



On February 25, 2003 appellant filed an occupational disease claim alleging that she experienced pain in her left arm due to factors of her federal employment. She related that she used her left arm almost exclusively as her right arm was in a splint. The Office accepted the claim, assigned file number xxxxxx127, for lateral epicondylitis of the left elbow. It further accepted that appellant sustained right lateral epicondylitis and an aggravation of major depressive disorder, single episode, under file number xxxxxx122. Appellant stopped work on March 10, 2003 and received compensation for total disability.

On December 1, 2003 the Office determined that the record contained a conflict in medical opinion between Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon and Office referral physician, and Dr. Eric E. Young, an attending Board-certified orthopedic surgeon, regarding appellant's work restrictions. It referred her to Dr. Herbert H. Maruyama, a Board-certified orthopedic surgeon, for an impartial medical examination. On December 12, 2003 Dr. Maruyama found that appellant continued to experience subjective symptoms of right and left epicondylitis. He determined that she could work full time with restrictions.<sup>1</sup>

On April 15, 2005 the Office notified appellant of its proposed termination of her compensation and medical benefits for the accepted conditions of right and left epicondylitis based on Dr. Maruyama's report.<sup>2</sup> By decision dated June 15, 2005, it finalized its termination of her compensation and authorization for medical benefits for bilateral epicondylitis under file numbers xxxxxx514, xxxxxx127 and xxxxxx122. In a decision dated July 12, 2006, the Office denied modification of its June 15, 2005 termination decision. Appellant appealed to the Board. On December 20, 2006 the Board determined that the case record submitted on appeal was incomplete and remanded the case for reconstruction of the case record and a new decision on the merits.<sup>3</sup>

On April 13, 2007 the Office referred appellant to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Lotman performed an examination on May 2, 2007 and diagnosed chronic bilateral lateral epicondylitis of the elbows. He found that appellant had exaggerated pain behaviors. Dr. Lotman opined that she could work full time with permanent restrictions of reaching for two hours per day, performing repetitive wrist and elbow movements for two hours per day, pushing and pulling up to 10 pounds two hours per day and reaching above her shoulder one hour per day.

On May 17, 2007 the Office notified appellant of its proposal to terminate her compensation as the opinions of Dr. Maruyama and Dr. Lotman supported that she could perform her usual employment duties.

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<sup>1</sup> By decision dated February 9, 2004, the Office denied appellant's request for a schedule award on the grounds that the evidence did not establish that she sustained a permanent impairment due to her work injury.

<sup>2</sup> The Office noted that it was still adjudicating the issue of whether appellant continued to have residuals of her psychological condition.

<sup>3</sup> Order Remanding Case, Docket No. 06-1819 (issued December 20, 2006).

In a report dated May 29, 2007, Dr. Michael P. Kuhn, a Board-certified orthopedic surgeon, asserted that appellant had a partial loss of function in her upper extremities. He found that she could perform sedentary work activities.

The Office determined that a conflict in medical opinion existed between Dr. Lotman and Dr. Kuhn regarding appellant's diagnosis and work restrictions. It referred appellant to Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. On September 27, 2007 Dr. Sabin reviewed appellant's history of injury and the medical evidence of record. He diagnosed a history of bilateral elbow epicondylitis, a history of depression and findings of fibromyalgia. Dr. Sabin related that appellant's current diagnosis remained bilateral elbow epicondylitis and evidence of fibromyalgia with positive trigger points and negative mock trigger points. He stated:

“Because of the physical exam[ination] being negative at the lateral epicondyles (the pain when she has resisted extension of the wrist for the fingers) I am concerned that the fibromyalgia has overtaken her symptomatology and perhaps lateral epicondylitis would not be direct issues. This would seem likely in that [appellant] has not worked since March 2003 and Dr. Lotman has stated in his note that[,] if she does not have the aggravating symptoms of repetitive motion, she should not have the lateral epicondylitis symptoms any longer. Therefore, it may be that the fibromyalgia is the predominant issue with multiple trigger points, which just happened to include the lateral epicondyle. Therefore, in conclusion, the bilateral epicondylitis may be resolved at this point, [appellant] now being left with fibromyalgia symptoms.”

Regarding the question of whether appellant had continued residuals of her employment injury, Dr. Sabin related:

“[Appellant] does have continuing residuals of pain at the lateral epicondylar area. However, I believe this is an issue concerning fibromyalgia on today's exam[ination] rather than bona fide lateral epicondylitis based on the physical exam[ination]. Therefore, this condition actually may be [the] result currently of [a] nonwork[-]related condition. The epicondylitis does not appear to be the diagnosis again based on above physical exam[ination] findings.”

Dr. Sabin opined that appellant could return to full-time work with no repetitive motion of the wrist and elbow, lifting up to five pounds and pushing and pulling 10 pounds.

On November 6, 2007 the Office notified appellant of its proposed termination of her medical benefits for bilateral epicondylitis under file numbers xxxxxx122, xxxxxx127 and xxxxxx514. It determined that Dr. Sabin found no residuals of bilateral epicondylitis.

On November 30, 2007 appellant's representative argued that Dr. Sabin's opinion did not support that she had no further condition or disability due to bilateral elbow epicondylitis. Counsel further raised concerns about the initial second opinion evaluation by Dr. Hrutkay. He also noted that Dr. Sabin was previously an associate of Dr. Maruyama, a prior impartial medical examiner.

By decision dated January 10, 2008, the Office terminated appellant's entitlement to medical benefits effective that date for the accepted condition of bilateral epicondylitis of the elbows. It noted that at the time Dr. Sabin examined her on September 27, 2007 he was no longer an associate of Dr. Maruyama. The Office further indicated that it did not rely on Dr. Hrutkay's opinion as the weight of the evidence in terminating authorization for medical benefits.

On appeal appellant's attorney contends that Dr. Sabin's finding that her condition of bilateral epicondylitis may have resolved and that she has fibromyalgia is unsupported by rationale and insufficient to support a termination of her medical benefits. Counsel further noted that the Office never finalized its May 17, 2007 notice of proposed termination of compensation and asserted that the Office was attempting to terminate medical benefits without terminating compensation.

### **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. The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>4</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>5</sup>

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.<sup>6</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>7</sup> 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.<sup>8</sup>

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<sup>4</sup> *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> 20 C.F.R. § 10.321.

<sup>8</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

## ANALYSIS

The Office accepted that appellant sustained right lateral epicondylitis under file number xxxxxx514, right lateral epicondylitis and an aggravation of major depressive disorder under file number xxxxxx122 and left lateral epicondylitis under file number xxxxxx127. Appellant stopped work on March 10, 2003.<sup>9</sup>

The Office determined that a conflict existed between Dr. Lotman, an Office referral physician, and Dr. Kuhn, appellant's attending physician, regarding her diagnosis and work restrictions. It referred her to Dr. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. When the record contains a conflict in medical opinion 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.<sup>10</sup> The Board finds that the Office improperly terminated appellant's authorization for medical treatment for the accepted conditions of bilateral epicondylitis based on the opinion of Dr. Sabin. In a report dated September 27, 2007, Dr. Sabin related that the current diagnosis continued to be bilateral elbow epicondylitis.<sup>11</sup> On examination he found positive trigger points and negative mock trigger points for fibromyalgia. Dr. Sabin asserted that based on the physical examination appellant's "bilateral epicondylitis may be resolved at this point..." He found that her residual pain in the lateral epicondylar area could be the result of fibromyalgia. Dr. Sabin concluded that epicondylitis did not "appear to be the diagnosis" based on the findings on examination.

The Board finds that Dr. Sabin's opinion that appellant's bilateral epicondylitis "may be resolved" is speculative in nature and thus of diminished probative value.<sup>12</sup> In order to terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.<sup>13</sup> As Dr. Sabin did not provide a reasoned, unqualified opinion that appellant had no further residuals of her employment injury, the Board finds that the Office did not meet its burden of proof to terminate appellant's authorization for medical benefits.

## CONCLUSION

The Board finds that the Office improperly terminated appellant's entitlement to medical benefits.

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<sup>9</sup> At the time of this appeal, the Office has not issued a final decision terminating compensation or medical benefits for the psychiatric condition.

<sup>10</sup> See *Darlene R. Kennedy*, *supra* note 8.

<sup>11</sup> As noted by appellant's attorney, Dr. Sabin was previously associated with Dr. Maruyama, who performed an earlier impartial medical examination. At the time of Dr. Sabin's examination, however, he was no longer in practice with Dr. Maruyama.

<sup>12</sup> *L.R. (E.R.)*, 58 ECAB \_\_\_\_ (Docket No. 06-1942, issued February 20, 2007); *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>13</sup> See *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 10, 2008 is reversed.

Issued: May 18, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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