

Office accepted appellant's claim for bilateral arm sprain. On June 13, 1998 appellant returned to limited duty and, on July 4, 1998, to full duty.

On March 3, 1999 appellant filed a claim for a recurrence of disability stating that on March 2, 1999 he felt severe pain in his left elbow. He added that he reinjured his left arm on September 16, 1998 while in the performance of duty. In an attending physician's report dated March 3, 1999, Dr. Elliot Schwartz, an attending internist, stated that appellant was disabled due to a left arm strain from March 3 to 17, 1999. On April 15, 1999 the Office advised appellant of the evidence needed to support his claim. In a report dated March 14, 1999, received by the Office on May 7, 1999, Dr. Schwartz placed appellant on total disability until May 13, 1999. In a May 6, 1999 letter, appellant noted that on September 16, 1998 he felt pain in the same location of his left arm and had received continuation of pay from September 16 to October 30, 1998. He returned to work on November 7, 1998 but stopped work on March 2, 1999, when he claimed disability which he related to the May 1, 1998 injury. The Office accepted appellant's recurrence of disability claim and paid wage-loss benefits beginning May 29, 1999.

In a work capacity evaluation dated June 23, 1999, Dr. Schwartz released appellant to return to light duty effective that day. On June 25, 1999 the employing establishment advised the Office that appellant retired effective June 21, 1999. On August 11, 1999 appellant elected Federal Employees' Compensation Act¹ benefits.

In a report dated January 27, 2000, Dr. Schwartz stated that appellant was totally disabled from work due to left arm pain. On June 27, 2000 he indicated that appellant had reached maximum medical improvement and could not work an eight-hour shift in his regular job due to left arm pain. On March 26, 2001 Dr. Schwartz continued appellant on total disability based on left arm pain. On May 28, 2002 he stated that appellant remained symptomatic with left arm pain. Dr. Schwartz diagnosed a bulging disc at L4-5 and opined that his low back condition could be related to his work-related injuries. He stated that appellant was permanently disabled based on left arm pain for four years after the initial injury and low back pain a year and a half after the initial injury. In a work capacity evaluation dated May 28, 2002, Dr. Schwartz indicated that appellant was totally disabled from work based on left arm pain and low back pain.

In a report dated April 24, 2003, Dr. Schwartz stated that appellant sustained a left elbow injury on May 1, 1998, and developed left arm pain in March 1999 at which time he was diagnosed with chronic left arm strain. Treatment was medication and avoidance of activities that would aggravate the condition. Dr. Schwartz also noted appellant's low back pain at this time. Examination that day revealed a nontender left arm with full range of motion at rest; however, pain was provoked upon resistance. Based on appellant's history of injury, Dr. Schwartz stated that appellant's left arm condition was based on a May 1998 work-related injury and a March 1999 exacerbation, and that the left arm disability was permanent as it remained symptomatic after five years. In a work capacity evaluation dated April 24, 2003, Dr. Schwartz repeated his May 28, 2002 report, noting that appellant was totally disabled from work based on left arm pain and low back pain.

¹ 5 U.S.C. §§ 8101-8193.

On June 11, 2003 the Office referred appellant, his medical records, a statement of accepted facts and a list of specific questions to Dr. Todd B. Soifer, a Board-certified orthopedic surgeon and second opinion physician. He was asked to determine if appellant continued to have medical residuals of his accepted injuries and, if not, to determine the date when the conditions caused by the accepted injuries resolved.

In a report dated July 2, 2003, Dr. Soifer noted a familiarity with appellant's history of injury, referring to his continued symptoms of left arm pain since the initial work-related injury on May 1, 1998. Upon examination, he noted normal left arm motion and left arm reflexes. Dr. Soifer also noted no bilateral impingement signs, and no muscle weakness or atrophy. He found no objective findings to support a continuing elbow condition, stating there were no orthopedic notes in the record to support the diagnosis, determined that appellant had no residuals from his work-related injury and that he was capable of working at his regular job with no restrictions. In a work capacity evaluation dated July 15, 2003, Dr. Soifer stated that there were no objective findings to support a disability from work based on appellant's work-related injury.

On September 25, 2003 the Office proposed termination of appellant's compensation benefits.

In a report dated October 15, 2003, Dr. Laurian Jacoby, appellant's physiatrist, stated that he examined appellant that day and noted his history on injury. He found that appellant was symptomatic with pain, weakness and discomfort in the left elbow during motion, reporting moderate tenderness and swelling over the left elbow. However, appellant had normal range of motion. Dr. Jacoby determined that appellant was partially disabled due to his left elbow "mostly because of lack of improvement for the last five years."

On October 28, 2003 the Office terminated appellant's compensation benefits effective November 1, 2003 on the grounds that he no longer had residuals of his work-related injury.

On October 31, 2003 appellant requested a review of the written record. On December 9, 2003 Dr. Jacoby repeated his October 15, 2003 report, noting appellant's continued left elbow pain.

In a decision dated March 24, 2004, a hearing representative affirmed the Office's October 28, 2003 decision based on the opinion of Dr. Soifer, the second opinion physician.

On October 7, 2004 appellant requested reconsideration. In support of his request for reconsideration, appellant submitted an April 4, 2004 report from Dr. Schwartz who noted that appellant sustained a left arm injury on May 1, 1998, and redeveloped arm pain on March 2, 1999. Based on appellant's history of injury, Dr. Schwartz opined that appellant's left arm pain was causally related to employment. He added that because appellant remained symptomatic after six years the disability was permanent. In a report dated June 15, 2004, Dr. Jacoby stated that appellant remained symptomatic with pain, weakness and discomfort in the left elbow during motion. He noted moderate tenderness and swelling over the left elbow and medial and lateral epicondyle. Dr. Jacoby noted normal left arm range of motion and fair to

good left arm muscle power. He diagnosed left elbow arthropathy secondary to repeated injuries during employment. By decision dated January 18, 2005, the Office denied modification of its March 24, 2004 decision on the grounds that the evidence submitted was repetitious and thus insufficient to warrant review of the claim.

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.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ 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.⁴

ANALYSIS

The Board finds that the question of whether appellant had continuing residuals of his work-related injury is still unresolved due to a conflict in the medical evidence. Appellant's attending physician, Dr. Schwartz, opined on January 27, 2000, that appellant was totally disabled due to left arm pain and, in subsequent reports, through April 24, 2003 and prior to the termination of benefits, maintained that appellant's continuing condition and disability were due to his employment injury. On the other hand, the Office referral physician, Dr. Soifer, opined on July 2, 2003 that appellant no longer had residuals of his left elbow condition and was capable of working with no restrictions.

Section 8123(a) of the Act,⁵ provides: "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." In this case, appellant's attending physician, Dr. Schwartz, found that appellant remained symptomatic based on his accepted left arm sprain. The Office referral physician, Dr. Soifer, opined that there were no residuals from his work-related injury and that he was capable of working at his regular-duty position without restrictions. Due to the difference of opinion between appellant's attending physicians and the Office referral physician, the Board finds that there is a conflict of medical opinion regarding whether appellant has continuing residuals as a result of his accepted conditions. Because the medical evidence of record was in conflict at the time of the Office's October 28, 2003 decision to terminate appellant's wage-loss benefits, which was affirmed by the hearing representative on March 24, 2004, the Office did not meet its burden of proof to terminate appellant's compensation on the grounds that he no longer has residuals of his work-related injury.

² *Jorge E. Sotomayor*, 52 ECAB 105 (2000).

³ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁵ 5 U.S.C. § 8123(a).

CONCLUSION

The Office did not meet its burden of proof to terminate appellant's compensation for medical benefits.⁶

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2004 is reversed.

Issued: February 1, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁶ In view of the Board's disposition of the merit issue, it is not necessary to address the nonmerit issue.