



that appellant also sustained left lateral epicondylitis. The Office authorized compensation benefits beginning February 18, 2007.

Appellant's attending physician Dr. Ross Marburger, a Board-certified orthopedic surgeon, completed a note on July 17, 2007, stating: "I cannot identify a discrete pathology to account for her multifocal ongoing elbow pain." He opined that appellant's symptoms exceeded objective findings, that he had nothing more to offer her and that she had reached maximum medical improvement. Dr. Marburger stated that appellant could continue her work status. He advised that appellant might benefit from pain management for chronic pain and recommended additional evaluation and treatment. Dr. Marburger's July 17, 2007 form report indicated that appellant should perform right hand work only.

The Office referred appellant for a second opinion evaluation with Dr. James B. Rickert, a Board-certified orthopedic surgeon. In a report dated September 11, 2007, Dr. Rickert reviewed appellant's history of injury and medical treatment. He performed a physical examination and found that she was tender on the ulnar aspect of the left forearm, all about the elbow and up toward the back of the neck. Dr. Rickert found that appellant lacked 10 degrees of extension of the elbow, but had full flexion, full supination and pronation with slightly reduced strength and normally sensory findings. He stated that there were no objective findings to show that her left elbow contusion or epicondylitis were still causing symptoms. Dr. Rickert noted that appellant's complaint of continued pain and stated that he did not believe that there was a diagnosis that would explain this and no treatment was available. He opined that appellant could return to her date-of-injury position and did not recommend additional treatment. Dr. Rickert stated that appellant could work without restrictions. The Office referred this report to Dr. Marburger on September 26, 2007.

In a letter dated February 6, 2008, the Office proposed to terminate appellant's compensation benefits on the grounds that she had no disability due to employment injuries.

On March 7, 2008 appellant disagreed with the proposed termination. In a report dated October 25, 2007, Dr. John M. Hague, a Board-certified rheumatologist, diagnosed myalgia and depression. He noted that appellant had erythema, swelling and tenderness in her left elbow as well as paresthesias in her fingers. Dr. Hague recommended additional testing and treatment. He examined appellant on February 19, 2008 and diagnosed septic olecranon bursitis. Dr. Hague recommended surgical drainage of the site.

By decision dated March 19, 2008, the Office terminated appellant's compensation benefits effective that date on the grounds that she was no longer totally disabled and was capable of performing her date-of-injury position.

Dr. Daniel C. Eby, an osteopath, completed a report on April 9, 2008. He noted that appellant was experiencing pain over her left elbow and the lateral epicondyle and pain over her left olecranon area. Dr. Eby noted her employment history of hitting her elbow and diagnosed open wound left olecranon bursa and left elbow lateral epicondylitis. He stated that the etiology of appellant's wound was unknown. Dr. Eby examined appellant on April 16 and 22, 2008 and stated that appellant's elbow wounds had not closed. On April 29, 2008 he again addressed appellant's wound care.

Appellant requested a review of the written record by the Branch of Hearings and Review on April 16, 2008. This request was postmarked May 7, 2008. By decision dated May 29, 2008, the Branch of Hearings and Review denied her request as untimely and found that her claim could be reviewed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>2</sup>

The Federal Employees' Compensation Act provides that, if there is a 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>3</sup> The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, 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 had no prior connection with the case.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

Appellant's attending physician, Dr. Marburger, a Board-certified orthopedic surgeon, completed reports on July 17, 2007 and indicated that appellant could perform right hand work only. He stated that he had no further treatment to offer her, but that appellant might benefit from pain management for chronic pain. Dr. Marburger recommended additional evaluation and treatment. The Office referred appellant to Dr. Rickert, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 11, 2007, Dr. Rickert found that appellant was tender on the ulnar aspect of her forearm, all about the elbow and up toward the back of the neck and lacked 10 degrees of elbow extension. He stated that there were no objective findings to show that the accepted conditions of left elbow contusion or epicondylitis were still causing symptoms. Dr. Rickert noted appellant's continued pain and stated that he did not believe that there was a diagnosis that would explain this pain and therefore no treatment available. He opined that appellant could return to her date-of-injury position without restrictions.

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits due to the unresolved conflict of medical opinion evidence between appellant's attending physician, Dr. Marburger, and Dr. Rickert, the Office's second opinion physician. The two physicians disagreed regarding the extent of appellant's disability and her

---

<sup>1</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>2</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8123.

<sup>4</sup> 20 C.F.R. § 10.321.

need for additional medical treatment. Dr. Marburger indicated that appellant should not use her left hand to perform work duties, while Dr. Rickert found that appellant had no work restrictions. He opined that appellant required additional treatment from a pain management specialist while Dr. Rickert concluded that appellant's current condition would not benefit from additional treatment. Due to these unresolved medical issues, the Office failed to meet its burden of proof to terminate appellant's compensation benefits and the March 19, 2008 decision must be reversed.<sup>5</sup>

**CONCLUSION**

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits and that the March 19, 2008 decision must be reversed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 19, 2008 is reversed.

Issued: September 30, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

---

<sup>5</sup> Due to the Board's resolution of this issue, the Board will not address the timeliness of appellant's request for a review of the written record.