

employment duties as a logistics management specialist at Tinker Air Force Base.¹ Under file number 160353380, the Office accepted that appellant sustained a left shoulder impingement and a recurrent ganglia of the left wrist as a result of her employment duties as an assistant bank examiner for the Department of the Treasury.² The record reflects that appellant retired from federal employment and, as of July 26, 2005, was in receipt of workers' compensation benefits.

Appellant initially filed an appeal with the Board on February 14, 2002 regarding the denial of her claim under file number 160353380. By order dated July 30, 2002,³ the Board remanded the case to consolidate her two case records, reconstruct the file and issue a new decision based on the entire record. In an October 16, 2002 decision, the Office terminated appellant's compensation benefits relying on the opinion of Dr. Ghazi M. Rayan, a Board-certified orthopedic surgeon, who served as an impartial medical examiner. In an April 22, 2003 decision, the Board set aside the Office's October 16, 2002 decision due to an incomplete record and remanded the case for proper assemblage of the record and a *de novo* decision.⁴ In an August 21, 2003 decision, the Office terminated appellant's compensation effective May 20, 2001 again relying on the impartial medical opinion of Dr. Rayan. In a February 27, 2004 decision,⁵ the Board reversed the Office's decision on the grounds that the report of Dr. Rayan was not sufficient to resolve the medical conflict regarding appellant's employment-related residuals. Dr. Rayan submitted a supplemental report dated March 29, 2004 and by decision dated May 19, 2004, the Office terminated appellant's compensation effective June 12, 2004. In a March 21, 2005 decision,⁶ the Board reversed the Office's decision on the grounds that the Office had not resolved the medical conflict regarding appellant's employment-related residuals. The law and the facts of the case as set forth in the previous decisions are hereby incorporated by reference. The Board notes that the original conflict in medical opinion arose between Dr. Douglas Brant, an attending Board-certified orthopedic surgeon, and Dr. Ralph Payne, a Board-certified orthopedist and Office referral physician.

In a January 27, 2005 report, Dr. Brant advised that appellant currently worked part time as a real estate agent but reported daily shoulder pain that precluded full-time employment. He advised that appellant's previous surgeries on her wrists prevented her from participating in any

¹ In a September 9, 1997 decision, the Office awarded appellant a 22 percent impairment to the right upper extremity. In an April 6, 1998 decision, the Office awarded appellant a 10 percent impairment to the left upper extremity and, by decision dated August 9, 1999, an additional 9 percent impairment to the left upper extremity was awarded.

² By decision dated December 18, 2001, the Office awarded appellant a 10 percent impairment of the left upper extremity. By decision dated December 24, 2002, the Office awarded appellant an additional four percent impairment of the left upper extremity.

³ Docket No. 02-899 (issued July 30, 2002).

⁴ Docket No. 03-679 (issued April 22, 1999).

⁵ Docket No. 04-230 (issued February 27, 2004).

⁶ Docket No. 05-42 (issued March 21, 2005). The Board notes that appellant had filed a second appeal of the Office's May 19, 2004 termination decision and was assigned a separate docket number. In an Order Dismissing Appeal dated December 15, 2004, the Board dismissed the later docket number as two docket numbers were assigned to the Office's May 19, 2004 termination decision. Docket No. 05-93 (issued December 15, 2004).

extended computer activities and noted that she continued on a pain management protocol. In subsequent progress reports dated January 31 and March 1, 2005, Dr. Brant reported that appellant had bilateral elbow, wrist and shoulder pain with no objective evidence of any continued disability.

On March 1, 2005 the Office approved appellant's request to change treating physicians from Dr. Brant to Dr. John W. Ellis, a Board-certified family practitioner. In a February 15, 2005 report, Dr. Ellis noted the history of appellant's injuries while working at Tinker Air Force Base and the Department of the Treasury and her subsequent medical treatment. He presented his examination findings and diagnosed right wrist ganglion cyst, status post surgical removal; left wrist ganglion cyst post surgical removal with recurrent cysts requiring additional surgeries; strain/tendinitis of both wrists; bilateral de Quervain's syndrome/stenosing tenosynovitis; bilateral carpal tunnel syndrome; bilateral medial epicondylitis/cubital vanal syndrome; bilateral rotator cuff syndrome; bilateral shoulder impingement syndrome; bilateral forearm strain/tendinitis; chronic pain and depression related to the above-mentioned diagnoses; and generalized myofascial pain syndrome involving the neck, the back and shoulders/ parascapular area. Dr. Ellis stated that, although appellant's condition was static in nature, it would progressively worsen in time. He opined that appellant was not capable of performing the essential duties of the positions from which she retired. In a May 19, 2005 report, Dr. Ellis opined that appellant's conditions and impairment was causally related to her employment duties.⁷

In an August 4, 2005 letter, the Office noted that a conflict of medical evidence existed between Dr. Brant, who opined that appellant presented with severe pain and was totally disabled, and Dr. Payne, who opined that appellant was capable of performing her full-time work as a bank specialist, and referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Robert Holladay, a Board-certified orthopedic surgeon, located in Dallas, Texas.

In an August 26, 2005 report, Dr. Holladay noted appellant's history of injuries and medical treatment, reviewed the medical record, a job description provided by the Office and the statement of accepted facts in addition to a timeline, which appellant submitted. He set forth examination findings and noted appellant's complaints of pain. Based on the absence of objective findings, Dr. Holladay opined that appellant was able to perform her duties as an Associate Bank Examiner as there was no evidence clinically which would limit or restrict her from performing such duties. He stated that there were many and varied subjective complaints in the neck and in both upper extremities and that most of the symptoms related to the soft tissue posteriorly of the shoulder which were not related to an impingement syndrome. Dr. Holladay stated that appellant's clinical symptoms did not match the structural findings of the magnetic resonance imaging (MRI) scan of her left shoulder and opined that any changes on the MRI scan were not caused by her work activities, but were conditions of life and degenerative processes

⁷ Dr. Ellis opined that appellant's bilateral forearm and elbow injury and complaints should be considered consequential injuries as a result of the original left shoulder injury of September 1, 1999 and her right shoulder and bilateral hand injuries of July 1, 1985. In a July 3, 2005 letter, appellant requested that the Office accept Dr. Ellis' diagnoses. However, as the Office has not rendered a decision on the claimed consequential injuries, the Board does not have any jurisdiction over this matter. 20 C.F.R. § 501.2(c).

that were normal for her chronological age. He further stated that electromyogram (EMG) and nerve conduction studies were found to be within normal limits and there was no evidence of atrophy, profound weakness or objective loss of sensation. Dr. Holladay stated that appellant had underlying depression and signs and symptoms consistent with fibromyalgia, which he stated may result in myofascial somatic complaints. However, he opined that appellant no longer had any disability or residuals due to her accepted work-related conditions.

In a September 21, 2005 letter, the Office issued a notice of proposed termination finding that the weight of the medical evidence, as evidenced by Dr. Holladay's August 26, 2005 report, established that appellant no longer had any disability or residuals due to her accepted work-related conditions.

In an October 20, 2005 letter, appellant's attorney requested that the Office provide evidence which demonstrated why Dr. Holladay was selected as the impartial medical specialist. Counsel claimed that the Office improperly bypassed over 480 Board-certified orthopedic physicians located in appellant's zip code and adjacent zip codes closer to her home than Dr. Holladay whose office was located over 200 miles away.

In an October 25, 2005 report, which the Office received on October 31, 2005, Dr. Ellis advised that he had reviewed Dr. Holladay's August 25, 2005 report and that it remained his opinion that appellant was disabled and unable to return to performing her job duties at either Tinker Air Force Base or the Department of Treasury.

By decision dated October 31, 2005, the Office terminated appellant's compensation and medical benefits effective November 26, 2005 based on the impartial medical report of Dr. Holladay. The Office noted that it had followed proper procedure in selecting the impartial medical examiner in appellant's case as very few Board-certified orthopedics surgeons practiced in appellant's place of domicile which she had not already seen and that it could not secure a Board-certified specialist willing to be an impartial examiner closer to appellant's home. The Office also noted that appellant did not object to an examination by Dr. Holladay and that it had paid travel expenses.

On appeal, appellant argues that the Office did not follow the proper procedures in selecting Dr. Holladay.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ 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.⁹ In situations where there are opposing medical reports of virtually equal weight

⁸ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁹ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

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 on a proper factual background, must be given special weight.¹⁰

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.¹¹

The Office procedures further provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the Physicians Directory System (PDS) should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.¹² The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.¹³

Under the Office procedures, a claimant who asks to participate in the selection of an impartial medical examiner or who objects to the selected physician must provide a valid reason.¹⁴ Upon the claimant's request, the claimant will be afforded a list of three specialists acceptable to the Office, from which the claimant may choose.¹⁵ The procedural opportunity for participation in the selection of an impartial medical examiner has been recognized by the Board.¹⁶ However, this procedural opportunity is not an unqualified right under the Federal

¹⁰ *Gloria J. Godfrey*, *supra* note 8.

¹¹ *Charles M. David*, 48 ECAB 543 (1997).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Albert Cremato*, 50 ECAB 550 (1999).

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (March 1994). *See also Willie M. Miller*, 53 ECAB 697 (2002); *Arden E. Butler*, 53 ECAB 680 (2002).

¹⁴ Federal (FECA) Procedure Manual Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

¹⁵ *Id.*

¹⁶ *Roger S. Wilcox*, 45 ECAB 265, 273-74 (1993).

Employees' Compensation Act. The Office has imposed limitations requiring that the employee provide a valid reason for any objection proffered against the designated impartial specialist. It is within the discretion of the Office to determine whether a claimant has provided a valid objection to a selected physician.

ANALYSIS

The Office found, pursuant to the Board's March 21, 2005 decision, that there was an unresolved conflict between Dr. Brant, appellant's treating physician, and Dr. Payne, an Office referral physician, regarding whether appellant was capable of performing her position as a bank examiner due to her accepted work-related injuries and whether she had residuals of her accepted injuries. Medical evidence from Dr. Ellis, appellant's current attending physician, reinforced Dr. Brant's opinion that appellant was totally disabled from her bank examiner duties. Dr. Ellis opined in a February 15, 2005 report that appellant was not capable of performing the essential duties of the position from which she retired. The Office properly referred appellant to Dr. Holladay, a Board-certified orthopedic surgeon, for an impartial medical evaluation and an opinion on the matter to resolve the conflict.¹⁷

On appeal, appellant argued that the Office did not follow the correct procedures in selecting Dr. Holladay. She claimed that the Office improperly bypassed over 480 Board-certified orthopedic physicians located in her zip code and adjacent zip codes closer to her home than Dr. Holladay whose office was located over 200 miles away.

In this case, appellant was fully informed before the scheduled impartial examination of the nature of the conflict but did not submit a written request to participate in selecting the physician or object to the physician until the Office issued its notice proposing termination of compensation benefits. Appellant's attorney then requested that the Office explain how it followed its procedures in selecting Dr. Holladay. In its October 31, 2005 termination decision, the Office explained why Dr. Holladay was selected, noting that there were very few Board-certified orthopedic surgeons located near appellant that were not associated with the case that would accept workers' compensation cases. The Office noted that appellant did not object to Dr. Holladay's examination and that it had paid her travel expenses. Other than asserting a general allegation, appellant has not provided any evidence to support that the Office failed to comply with its rotational procedures. She has not provided any probative evidence to demonstrate bias on the part of Dr. Holladay. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.¹⁸ Accordingly, appellant has not presented any evidence establishing that Dr. Holladay was improperly selected as the impartial medical examiner or that he was biased.

In a report dated August 26, 2005, Dr. Holladay noted the history of injury and his review of the medical records. Based on the absence of objective findings, he opined that appellant was

¹⁷ See *Jack R. Smith*, 41 ECAB 691, 701 (1990).

¹⁸ *Willie M. Miller*, *supra* note 13; *Roger S. Wilcox*, *supra* note 16.

capable of performing her duties as an associate bank examiner as there was no evidence clinically which would limit or restrict her from performing such duties. Dr. Holladay stated that appellant's subjective complaints related to the soft tissue posteriorly of the shoulder which were not related to an impingement syndrome and that her clinical symptoms did not match the structural findings on the MRI scan of the left shoulder which he opined were normal due to the degenerative process and appellant's chronological age. He further noted that the EMG and nerve conduction studies were within normal limits and there was no evidence of atrophy, profound weakness or objective loss of sensation. Dr. Holladay opined that, although appellant had the underlying medical condition of depression and the signs and symptoms consistent with fibromyalgia which may result in myofascial somatic complaints, appellant no longer had any disability or residuals due to her accepted work-related conditions. The Office relied on his opinion in its October 31, 2005 termination decision, finding that appellant's accepted work injuries no longer disabled her from performing her position as an associate bank examiner.

The Board finds that Dr. Holladay's impartial opinion that appellant could perform her duties as a bank examiner is sufficiently probative, rationalized and based upon a proper factual background to be entitled to special weight. He had a complete copy of appellant's medical file in addition to appellant's job description and statement of accepted facts. Dr. Holladay provided findings on examination in the areas where the Office accepted medical conditions, reviewed the diagnostic testing of record and concluded that there was no clinical evidence which would limit or restrict appellant from performing the duties of an associate bank examiner due to her accepted work-related conditions. He further found that appellant no longer had any disability or residuals due to her accepted work-related conditions. Therefore, the Office properly accorded Dr. Holladay's opinion the special weight of an impartial medical examiner.¹⁹ While Dr. Ellis opined that appellant was not capable of performing the essential duties of her position and that her conditions and impairment were causally related to her employment duties, his reports are of diminished probative value as it is lacking in medical rationale as to how appellant's current medical conditions related to her employment injuries and what her limitations were such that she would be prevented from performing her duties.²⁰ Therefore, Dr. Ellis' reports are insufficient to overcome the weight of the impartial medical specialist's report or to create a new conflict of medical opinion.

The Board finds that Dr. Holladay's opinion as the impartial medical examiner is entitled to special weight and establishes that appellant was capable of returning to her preinjury employment. The Board further finds that appellant's arguments regarding an alleged procedural error in the selection of Dr. Holladay are not substantiated. The Board finds that the Office discharged its burden of proof to terminate appellant's compensation benefits effective November 26, 2005.

¹⁹ *Gary R. Seiber*, 46 ECAB 215 (1994).

²⁰ *See Robert S. Winchester*, 54 ECAB 191 (2002).

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate appellant's compensation benefits effective November 26, 2005 based on the opinion of Dr. Holladay, the impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2006
Washington, DC

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

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