discoloration or instability. There was no evidence of synovitis. Appellant reported some discomfort in the left trapezius. There was full range of motion of the cervical spine.

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<sup>1</sup> Docket No. 99-2220 (issued November 28, 2000).

Dr. Smith reported that the reason appellant was unable to work for the past 12 to 13 years was uncertain, as he had clearly been weight lifting and had significant strength or power in the left upper extremity. Dr. Smith was unable to explain any ongoing disability but deferred a final opinion until additional medical records were obtained and appellant returned for a follow-up visit.

The record indicates that on April 11, 2001 Dr. Smith's office telephoned the Office for authorization to obtain an updated magnetic resonance imaging (MRI), which the Office approved. On April 12, 2001 Dr. Smith's office faxed to the Office claims examiner a copy of an April 11, 2001 letter from appellant's attorney.

In a follow-up report dated April 16, 2001, Dr. Smith related appellant's history of injury. He reviewed the medical record and summarized appellant's care. Dr. Smith described his findings on physical examination in detail. An updated MRI of the left shoulder, obtained on April 11, 2001, was noted to be normal. The labrum was intact. There was no effusion. The rotator cuff was intact. There was no evidence of arthrosis. Dr. Smith diagnosed normal left shoulder and reported as follows:

“[Appellant's] current exam[ination] shows no evidence of shoulder pathology, nor referred pain from the neck. He has no evidence of shoulder instability or rotator cuff disease. [Appellant] is able to elicit an audible clunk with rotation of his shoulder, which he has demonstrated on several occasions, but a similar clunk is noted with active [range of motion] on the right. [He] may return to work at his previous position without restrictions. There is no objective evidence to support any type of restriction with respect to use of the left shoulder. In addition, there is full [range of motion] of the elbow, wrist and digits of the left hand. There is no evidence of synovitis in any of these joints or pain with passive [range of motion]. According to [the] fifth [e]dition [of the] A.M.A., [*G*]uides, there is no impairment with respect to [appellant's] work-related injury.”

On April 23, 2001 Dr. Lynch, appellant's attending neurologist, reported that appellant was having increasing pain in the region of the acromioclavicular joint of the left shoulder. He noted tenderness around this joint and mildly decreased range of motion. Dr. Lynch stated that appellant appeared to be developing actual worsening of his left shoulder pain but referred him to Dr. Randall R. Robbins, an orthopedic surgeon, for evaluation of possible treatable causes.

On May 21, 2001 Dr. Robbins related that appellant was originally injured at work with an acute traumatic dislocation to the left shoulder. He described his complaints and noted that appellant stated to having two to three subluxations/dislocations over the past six months. Findings on physical examination included a positive apprehension sign, positive relocation test with significant weakness of both supra and infraspinatus muscle strength testing with full subscapularis strength testing. X-rays showed a typical Bankart and Hill-Sach's lesion with erosion of the anterior glenoid neck. Dr. Robbins diagnosed recurrent anterior instability, left shoulder, secondary thoracic outlet syndrome, left shoulder and secondary impingement syndrome, left shoulder. He recommended an open Bankart repair.

On June 7, 2001 the Office proposed to terminate appellant's compensation benefits for the accepted condition of left shoulder strain on the grounds that the weight of the medical evidence rested with the opinion of Dr. Smith, the impartial medical specialist.

In a decision dated July 10, 2001, the Office finalized the termination of appellant's compensation benefits.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

To resolve the conflict in medical opinion between Dr. Lynch, appellant's attending neurologist and Dr. Littell, the orthopedic referral physician, on whether appellant continued to suffer disabling residuals of his accepted left shoulder strain, the Office referred him to Dr. Smith, a Board-certified orthopedic surgeon. The Office provided Dr. Smith appellant's record and a statement of accepted facts so that he could base his opinion on a proper factual and medical background. Dr. Smith described his findings on physical examination and the results of an MRI obtained on April 11, 2001. He diagnosed normal left shoulder and reported that appellant could return to work at his previous position without restrictions.

When 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 specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>4</sup>

The Board finds that the opinion of Dr. Smith is based on a proper factual background and is sufficiently well rationalized that it justifies the termination of compensation benefits for the condition of left shoulder strain. The Board will affirm the Office's July 10, 2001 decision.<sup>5</sup>

The May 21, 2001 report of Dr. Robbins, recommending an open Bankart repair, is of little probative value on the issue because it relates that appellant sustained an acute traumatic dislocation to the left shoulder at work, which the Office has not accepted as factual. Dr. Robbins did not diagnose left shoulder strain and did not attempt to establish how any of the

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<sup>2</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>3</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>4</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>5</sup> Appellant has not established that Dr. Smith's opinion was biased.

diagnosed conditions were a result of the incident that occurred at work on February 11, 1988. His opinion is insufficient to create a conflict with the impartial medical specialist.

In the case of *Carlton L. Owens*,<sup>6</sup> an Office medical adviser telephoned the impartial medical specialist and, after an oral communication, noted that the specialist would provide the Office with another opinion on the medical issue disputed in the case. In *Owens*, the Board held that oral communications or conversations between the Office or one of its medical advisers or consultants and the impartial medical specialist on disputed issues should not occur, as it undermined the appearance of impartiality. Such communication, the Board held, must be in writing. The Board noted that under 5 U.S.C. § 8123(a) medical opinion evidence obtained from an impartial medical specialist should be based on a “completely independent evaluation and judgment and untrammelled by potential opinions expressed in oral communications between the Office and the impartial specialist.”<sup>7</sup>

In the case of *Harrison Combs, Jr.*,<sup>8</sup> the record showed that the telephone conversations between the Office and members of the staff of the impartial specialist concerned the specialist’s availability for the examination, the date and time of the examination and the method of payment. The Board held: “There is no evidence of any oral communication regarding the disputed issue of whether appellant had any employment-related disability and, therefore, the oral communications were not improper.”<sup>9</sup>

In the instant case, the record shows that Dr. Smith, the impartial medical specialist, telephoned the Office claims examiner on April 4, 2001 and that his office also telephoned the Office on April 11, 2001. As in the *Combs* case, there is no report or evidence in the case record, from the impartial medical specialist or otherwise, to substantiate that the Office and impartial medical specialist engaged in a prohibited oral communication regarding the disputed issue of whether appellant continued to suffer disabling residuals of his accepted left shoulder strain. Accordingly, the Board finds, as it did in *Combs*, that the oral communication was not improper.

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<sup>6</sup> 36 ECAB 608 (1985).

<sup>7</sup> *Id.* at 616-17.

<sup>8</sup> 45 ECAB 716 (1994).

<sup>9</sup> *Id.* at 730

The July 10, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
December 26, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member