

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

TYRONE HARRISON, Appellant	)	
	)	
and	)	Docket No. 05-1734
	)	Issued: March 20, 2006
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Tampa, FL,	)	
Employer	)	
	)	

*Appearances:*  
Tyrone Harrison, 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 August 17, 2005 appellant filed a timely appeal of a February 2, 2005 decision of the Office of Workers' Compensation Programs that terminated his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation effective February 3, 2005.

**FACTUAL HISTORY**

On January 15, 1993 appellant, then a 44-year-old mail handler, filed a claim for compensation for a traumatic injury to his right arm and chest sustained on December 21, 1992 by lifting a parcel. He stopped work on January 4, 1993 and was hospitalized from January 4 to 8, 2003 for nonspecific chest pain, which was determined not to be of cardiac origin. Chronic cervical strain with right upper extremity pain secondary to a herniated disc at C4-5 was

diagnosed. A right shoulder arthrogram on March 15, 1993 was interpreted as normal with no tear of the rotator cuff. By decision dated March 5, 1993, the Office found that appellant had not established that he sustained an injury on December 21, 1992.

Appellant requested a hearing and submitted additional medical evidence. In an April 7, 1993 report, Dr. Robert C. Henderson, a Board-certified orthopedic surgeon, diagnosed rotator cuff tendinitis consistent with overhead lifting. A magnetic resonance imaging (MRI) scan of this right shoulder on May 15, 1993 revealed a focal area of tendinitis at the supraspinatus tendon, but no tear or impingement. On June 22, 1993 Dr. Henderson performed surgery on appellant's right shoulder, which he described as debridement, decompression, resection of the coracoacromial ligament and anterior acromioplasty.

By decision dated December 29, 1993, an Office hearing representative found that appellant's rotator cuff tendinitis was related to his overhead lifting on December 21, 1992 but that his cervical spine problem was not related to his employment. On March 27, 1995 he filed a claim for a schedule award. On July 22, 1995 the Office granted a schedule award for a nine percent impairment of the right arm, based on ranges of shoulder motion reported by Dr. Henderson on April 17, 1995. Appellant retired on disability effective November 5, 1996.

On October 28, 1996 the employing establishment offered appellant a limited-duty position which Dr. Henderson indicated he could perform. He refused the job offer and submitted a July 28, 1997 report from Dr. Ernesto Nieto, a Board-certified orthopedic surgeon, indicating that he could perform limited duty only four to six hours per day. On October 16, 1997 the Office referred appellant, the case record and a statement of accepted facts to Dr. Jose J. Diaz, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion on his capacity for work. In November 10, 1997 and January 14, 1998 reports, he indicated that appellant's limitation of shoulder motion was related to his December 21, 1992 injury, that he could perform limited duty and that appellant should be seen by a neurologist. The Office referred appellant to Dr. David G. Dillenbeck, a Board-certified neurologist, who performed an electromyogram and nerve conduction studies on May 5, 1998. In a report of that date, he stated that appellant's progressive symptoms of cervical radiculopathy were not related to his December 1992 injury. Dr. Dillenbeck concluded that from a shoulder standpoint, he should be able to perform some work, but that his other conditions prevented him from working. In an August 18, 1998 report, Dr. Diaz stated that he had reviewed Dr. Dillenbeck's report and diagnostic studies and, with this additional information, concluded that appellant was unable to work. A September 14, 1998 Office memorandum noted that only a shoulder condition had been accepted but all physicians indicated permanent residuals and work limitations and the cervical spine condition was totally disabling.

A September 27, 2000 right shoulder MRI scan showed an intact rotator cuff and no significant impingement. An April 1, 2003 right shoulder MRI scan showed mild tendinitis involving the anterior margin of the supraspinatus tendon and no full thickness rotator cuff tear. In an April 1, 2003 report, Dr. Alfred O. Bonati stated that this MRI scan appeared within normal limits, that January 16, 2003 x-rays revealed an acromion spur and that an impingement test was questionably positive with a report of pain but ability to move the shoulder.

In a December 5, 2003 investigative memorandum, a postal inspector stated that observation of appellant on April 16, June 26 and November 25, 2003, recorded on videotape, showed him using his right arm in excess of his documented medical limitations. On February 18, 2004 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Jack Gresham, a Board-certified orthopedic surgeon, for a second opinion evaluation of his condition and his ability to work. In a March 4, 2004 report, he reviewed his history, noting that appellant was presently receiving no definitive treatment for any right shoulder problem. On examination any attempted passive motion of the right shoulder was met with marked voluntary guarding and complaints of severe pain. Dr. Gresham diagnosed psychophysiological musculoskeletal reaction with pain and limitation of motion of the right shoulder. In answer to the Office's questions, he stated that appellant did not continue to have residuals of his employment injury, that he was disabled for gainful employment but not due to his resolved right shoulder tendinitis. He opined that appellant's present symptomatic complaints regarding the right shoulder related to factors other than physical injury and that no type of treatment would assuage his subjective symptom complex.

On August 3, 2004 the Office referred appellant, the case record and a statement of accepted facts to Dr. James D. Melton, Jr., a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion on the extent of any residuals of his employment injury and on his ability to work. In a September 1, 2004 report, he set forth appellant's history and reviewed the medical evidence, noting that the May 15, 1993, September 27, 2000 and April 1, 2003 MRI scans all revealed some evidence of tendinitis but nothing suggesting impingement or rotator cuff tear. He noted that physical therapy and the June 1993 surgery to appellant's shoulder did not benefit him and that the videotape from the postal inspector demonstrated, over an extended period of time, appellant performing activities and motions with his right shoulder without apparent difficulties. Examination of the shoulder revealed no instability, no tenderness over the acromioclavicular joint, normal neurological and vascular findings, no muscle atrophy or wasting to suggest he was not using the shoulder in ordinary activity, a tendency to hold the shoulder in a rigid fashion and very little movement that certainly did not appear anatomical. Dr. Melton concluded that appellant's right shoulder condition had resolved and that no further treatment of the shoulder was necessary. He explained:

"First, in the opinion of this examiner, there is a possibility that there was a temporary aggravation of tend[i]nitis in the right shoulder in December of 1992, that extended for perhaps several weeks or possible months into 1993 that may have been temporarily aggravated by the job activities. [Appellant] has not worked at the [employing establishment] since 1996 and I do not feel that any problems that the patient currently has in the right shoulder are related to any work activities in December 1992 or at any other time. He has extensive subjective complaints and does not cooperate in moving the shoulder describing pain which is not consistent with the other findings in this situation. In this situation it appears that [appellant] is primarily focused on disability benefits and relative to the right shoulder, I, number one, do not find any causal relationship between work activities or injury in December 1992 and the patient's current complaints. I also find no objective evidence of significant pathology in the right shoulder to restrict [appellant's] activities relative to use of the shoulder at work or otherwise."

On November 24, 2004 the Office notified appellant that it proposed to terminate his compensation, including his medical benefits, on the basis that the weight of the medical evidence demonstrated that he no longer had any disability or residuals due to his accepted work-related condition.

In a December 22, 2004 letter, appellant disagreed with the proposed termination, objected to the findings of Dr. Gresham and Dr. Melton and submitted additional medical evidence. In a December 13, 2004 report, Dr. Allen D. Miller, a Board-certified orthopedic surgeon, set forth a history of appellant's 1992 employment injury and of an incident in early 2003 when he reached up for something at home and "felt an acute painful popping sensation in the right shoulder," after which he noted increasing discomfort in his shoulder. Dr. Miller diagnosed degenerative osteoarthritis of the right acromioclavicular joint with possible impingement syndrome, right rotator cuff tendinitis with possible partial rotator cuff tear and adhesive capsulitis of the right shoulder. In a December 20, 2004 report, Dr. Miller stated that a December 16, 2004 MRI scan revealed partial undersurface thickness tears of the supra and infraspinatus, subacromial bursitis and degenerative changes at the glenohumeral joint. In a January 17, 2005 report, he stated that the injection he gave appellant on December 20, 2004 resulted in little improvement and that he had begun physical therapy for the right shoulder.

By decision dated February 2, 2005, the Office terminated appellant's compensation effective February 3, 2005 on the grounds that his employment injury had resolved. Appellant's March 7, 2005 request for a hearing was denied by the Office as untimely.<sup>1</sup>

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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>2</sup> In situations where there are 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 on a proper factual background, must be given special weight.<sup>3</sup>

### **ANALYSIS**

There was a conflict of medical opinion in this case between appellant's physician, Dr. Bonati, who believed he still had residuals of his December 21, 1992 shoulder injury and the Office's referral physician, Dr. Gresham, who concluded that this injury had resolved without residuals. To resolve this conflict, the Office, pursuant to section 8123(a) of the Federal

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<sup>1</sup> Appellant did not dispute this decision on appeal.

<sup>2</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>3</sup> *James P. Roberts*, 31 ECAB 1010 (1980).

Employees' Compensation Act,<sup>4</sup> referred appellant, the case record and a statement of accepted facts to Dr. Melton, a Board-certified orthopedic surgeon. In an August 3, 2004 report, Dr. Melton concluded that his right shoulder tendinitis possibly was temporarily aggravated in December 1992 for at most several months, but that his right shoulder problems on August 3, 2004 were not related to his December 1992 or other work activities. He also found no objective evidence of significant pathology in the right shoulder and stated that the 1993, 2000 and 2003 MRI scan showed nothing suggesting impingement or rotator cuff tear.

The reports of Dr. Miller, a Board-certified orthopedic surgeon, that appellant submitted in response to the Office's proposal to terminate his compensation, do not outweigh or raise a conflict with the report of the impartial medical specialist, Dr. Melton. Dr. Miller concluded that appellant had conditions of the right shoulder, but did not state that any of these conditions, including the partial tears seen on a December 16, 2004 MRI scan, were related to appellant's December 21, 1992 employment injury. Dr. Melton's report constitutes the weight of the medical evidence and this report is sufficient to meet the Office's burden of proof to terminate his compensation.

### **CONCLUSION**

The Board finds that the weight of the medical evidence establishes that appellant's December 21, 1992 employment injury resolved by February 3, 2004. The Office properly terminated his compensation.

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<sup>4</sup> 5 U.S.C. § 8123(a) states 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."

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 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