

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

E.S., Appellant

and

**DEPARTMENT OF THE ARMY,
ACQUISITION SUPPORT CENTER,
Fort Belvoir, VA, Employer**

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**Docket No. 07-2253
Issued: February 12, 2008**

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 7, 2006 and April 10, 2007 merit decisions which terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective December 7, 2006 on the grounds that she had no residuals of her January 3, 2003 employment injury after that date.

FACTUAL HISTORY

The Office accepted that on January 3, 2003 appellant, then a 47-year-old secretary, sustained a C6 cervical radiculopathy and ulnar neuritis of her left elbow due to lifting files from a cabinet. Appellant began working in a limited-duty position for the employing establishment

and received compensation for periods of disability. The findings of electromyogram (EMG) and nerve conduction testing of appellant's arms showed ulnar neuritis across the left elbow and chronic left C6 cervical radiculopathy.

On July 7, 2003 Dr. Rida N. Azer, an attending Board-certified orthopedic surgeon, stated that May 9, 2003 magnetic resonance imaging (MRI) scan showed disc bulges at C4-5 and C5-6 and a disc herniation at C7-T1.¹ The findings of a May 6, 2004 scan showed degenerative changes including a mild disc bulge at C3-4, broad-based disc bulges at C5-6 and C6-7, and a mild central disc bulge at C7-T1 with narrowing of the ventral arachnoid space but no definite cord impingement.² Myelogram testing on July 2, 2004 showed multilevel changes, including mild central canal stenosis and mild-to-moderate right foraminal stenosis at C5-6, mild-to-moderate right-sided central canal stenosis at C5-6 due to disc protrusion and moderate central canal stenosis at C7-T1.

The Office referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether she continued to have residuals of her January 3, 2003 employment injury. On October 21, 2004 Dr. Smith stated that the disc herniation at C7-T1 in the May 9, 2003 MRI scan was more likely than not an "artifact" as the May 6, 2004 MRI scan only showed a mild central disc bulge at C7-T1. Dr. Smith noted that appellant complained of symptoms in her right arm rather than her left arm. On examination appellant's neck showed no spasm, atrophy, trigger points or deformity and that palpation of the spine during excursion revealed no spasm, crepitation or rigidity. Dr. Smith determined that appellant had completely recovered from her accepted cervical radiculopathy and ulnar neuritis conditions "since she has absolutely no complaints with the left upper extremity and a completely normal examination." He determined that appellant could return to her regular work for the employing establishment.

The findings of a December 3, 2004 MRI scan showed results which were similar to those found in May 2004, *i.e.*, cervical disc bulging at several levels but no disc herniation. The findings of December 27, 2004 EMG and nerve conduction testing showed evidence of chronic denervation along the C6 nerve on both sides and along the C8 nerve on the left.

In a January 6, 2005 decision, the Office terminated appellant's compensation effective January 22, 2005 on the grounds that she had no residuals of her January 3, 2003 employment injury after that date. The Office based its termination on the opinion of Dr. Smith.

In a December 31, 2004 report, Dr. Hampton J. Jackson, Jr., an attending Board-certified orthopedic surgeon, indicated that appellant presented with complaints of persistent neck, left shoulder and left arm pain. On examination appellant exhibited clear-cut hypoesthesia at C6 bilaterally and at C8 on the left and had limited motion of the cervical spine. Dr. Jackson

¹ At C5-6 the central canal had minimal narrowing and the foramen had moderate narrowing and at C6-7 the central canal had mild-to-moderate narrowing and the foramen had minimal narrowing.

² There were bony endplate changes at C3-4, C5-6 and C6-7. The findings of a January 24, 2004 cervical discogram indicated that "technical limitations preclude any reasonable attempt to access the C6-7 disc" although some "painful element" was suspected at that level as well as at C7-T1.

diagnosed chronic pain syndrome associated with the injury of January 3, 2003, cervical disc injury with resultant radiculitis and resolved ulnar neuritis. He stated that appellant had “ongoing disabilities” related to her January 3, 2003 employment injury. Dr. Jackson indicated that appellant sustained cervical disc tearing on January 3, 2003 which, despite experiencing some healing associated with osteophyte development, still caused impairment.

Appellant requested a review of the written record by an Office hearing representative. In a September 14, 2005 decision, the Office hearing representative set aside the Office’s January 6, 2005 termination decision and remanded the case to the Office for further development. The Office hearing representative determined that the Office did not meet its burden of proof to terminate appellant’s compensation due to a conflict in the medical evidence between the December 31, 2004 report of Dr. Jackson and the October 21, 2004 report of Dr. Smith. She remanded the case to the Office for referral of appellant to an impartial medical specialist for an examination and opinion regarding whether appellant continued to have residuals of her January 3, 2003 employment injury.³

In a November 3, 2005 letter, the Office advised appellant that she was being referred to Dr. Wylie Lowery, a Board-certified orthopedic surgeon, for a referee examination. The Office stated that it had “determined that a conflict in medical evidence exists in your case and therefore a referee examination must be conducted.” It indicated that 5 U.S.C. § 8123 provided that the specialist selected to resolve a conflict of medical evidence must not have been previously involved in a case and asked appellant to report any previous involvement with Dr. Lowery.

On December 6, 2005 Dr. Lowery discussed appellant’s January 3, 2003 employment injury and her course of medical treatment. He indicated that the MRI scans showed several cervical disc bulges but no disc herniation. Dr. Lowery stated that appellant mainly complained of cervical and left-sided shoulder pain. Examination of the upper extremities revealed normal motor coordination and sensation which was intact to vibration and proprioception. Appellant had no palpable tenderness along the anterior aspect of the neck and did not have any significant facet joint tenderness but had some mild paraspinal tenderness along the poster aspect including the trapezius and paraspinal musculatures. She had some pain at the ends of paraspinal musculature motion but had negative Valsalva, Adson, distraction and compression tests. Motor strength in the arms and hands was normal, reflexes were intact in the biceps, brachioradialis, and triceps muscles, and sensation to light touch was normal in the C5, C6, C7, C8 and T1 nerve distributions in both arms.

Dr. Lowery diagnosed resolved brachial and ulnar neuritis, chronic cervical spine pain with underlying cervical spondylosis and left shoulder rotator cuff tendinitis. He concluded that appellant’s conditions related to the January 3, 2003 employment injury had resolved without any active residuals and indicated that the underlying diagnoses of cervical spondylosis and rotator cuff tendinitis were not related to the January 3, 2003 injury. Dr. Lowery stated that his opinion was supported by the fact that appellant’s pain diagrams were inconclusive relating to any radicular pattern as seen in the MRI scans and the cervical discograms. He indicated that the

³ The September 14, 2005 decision of the Office hearing representative was sent to the current addresses of appellant and appellant’s representative.

MRI scans showed relatively stable findings.⁴ Dr. Lowery indicated that appellant could perform her regular work as a secretary.

On January 25, 2006 appellant's representative asserted that he had not been advised of the referral of appellant to an impartial medical specialist. Therefore, the Office could not use the opinion of the impartial medical specialist to adversely affect appellant. On January 26, 2006 appellant's representative indicated that a current MRI scan showed a disc herniation at C7-T1 "which Dr. Smith was unable to verify from a previous MRI [scan]."

On December 21, 2005 Dr. Jackson indicated that "an updated MRI [scan]" showed persistent herniation at C7-T1 with cord abutment but no displacement and significant changes at C5-6 and C3-4. He stated, "My analysis of this MRI [scan] compared to her previous one is that she sustained a disc injury in the cervical spine." Dr. Jackson noted that his diagnosis was "cervical disc syndrome, junctional disc failure and cervical radiculopathy, all related to the work injury of January 3, 2003."⁵ The findings of March 13, 2006 EMG and nerve conduction testing showed results consistent with chronic left C7 and bilateral C6 cervical radiculopathies. On June 28, 2006 Dr. Jackson stated that when he saw appellant on January 25, 2006 he felt that she still had evidence of sub-annular herniation at C5-6 and C7-T1. He stated, "My impression remains the same that she sustained cervical disc injuries as a result of the incident of January 3, 2003 at work."

In a December 7, 2006 decision, the Office terminated appellant's compensation effective December 7, 2006 on the grounds that she had no residuals of her January 3, 2003 employment injury after that date. The Office determined that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Lowery.

Appellant requested a review of the written record by an Office hearing representative. On December 14, 2006 appellant's representative again discussed the nature of the referral to Dr. Lowery and the existence of a new MRI scan. In an April 10, 2007 decision, the Office hearing representative affirmed the December 7, 2006 decision.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁶ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁷ 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 includes the necessity of

⁴ Dr. Lowery indicated that he could not read the most recent MRI scan, presumably the one obtained on December 3, 2004.

⁵ Appellant also submitted November 16, 2005 and January 25, 2006 reports of Dr. Jackson which were mostly illegible.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁸ *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

Section 8123(a) of the 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.”¹⁰ In situations where 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.¹¹

In the case of *Henry J. Smith, Jr.*,¹² the Board held that when the Office does not notify a claimant or a claimant’s representative of a physician’s status as impartial medical specialist, that physician may not serve as the impartial medical examiner in that case. The Office’s procedures for selecting an impartial medical specialist, as noted in the *Smith* decision, are intended to assure that a claimant or a claimant’s representative has knowledge that a physician is an impartial medical specialist in order to preserve the opportunity to exercise the procedural right to participate in the selection of the impartial medical specialist.¹³

A claimant who asks to participate in the selection of an impartial medical specialist or who objects to the selected physician must provide a valid reason. The procedural opportunity of a claimant to participate in the selection of an impartial medical specialist is not an unqualified right as the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical specialist.¹⁴

ANALYSIS

The Office accepted that on January 3, 2003 appellant, then a 47-year-old secretary, sustained a C6 cervical radiculopathy and ulnar neuritis of her left elbow due to lifting files from a cabinet. In a December 7, 2006 decision, the Office terminated appellant’s compensation effective December 7, 2006 on the grounds that she had no residuals of her January 3, 2003 employment injury after that date. The Office determined that the weight of the medical

⁹ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² *Henry J. Smith, Jr.*, 43 ECAB 524 (1992); *reaff’d on recon.*, 43 ECAB 892 (1992).

¹³ See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (March, August 1994). In *Delmon R. Rumsey*, 37 ECAB 645 (1986) the Board noted that a claimant may have actual knowledge of the conflict and of the purpose of the referral based on the adjudication of his claim.

¹⁴ See *David Alan Patrick*, 46 ECAB 1020, 1025 (1995). Although there is no set standard for the timeliness of a request to participate in selection of an impartial medical examiner, it is logical that such a request should be made prior to the selection process. *David Alan Patrick* at 1025.

evidence rested with the opinion of Dr. Lowery, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

The Board finds that the Office properly determined that there was a conflict in the medical opinion between Dr. Smith, a Board-certified orthopedic surgeon acting as an Office referral physician, and Dr. Jackson, an attending Board-certified orthopedic surgeon, regarding whether appellant continued to have residuals of her January 3, 2003 employment injury.

On October 21, 2004 Dr. Smith stated that appellant complained of symptoms in her right arm rather than her left arm. He indicated that on examination appellant's neck showed no spasm, atrophy, trigger points or deformity and that palpation of the spine during excursion revealed no spasm, crepitation or rigidity. Dr. Smith determined that appellant had completely recovered from her accepted cervical radiculopathy and ulnar neuritis conditions "since she has absolutely no complaints with the left upper extremity and a completely normal examination." He determined that appellant could return to her regular work for the employing establishment. In contrast Dr. Jackson indicated on December 31, 2004 that appellant exhibited clear-cut hypoesthesia at C6 bilaterally and at C8 on the left and had limited motion of the cervical spine. He diagnosed chronic pain syndrome associated with the injury of January 3, 2003, cervical disc injury with resultant radiculitis and resolved ulnar neuritis. Dr. Jackson determined that appellant continued to have disability due to her January 3, 2003 employment injury.

In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Lowery for an impartial medical examination and an opinion regarding whether she continued to have employment-related residuals.¹⁵ Appellant's representative alleged that the referral to Dr. Lowery was improper and that his opinion could not be used to "adversely affect" appellant because he was not advised that appellant would be referred to an impartial medical specialist. Appellant's attorney asserted that appellant was denied an opportunity to participate in the process for selecting an impartial medical specialist. The Board finds that this argument is without merit.

The Board notes that appellant and her representative received actual notice from the Office that an impartial medical specialist would be selected. The Office hearing representative's decision of September 14, 2005 found that a conflict existed in the medical evidence which required referral of appellant to an impartial medical specialist. In so doing, the hearing representative set aside a January 6, 2005 decision which terminated appellant's compensation. Both appellant and her representative were adequately apprised by this decision that appellant would be referred to an impartial medical specialist.¹⁶ Appellant also received actual notice of Dr. Lowery's status in a November 3, 2005 letter which advised her of the referral to Dr. Lowery. The letter explicitly advised appellant that Dr. Lowery would perform a "referee examination" to resolve a conflict in the medical evidence and made reference to 5 U.S.C. § 8123.

¹⁵ See *supra* note 10 and accompanying text.

¹⁶ See *Richard Coonradt*, 50 ECAB 360, 361-62 (1999); *Henry J. Smith, Jr.*, *supra* note 12.

Moreover, appellant's representative did not set forth a valid reason for why he wished to participate in the selection process of the impartial medical specialist or raise a specific objection to the appointment of Dr. Lowery. Therefore, his request does not conform with the Office's procedural requirements for participating in the selection of an impartial medical examiner.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Lowery, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹⁷ The December 6, 2005 report of Dr. Lowery establishes that appellant had no disability due to her January 3, 2003 employment injury after December 7, 2006.

On December 6, 2005 Dr. Lowery indicated that the MRI scans showed several cervical disc bulges but no disc herniation. He noted that examination of appellant's upper extremities revealed normal motor coordination, sensation which was intact to vibration and proprioception, and mild paraspinal muscle tenderness. Valsalva, Adson, distraction and compression tests were negative, motor strength in the arms and hands was normal, reflexes were intact in the biceps, brachioradialis and triceps muscles, and sensation to light touch was normal in the C5, C6, C7, C8 and T1 nerve distributions in both arms. Dr. Lowery diagnosed resolved brachial and ulnar neuritis, chronic cervical spine pain with underlying cervical spondylosis and left shoulder rotator cuff tendinitis. He concluded that appellant's conditions related to the January 3, 2003 employment injury had resolved without any active residuals. Dr. Lowery indicated that appellant could perform her regular work as a secretary.

The Board has carefully reviewed the opinion of Dr. Lowery and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Lowery's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹⁸ Dr. Lowery provided medical rationale for his opinion by explaining that appellant's limited remaining symptoms were due to nonwork-related conditions, including underlying cervical spondylosis and rotator cuff. Dr. Lowery stated that his opinion was supported by the fact that appellant's pain diagrams were inconclusive relating to any cervical radicular pattern as seen in the MRI scans and the cervical discograms. He indicated that appellant's MRI scans showed relatively stable results over time and did not show any cervical disc displacement which would be competent to cause radiculopathy.¹⁹

Appellant submitted additional reports of Dr. Jackson, including those dated December 21, 2005 and June 26, 2006. Dr. Jackson continued to find that appellant had residuals of her January 3, 2003 employment injury. However, as Dr. Jackson was on one side

¹⁷ See *supra* note 11 and accompanying text.

¹⁸ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁹ Dr. Lowery indicated that he could not read the most recent MRI scan. Presumably he was referring to the MRI scan obtained on December 3, 2004. The findings of a December 3, 2004 MRI scan showed results which were similar to those found in May 2004, *i.e.*, cervical disc bulging at several levels but no disc herniation.

of the conflict in the medical evidence, his additional reports are essentially duplicative of his previously-stated opinion and are insufficient to give rise to a new conflict.²⁰

For these reasons, the Office met its burden of proof to terminate appellant's compensation effective December 7, 2006.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective December 7, 2006 on the grounds that she no longer had residuals of her January 3, 2003 employment injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 10, 2007 and December 7, 2006 decisions are affirmed.

Issued: February 12, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁰ See *Richard O'Brien*, 53 ECAB 234 (2001). Dr. Jackson discussed "an updated MRI" but the record does not contain a copy of this test. Moreover, he seems to relate appellant's continuing problems to conditions that are not accepted as employment related, such as the condition of her C7-T1 disc.