

returned to work since March 26, 2000; she underwent arthroscopic surgery on her right shoulder on August 13, 2001. The Office paid appropriate compensation for temporary total disability.

In a report dated May 24, 2006, Dr. Cranford Scott, Board-certified in internal medicine and appellant's treating physician, stated that appellant had no functional use of her right upper extremity that would allow her to be gainfully employed. He advised that she was totally disabled from any form of employment. Dr. Scott opined that appellant's August 2001 right shoulder surgery was not successful because she reverted to her preoperative state in which she was unable to tolerate any movement in her right shoulder. He stated that appellant still had chronic pain secondary to reflex sympathetic dystrophy disorder. Dr. Scott also noted that she was taking medication which impaired her cognition and her ability to work; she also had a significant adjustment disorder with a depression due to her chronic illness.¹ He advised that the chronic pain she experienced would also interfere with her ability to concentrate or perform any potential employment duties.

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted condition, the Office referred appellant for a second opinion examination with Dr. Thomas R. Dorsey, Board-certified in orthopedic surgery. In a report dated June 14, 2006, Dr. Dorsey stated that appellant was no longer totally disabled due to her March 2000 right shoulder. He opined that appellant would have been totally disabled due to the March 2000 work injury for approximately six weeks, but that her total disability would have ceased after that. Dr. Dorsey advised that appellant could return to work with the following restrictions: no reaching exceeding four hours; no reaching above the right shoulder; no pushing or pulling exceeding 20 pounds for two hours; and no climbing.

In reports dated September 19 and December 18, 2006, Dr. Scott essentially reiterated his previously stated findings and conclusions and indicated that appellant remained totally disabled due to residuals from her accepted right shoulder condition. In an August 28, 2007 report, he stated that appellant was experiencing daily pain in her right shoulder, which increased at night. Dr. Scott related that the pain not only involved her shoulder and upper arm, but had begun to radiate into her fingers. He stated that appellant's problem with overuse syndrome of the left shoulder was caused by her accepted right shoulder condition and should be considered a consequential, work-related condition stemming from the March 2000 right shoulder injury.

The Office found that there was a conflict in the medical evidence between appellant's treating physician, Dr. Scott, who opined that appellant remained totally disabled from all forms of gainful employment due to her March 2000 right shoulder injury, and Dr. Dorsey, the second opinion physician, who opined that appellant was able to perform her work duties with restrictions.

The Office referred the case to a referee medical specialist, Dr. Phillip D. Kiester, a Board-certified orthopedic surgeon. In a report dated September 24, 2007, Dr. Kiester reviewed the medical history, the statement of accepted facts and stated findings on examination. He

¹ Dr. Scott also stated that appellant had limited use of her left upper extremity due to chronic overuse syndrome, which further impeded her ability to engage in gainful employment. The Board notes, however, that the Office has never accepted a left shoulder condition.

stated that appellant had sustained a mild shoulder strain but opined that there was no evidence of residual injury to the shoulder; he also noted that appellant made significant efforts to feign residuals from the March 2000 work injury. Dr. Kiester agreed with Dr. Dorsey's opinion that the inflammatory period for adhesive capsulitis usually lasted six weeks, at which time the pain is essentially gone from the shoulder and the body begins to perform motion through the scapulothoracic junction. He indicated that appellant's subjective complaints of right shoulder pain were not supported by the objective findings, noting that the results of magnetic resonance imaging (MRI) scans of her right shoulder and neck were both normal. Dr. Kiester advised that she was "volitionally" holding her arm tightly abducted, which was its normal position; this opinion was confirmed when he noticed that her arm swung normally when she exited the elevator as she went to her car. He stated that there was no evidence of inflammatory processes, no change in her shoulder function as the disease progressed and no evidence of scapulothoracic motion. Dr. Kiester concluded that appellant's right shoulder function was perfectly normal and was sufficient to permit usage of her right upper extremity based on her current physical findings. He therefore opined that there was no reason to impose restrictions on her activities.

In a notice of proposed termination dated January 8, 2008, the Office, based on Dr. Kiester's opinion, found that the weight of the medical evidence demonstrated appellant was no longer totally disabled due to her March 26, 2000 employment injury. It found that Dr. Kiester'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. Appellant did not submit any additional medical evidence.

By decision dated February 20, 2008, the Office terminated appellant's compensation benefits.

On March 13, 2008 appellant requested a review of the written record.

In a January 22, 2008 report, received by the Office on March 27, 2008, Dr. Philip A. Sobol, Board-certified in orthopedic surgery, stated that appellant had neck and bilateral shoulder residuals from her March 26, 2000 work injury. He stated that she subsequently developed left shoulder symptoms and disability secondary to overcompensation for the injured right shoulder, which was a direct consequence of the March 2000 injury.² Dr. Sobol recommended additional operative intervention to the right shoulder, to include joint replacement surgery, if her condition significantly worsened. He noted that an October 25, 2007 computerized axial tomography (CAT) scan of the right shoulder revealed mild degenerative changes in the glenohumeral joint and acromioclavicular joint in an otherwise normal study. Dr. Sobol also recommended additional diagnostic studies, including radiographs, MRI scan, computerized tomography scans and electrodiagnostic studies as warranted.

² Dr. Sobol noted that appellant had developed right elbow and right wrist symptoms and impairment which were the direct consequence of the March 2000 right shoulder injury. As with the left shoulder, however, the Office never accepted conditions based right elbow or wrist injuries.

By decision dated July 14, 2008, an Office hearing representative affirmed the February 20, 2008 termination decision, finding that the Office met its burden to terminate compensation.

In a letter received by the Office on October 16, 2008, appellant requested reconsideration. Appellant submitted results of a February 12, 2008 MRI scan, received by the Office on October 16, 2008, which indicated abnormal findings in the right shoulder. The MRI scan revealed that appellant had a bursal surface irregularity secondary to moderate arthrosis of the acromioclavicular joint; hypertrophy causing impression on the bursal surface of the supraspinatus tendon; a type III anatomy of the anterior acromion; and signal changes in the superior labrum suggesting a Type 1 SLAP lesion and/or degenerative tear. The report recommended further and more detailed evaluation of the right shoulder.

In a September 18, 2008 report, Dr. Sobol expressed his disagreement with Dr. Kiester's impartial medical report. He stated that he had not detected any evidence of malingering during his examination of appellant, even when she was distracted. Dr. Sobol considered appellant's complaints of chronic pain credible and caused by the effects and consequences of her March 2000 work injury. He stated that appellant continued to experience chronic right upper extremity pain, reduced mobility and reduced function resulting from intractable pain, the etiology of which included many factors, which he described as a variant of chronic regional myofascial pain syndrome. Dr. Sobol stated that appellant's condition was complex, with features of right shoulder contracture subsequent to progressive disuse and deterioration of her right shoulder condition following the August 2001 arthroscopic procedure, in addition right brachial plexopathy and cervical radiculitis. He also noted that appellant's condition was complicated by severe depression.

Dr. Sobol related appellant's complaint that Dr. Kiester on examination forcefully attempted to range her right shoulder by intertwining his fingers in her right hand and then forcefully moving her right upper extremity; this caused severe pain and induced her to become very defensive and protective of herself. He stated that he approved of such assisted passive range of motion but considered it inappropriate for a physician to forcefully perform passive ranging in a patient with a prior diagnosis of contracture and history of impaired mobility, particularly if it caused severe pain and perhaps further injury to the patient. Dr. Sobol also disagreed with Dr. Kiester's opinion that appellant had normal function of her right shoulder and did not require work restrictions or disability. He stated that Dr. Kiester lacked the medical expertise to conclude that appellant was volitionally manipulating her examination behavior in the attempt to feign residuals from the injury. Dr. Sobol advised that psychiatric evaluation in conjunction with this issue could be warranted.

Dr. Sobol disagreed with Dr. Kiester's conclusion that appellant did not require further medical care, which appeared to be based on his impression that she was malingering. He concluded that appellant had chronic pain and impairment from her orthopedic conditions, causally related to the March 2000 work injury.

In a report dated October 5, 2008, Dr. Scott also stated his disagreement with Dr. Keister's opinion that appellant was malingering and fabricating her symptoms on examination. He stated that appellant continued to be totally disabled for any gainful

employment and reiterated his opinion that appellant continued to suffer from post-traumatic adhesive capsulitis of the right shoulder and subsequent overuse syndrome involving her left upper extremity, as well as subsequent musculoskeletal pain syndrome involving her neck, lower back and both shoulders.

By decision dated January 9, 2009, the Office denied the request for modification of the February 20, 2008 termination decision.

LEGAL PRECEDENT -- ISSUE 1

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.³

Section 8123 (a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁴ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁵

ANALYSIS -- ISSUE 1

In order to resolve the conflict in the medical evidence between appellant's treating physician, Dr. Scott, and Dr. Dorsey, the second opinion physician, the Office referred the case to a referee medical specialist, Dr. Kiester, who found in his September 2007 report that appellant had no residuals from his March 2000 right shoulder injury. He stated that appellant sustained a right shoulder strain and adhesive capsulitis as a result of the March 2000 work incident, the effects of which typically last six weeks. Dr. Kiester found no evidence of inflammatory processes and noted no change in shoulder function as the disease progressed. He stated that based on her current physical findings, appellant's right shoulder function was perfectly normal and sufficient to permit usage of her right upper extremity. Dr. Kiester advised that appellant made significant efforts to feign residuals from the March 2000 work injury during his examination and indicated that her subjective complaints of right shoulder pain were not supported by the objective findings. He concluded that there was no reason to impose restrictions on her activities. The Office relied on Dr. Kiester's opinion in its February 20, 2008 decision, finding that appellant had no residuals or continuing disability stemming from her March 2000 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Kiester'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 March 2000 injury. His opinion is sufficiently probative, rationalized, and based upon a proper factual background. Therefore, the

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ 5 U.S.C. § 8123(a).

⁵ *Richard R. LeMay*, 56 ECAB 341 (2005).

Office properly accorded Dr. Kiester's opinion the special weight of an impartial medical examiner.⁶

LEGAL PRECEDENT -- ISSUE 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.⁷

ANALYSIS -- ISSUE 2

Once the Office properly terminated appellant's compensation in its February 20, 2008 decision, the burden of proof shifted to appellant to establish continuing disability.⁸

Appellant submitted reports from Drs. Sobol and Scott. Although Drs. Scott and Sobol opined that appellant sustained consequential injuries to her neck, left shoulder, right wrist and right elbow, as well as a consequential psychological condition, neither presented a probative, rationalized medical opinion indicating that appellant had additional, consequential conditions causally related to employment factors, in addition to her accepted right shoulder condition. The Office had not accepted any other condition, and appellant never filed a claim based on neck, left shoulder, right wrist and right elbow or psychological conditions causally related to her 2000 right shoulder injury.

In addition, Dr. Scott's October 5, 2008 report does not constitute probative medical opinion showing that appellant had any continuing disability or residuals from her accepted condition. It did not provide a well-reasoned opinion to negate the Office's finding that appellant did not have any employment-related disability following the termination of her benefits. Dr. Scott's report is essentially a restatement of one side of the conflict in the medical evidence which was resolved by Dr. Kiester's referee medical report and merely expresses his preference for Dr. Sobol's opinion over that of Dr. Kiester, without providing a probative, well-rationalized opinion that appellant's right shoulder condition is causally related to her 2000 work injury.

In his January 22, 2008 report, received by the Office on March 27, 2008, Dr. Sobol stated that he had reviewed an October 25, 2007 CAT scan of the right shoulder, which revealed mild degenerative changes in the glenohumeral joint and acromioclavicular joint but was otherwise normal. In his September 18, 2008 report, Dr. Sobol noted his disagreement with Dr. Keister's opinion that appellant had normal function of her right shoulder and did not require work restrictions or disability. He did not concur with Dr. Kiester that she was malingering or feigning her symptoms on examination. Dr. Sobol considered appellant's complaints of chronic pain credible and opined that they were caused by her March 2000 work injury. He believed that

⁶ *Gary R. Seiber*, 46 ECAB 215 (1994).

⁷ *Id.*

⁸ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

appellant continued to have residuals from the March 2000 work injury which required additional medical care.

Appellant submitted results of a February 12, 2008 MRI scan, received by the Office on October 16, 2008, which indicated abnormal findings in the right shoulder. Because Dr. Keister's September 24, 2007 impartial medical opinion was partially based on his finding that appellant's complaints of right shoulder pain were not supported by the objective findings, including MRI scan results he reviewed, and because Dr. Sobol noted that an October 25, 2007 CAT scan he reviewed was essentially normal, the Office should have had the more recent February 12, 2008 MRI scan results reviewed by an orthopedic specialist. Accordingly, the January 9, 2009 decision is set aside and remanded for referral to Dr. Keister to determine whether the February 12, 2008 abnormal MRI scan results indicate that appellant had continuing disability caused by the March 26, 2000 employment injury. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.⁹

CONCLUSION

The Board finds that the case is not in posture for decision with regard to the issue of whether appellant had continuing disability caused by the accepted employment injury following the termination of compensation on February 20, 2008.

⁹ Appellant asserts that the condition of his right shoulder has deteriorated to the point where he is unable to use his right arm for any work activities. He therefore seeks compensation for wage loss based on his right shoulder condition. The Board notes that appellant can claim compensation for his right shoulder by filing a Form CA-2a claim for a recurrence of disability with the Office.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2009 decision of the Office of Workers' Compensation Programs be set aside and remanded for further development consistent with this decision.

Issued: February 23, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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