

**United States Department of Labor
Employees' Compensation Appeals Board**

CHARLOTTE A. GOURLEY, Appellant

and

**DEPARTMENT OF THE ARMY, TOOELE
ARMY DEPOT, Tooele, UT, Employer**

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**Docket No. 06-495
Issued: July 14, 2006**

Appearances:
Charlotte A. Gourley, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 30, 2005 appellant filed a timely appeal from an October 26, 2005 Office of Workers' Compensation Programs' hearing representative's decision that affirmed a June 7, 2005 decision terminating her wage-loss and medical benefits, and a November 22, 2005 decision denying appellant's request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in terminating appellant's compensation effective June 12, 2005; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim.

FACTUAL HISTORY

This case was previously before the Board. On July 19, 1990 appellant sustained injury to her right upper extremity striking her elbow against an axle. The claim was accepted for a right elbow strain/sprain, right forearm strain/sprain and right lateral epicondylitis. Appellant

received appropriate compensation and medical benefits. On June 24, 2003 the Office terminated appellant's compensation and medical benefits effective July 12, 2003. An Office hearing representative affirmed that decision on November 20, 2003. On December 17, 2003 the Office denied appellant's request for reconsideration. By decision dated July 19, 2004, the Board reversed the Office's decisions on the grounds that it failed to properly develop a conflict in medical opinion which existed between the second opinion physician and appellant's treating physician. The findings of fact and conclusions of law from the prior decision are incorporated by reference.¹

The Office reinstated appellant's benefits and paid compensation from July 12, 2003. On December 9, 2004 the Office referred appellant, a copy of her medical records, a statement of accepted facts and questions, to Dr. A. Creig MacArthur, a Board-certified orthopedic surgeon, selected as the impartial medical examiner.

In a report dated January 3, 2005, Dr. Robert H. Horne, an attending orthopedic surgeon, stated that appellant's right elbow pain was the same as it was two years prior, noting pain adjacent to the lateral epicondyle and on the medial epicondyle. Appellant's flexor and extensor muscles were tender, she had a normal range of motion of both the right wrist and elbow, did not have a positive Finkelstein's test, and her right grip strength was 0 and left grip was 57 pounds. Dr. Horne noted that her right forearm was a half centimeter smaller than the left and that x-rays revealed no calcification. He stated that appellant's diagnosis as "unfinished without diagnosis," with postoperative pain following expiration of radial nerve compression syndrome.

In a report dated January 29, 2005, Dr. MacArthur noted that appellant complained of right elbow pain radiating into the right hand. He reviewed appellant's history of injury and medical treatment, including a history of radial and ulnar nerve surgeries. Upon examination, Dr. MacArthur stated that appellant moved her right upper extremity well, including her arm and hand, and that it appeared normal. Appellant's muscle groups were comparable, noting a larger appearance on the involved side, with no induration, swelling or redness, and noted normal skin. Dr. MacArthur found that appellant had normal passive and active range of motion findings of the shoulder, elbow, wrist and fingers in all appropriate planes. He noted normal circulation, warm hands, no shiny skin or wasting and normal deep tendons reflexes. Dr. MacArthur stated that appellant's strength testing was inconsistent as her right hand changed from weak to strong when she was distracted. He opined that Dr. Horne provided no objective findings, history, physical examination or diagnostic testing to establish a diagnosis. Dr. MacArthur opined that Dr. Horne proceeded to surgical intervention in spite of negative physical and electrographic findings. He determined that there was no need for surgery. Dr. MacArthur stated that the magnetic resonance imaging (MRI) scan and computerized tomography (CT) scan were normal. Appellant's symptoms of weakness and clawing disappeared upon distracting her attention and the physician concluded that these symptoms were based on a lack of compliance with testing. Dr. MacArthur concluded that appellant had a normal arm and hand, that no organic diagnosis was established and that she could return to full duty. He noted that prior treatments were unsuccessful because the presumed diagnoses were incorrect and that, absent a diagnosis, the treatment rendered was far beyond rationality.

¹ Docket No. 04-752 (issued on July 19, 2004).

On April 26, 2005 the Office notified appellant that it proposed termination of wage-loss compensation and medical benefits. On May 1, 2005 appellant stated that she experienced pain as a result of the violent examination provided by Dr. MacArthur and noted her disagreement with the Office's proposed termination. By decision dated June 7, 2005, the Office terminated appellant's compensation benefits effective June 12, 2005.

On June 12, 2005 appellant requested review of the written record and submitted a narrative in support of her request. Appellant again alleged unprofessional conduct by Dr. MacArthur. On October 26, 2005 an Office hearing representative affirmed the June 7, 2005 decision.

Appellant filed a request for reconsideration on November 11, 2005 in which she complained about the credentials of the physician administering an electromyogram (EMG) evaluation, and the treatment she received from the second opinion physician and the impartial medical examiners. The Office denied appellant's request for reconsideration on November 22, 2005 without conducting further merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² 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.³

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: 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.⁴ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁵

ANALYSIS -- ISSUE 1

A conflict in medical opinion arose between appellant's treating physician, Dr. Horne, and the second opinion physician, Dr. Dewey C. MacKay, as to the nature and extent of disability due to her December 12, 2003 employment-related injuries. Dr. Horne opined that she was disabled due to her accepted employment injuries while Dr. MacKay opined that she was no

² *Jorge E. Sotomayer*, 54 ECAB 105 (2000).

³ *Mary E. Lowe*, 52 ECAB 223 (2001).

⁴ 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁵ *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

longer disabled from the employment injury. To resolve the conflict, the Office properly referred appellant to Dr. MacArthur as the impartial medical examiner.

In a report dated January 29, 2005, Dr. MacArthur reviewed appellant's history of injury and examined appellant. He determined that she had no employment-related disability related to the right upper extremity. Dr. MacArthur noted that appellant moved her arm and hand and had normal muscle groups with no induration, swelling or redness and noted normal skin. A physical examination revealed full range of motion in the shoulder, elbow, wrist and fingers, with normal circulation, warm hands, no findings of wasting and that her deep tendon reflexes were normal. Dr. MacArthur noted that strength on the right was inconsistent but strong when appellant was distracted. His examination revealed no objective factors to support continuing disability from work at that time.

The Board finds that the Office properly relied on Dr. MacArthur's January 29, 2005 report in determining that appellant's accepted employment injury had resolved. His opinion is sufficiently well rationalized and based upon a proper factual background and review of appellant's medical records and history of injury. Dr. MacArthur not only examined her but also reviewed appellant's medical records including an EMG evaluation, a CT scan and an MRI scan.⁶ The Office properly accorded special weight to the impartial medical specialist's findings. As the weight of the medical evidence establishes that appellant had no residuals of her accepted right elbow strain/sprain, right forearm strain/sprain and right lateral epicondylitis, the Office properly terminated her compensation and medical benefits.

Appellant contends that Dr. MacArthur conducted his examination in a rough manner and made discourteous comments about Dr. Horne. However, she has not submitted probative evidence to substantiate bias or unprofessional conduct and the record does not otherwise support her various allegations. Appellant's allegations do not establish the fact that bias exists. 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.⁷ The record does not support appellant's allegations of bias in this case.⁸

⁶ Appellant's November 6, 1992 MRI scan revealed minimal edema and possible right shoulder tendinitis.

⁷ *William Fidurski*, 54 ECAB 146 (2002). Appellant did not allege any impropriety in the selection process *per se*.

⁸ Appellant also submitted a January 3, 2005 report in which Dr. Horne noted appellant's symptoms and diminished grip strength. However, this report, submitted after the referral to Dr. MacArthur but prior to Dr. MacArthur's examination, is of limited probative value as it failed to provide a specific diagnosis and did not specifically address causal relationship between her condition and employment. See *Michael E. Smith*, 50 ECAB 313 (1990) (medical evidence that does not offer any opinion regarding the cause of the employee's condition is of limited probative value on the issue of causal relationship).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS -- ISSUE 2

Appellant did not submit any pertinent new or relevant evidence with her November 11, 2005 request for reconsideration. Her complaints about the treatment she received from the referral physicians and an impartial medical examiner or credentials of the physician administering an EMG evaluation do not constitute new evidence. Appellant’s allegations do not address the underlying issue in this case which is whether she had residuals of her employment-related injury. Moreover, her allegations are similar to those previously raised before the Office.⁹ Appellant did not submit evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office and did not submit relevant and pertinent new evidence not previously considered by the Office. The Office properly denied her request for reconsideration. Appellant has not met any of the three requirements of 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that the Office properly terminated appellant’s compensation and medical benefits effective June 12, 2005 and properly refused to reopen appellant’s case for further review of the merits of her claim.

⁹ See *James W. Scott*, 55 ECAB ____ (Docket No. 04-498, issued July 6, 2004) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and October 26, 2005 are affirmed.

Issued: July 14, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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