

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

D.E., Appellant)	
)	
and)	Docket No. 08-2233
)	Issued: February 13, 2009
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY, Fort Meade, MD,)	
Employer)	
)	

<i>Appearances:</i> <i>Appellant, pro se</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decisions dated May 16, 2008, which terminated her compensation benefits. Under 20 C.F.R. §§ 501.2(c) and 501.3, 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 benefits.

FACTUAL HISTORY

On April 2, 2007 appellant, a 37-year-old sales store checker, injured her right shoulder and right wrist while lifting an item weighing 30 to 35 pounds. She filed a claim for benefits, which the Office accepted for right shoulder sprain, right upper arm sprain and right wrist sprain. The Office commenced payment for temporary total disability compensation.

In a report dated May 11, 2007, Dr. Mark A. Cohen, a Board-certified orthopedic surgeon and appellant's treating physician, stated that she still has pain in her shoulder and wrist, with vacillating pain radiating toward her neck and upper back area on the right side. He also noted pain with range of motion, diffuse tenderness over the wrist and right paraspinal muscle tenderness and spasm. Dr. Cohen diagnosed cervical sprain, sprain of the right shoulder and sprain of the right wrist, causally related to the April 2007 work injury. He continued to submit periodic reports updating appellant's condition and indicated that she remained totally disabled due to her April 2007 employment injury.

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted condition, the Office referred her for a second opinion examination with Dr. Robert A. Smith, Board-certified in orthopedic surgery.

In a report dated November 16, 2007, received by the Office on December 4, 2007, Dr. Smith, after reviewing the medical history and statement of accepted facts, indicated that appellant's subjective complaints of pain in her right wrist, right upper arm and right shoulder were not supported by objective findings. He noted that appellant's right hand showed no deformity or atrophy and that she displayed "pseudo weakness" in the relevant upper extremity muscle groups due to lack of effort. Dr. Smith found no evidence of any intrinsic abnormality of the shoulder joint and or any evidence of any spasm or muscle atrophy in the muscles around the upper back or shoulder. He advised based on his examination that appellant's conditions had long since resolved and that she had reached maximum medical improvement in that regard. Dr. Smith concluded that appellant no longer had residuals from her accepted right shoulder and right wrist conditions and required no further treatment.

In a report dated December 6, 2007, Dr. William J. Launder, Board-certified in orthopedic surgery and Dr. Cohen's associate, stated that appellant had horrible pain in her right hand and considerable pain in her left upper back on the left side. He noted that she felt unable to work. Dr. Launder advised that appellant was awaiting approval for surgery. He noted tenderness in the left paracervical and left parathoracic areas on examination, with a painful and tender nodule in the flexor crease of her thumb and an extremely positive Finkelstein's test. Dr. Launder diagnosed cervicothoracic strain, de Quervain's syndrome and trigger thumb.

In a February 4, 2008 report, Dr. Launder related that appellant stated that she had lost complete use of her right thumb, which was extremely painful and intolerable. He advised that appellant wanted surgery to repair her right thumb. Dr. Launder also noted midback pain, predominantly on the right, near her scapula, which was nonradicular. He reiterated his previous diagnoses of right trigger thumb, right de Quervain's syndrome and severe thoracic strain.

The Office found that, there was a conflict in the medical evidence between appellant's treating physicians, Drs. Cohen and Launder, who opined that she remained totally disabled due to her April 3, 2007 employment injury, and Dr. Smith, the second opinion physician, who opined that her accepted conditions had resolved and that she was able to perform her date-of-injury job without restrictions. It referred the case to a referee medical specialist, Dr. David Dorin, Board-certified in orthopedic surgery, who stated in a March 18, 2008 report that appellant's accepted right wrist and right shoulder conditions had long ago healed. He advised that appellant had no residual abnormalities resulting from the original sprain of the right wrist

and right shoulder. Dr. Dorin noted that she showed a lack of cooperation and dramatic overlay during her examination and opined that there was no need for any further treatment or surgery. He concluded that she could return to her regular work activities with no limitations.

In a notice of proposed termination dated April 11, 2008, the Office, based on Dr. Dorin's opinion, found that the weight of the medical evidence demonstrated that appellant was no longer disabled due to her April 2, 2007 employment injury. It found that Dr. Dorin's opinion was that of an impartial medical examiner sufficient to resolve the conflict in the medical evidence and constituted the weight of the medical evidence. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In reports dated March 24 and April 24, 2008, Dr. Cohen reiterated his opinion that appellant was unable to work due to her accepted right wrist and right shoulder conditions.

By decision dated May 16, 2008, the Office terminated appellant's compensation benefits, effective May 12, 2008.¹

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order 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) provides that, 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

ANALYSIS

In order to resolve the conflict in the medical evidence between appellant's treating physicians, Drs. Cohen and Launder, and Dr. Smith, the second opinion physician, the Office referred the case to a referee medical specialist, Dr. Dorin, who opined in his March 18, 2008

¹ On June 2, 2008 appellant requested a review of the written record. By decision dated October 22, 2008, an Office hearing representative affirmed the May 16, 2008 termination decision, finding that the Office met its burden to terminate compensation. As this decision was issued after appellant filed her appeal with the Board on August 12, 2008, it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *Oren E. Beck*, 33 ECAB 1551 (1982). By decision dated September 5, 2008, the Office denied appellant's schedule award claim. As this decision, on an issue not adjudicated prior to the filing of this appeal, was issued following the docketing of this appeal, the Board lacks jurisdiction to review this decision.

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

report that appellant's accepted conditions of sprained right wrist and sprained right shoulder, stemming from her April 2007 work injury, had resolved and that she could return to her regular work activities with no limitations. Dr. Dorin advised that appellant had no residual abnormalities resulting from the original sprain of the right wrist and right shoulder and stated that there was no need for any further treatment or surgery. The Office relied on Dr. Dorin's opinion in its May 16, 2008 decision, finding that appellant had no residuals or continuing disability stemming from her April 2007 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Dorin's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that appellant no longer had any residuals from her accepted April 2007 injury. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. Dorin's opinion the special weight of an impartial medical examiner.⁵

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

⁵ Gary R. Seiber, 46 ECAB 215 (1994).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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