

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

M.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southeastern, PA, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 17-0459
Issued: July 12, 2017**

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 23, 2016 appellant, through counsel, filed a timely appeal from a September 6, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 17, 2016; and (2) whether

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

appellant has met her burden of proof to establish any continuing disability or medical residuals on or after March 17, 2016 due to her accepted employment injuries.

On appeal counsel contended that the impartial medical examiner did not discuss her job requirements and only performed limited physical testing. He alleges that a second impartial medical examination was necessary.

FACTUAL HISTORY

On October 19, 2011 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome and rotator cuff strains and sprains due to repetitive work lifting and pulling plastic and rubber bands. On December 7, 2011 OWCP accepted appellant's claim for bilateral carpal tunnel syndrome, aggravation of sprain of shoulder, upper arm, and acromioclavicular (AC) joint on the right. A November 14, 2011 electromyogram (EMG) demonstrated median entrapment at the level of both wrists consistent with carpal tunnel syndrome. Appellant underwent a left carpal tunnel surgical release on February 1, 2012 and right carpal tunnel surgical release on July 13, 2012.

On November 20, 2012 appellant's attending physician, Dr. Frederic E. Liss, a Board-certified orthopedic surgeon and hand surgeon, released her to return to light-duty work four hours a day. He released her to eight hours of work a day on January 15, 2013 with restrictions on overhead lifting due to her right shoulder condition.

OWCP referred appellant for a second opinion evaluation on March 4, 2013 with Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon. He found that appellant had fully recovered from her bilateral carpal tunnel syndrome. Dr. Didizian reported that appellant had continued loss of range of motion (ROM) in the right shoulder and discomfort over the AC joint. He determined that appellant had reached maximum medical improvement. Dr. Didizian completed a work capacity evaluation and found that appellant could not reach above the shoulder and was limited to pushing and pulling 30 pounds for two hours a day. He also indicated that appellant could not lift over 20 pounds and that she required one 30-minute break and multiple 15-minute breaks.

OWCP referred appellant for vocational rehabilitation counseling on April 18, 2013. Job placement was unsuccessful.

In a report dated September 4, 2014, appellant's physician, Dr. Joel W. Eisner, a Board-certified internist, listed appellant's employment duties and diagnosed bilateral rotator cuff tendinitis, and lateral and medial epicondylitis due to her duties. He found marked limitation of ROM in both shoulders and tenderness over the lateral epicondyles of both elbows. Dr. Eisner opined that appellant was "unable to perform virtually any job" at the employing establishment. He completed a work restriction evaluation on August 14, 2014 and found that appellant could work limited duty sitting and walking for eight hours, standing for one to four hours, and reaching for up to two hours. Appellant was prohibited from reaching above the shoulder, operating a motor vehicle at work, squatting, kneeling and climbing. She could lift up to 15 pounds for two hours and pull up to 25 pounds for two hours.

On January 13, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Willie Thompson, a Board-certified orthopedic surgeon. In a report dated January 30, 2015, Dr. Thompson reviewed the statement of accepted fact (SOAF) and noted her accepted conditions of sprain of the right rotator cuff and bilateral carpal tunnel syndrome. He examined appellant and found that she would not perform any active motion with her right shoulder and indicated that she was extremely weak. Dr. Thompson found that when appellant was distracted she demonstrated full ROM with no weakness. Appellant's hand examination demonstrated negative Tinel's sign and intact sensation throughout both hands. She had normal grip strength and no atrophy of the thenar or hypothenar muscles to either hand. Dr. Thompson found that appellant's examinations were within normal limits with no factors resulting in disability or impairment. He concluded that appellant was capable of working eight hours a day in her date-of-injury position and found that there was no objective evidence supporting physical limitations.

In a letter dated March 9, 2015, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Thompson's report.

Dr. Scott M. Fried, an osteopath specializing in orthopedics, examined appellant on March 19, 2015. He described her medical treatment. On examination he found radiation of pain from appellant's neck to her right arm with weakness and dysesthesias into the hand. Appellant also reported that her right shoulder was painful and that she had limited ability to abduct the arm or reach away from her body. She reported being awakened with numbness and tingling in her fingers and increased left shoulder pain secondary to overuse. Dr. Fried found that appellant had positive Tinel's sign of the median nerve at the wrists bilaterally, and positive Tinel's sign of the ulnar nerve at the left cubital tunnel and the radial nerve at the right elbow. He diagnosed carpal tunnel median neuropathy secondary to work activities as well as right shoulder AC joint synovitis, rotator cuff tendinitis, and capsulitis. Dr. Fried opined that appellant had ongoing and recurrent carpal tunnel syndrome and found that she could not return to her date-of-injury position, but should fully retire.

On March 26, 2015 Dr. Liss examined appellant's right shoulder and found no obvious deformity. He found loss of ROM and positive impingement sign. Dr. Liss diagnosed adhesive capsulitis due to chronic tendinitis and bursitis.

Dr. Steven J. Valentino, an osteopath Board-certified in orthopedic surgery, examined appellant on April 7, 2015 due to neck pain with radiation into her arms with paresthesia and weakness. He found spasm in the cervical spine and positive impingement signs in both shoulders. Dr. Valentino diagnosed carpal tunnel syndrome and AC sprain.

Dr. Eisner examined appellant on April 6, 2015 and diagnosed epicondylitis of the elbow, chronic shoulder pain, and fibromyalgia. Dr. Guy Fried, a Board-certified physiatrist, on April 13, 2015 diagnosed chronic pain with many years of upper extremity work.

Appellant retired from the employing establishment on March 27, 2015. She elected FECA benefits on June 1, 2015.

Appellant had a cervical spine magnetic resonance imaging (MRI) scan on May 4, 2015 which showed multilevel degenerative spondyloarthropathy. She saw Dr. Valentino on May 5,

2015 and he reviewed her MRI scan. Dr. Valentino noted that appellant had long-standing degenerative changes on her cervical MRI scan and that an EMG showed no evidence of cervical radiculopathy. He diagnosed carpal tunnel syndrome and AC sprain.

Dr. Fried examined appellant on May 7, 2015 and noted that she had retired. He diagnosed AC joint synovitis, rotator cuff tendinitis and capsulitis, and carpal tunnel median neuropathy secondary to work activities. Dr. Fried opined that appellant could not return to regular work activities. On July 23, 2015 Dr. Eisner diagnosed fibromyalgia and bilateral shoulder bursitis. He injected both shoulders. In a note dated August 6, 2015, Dr. Fried found that appellant's shoulder ROM was limited bilaterally and diagnosed AC joint synovitis, rotator cuff tendinitis and capsulitis, and bilateral carpal tunnel median neuropathy secondary to work activities. He opined that appellant was disabled.

Appellant underwent a series of ultrasounds on September 17, 2015. Her right brachial plexus ultrasound demonstrated no covert pathology. A right median nerve and carpal tunnel ultrasound showed substantial swelling of the nerve consistent with compression, as well as flexor tenosynovitis. Appellant's left median nerve and carpal tunnel ultrasound also demonstrated swelling of the nerve and perineural scarring of the nerve as well as evidence of flexor tenosynovitis. Dr. Fried reviewed these test results on September 17, 2015 and diagnosed bilateral carpal tunnel median neuropathy secondary to work activities, AC joint synovitis on the right, as well as rotator cuff tendinitis and capsulitis. He also diagnosed radial neuropathy on the right, ulnar neuropathy on the left, and brachial plexopathy/cervical radiculopathy on the right.

On October 16, 2015 OWCP determined that there was a conflict of medical opinion as to the evidence regarding the extent of appellant's employment-related residuals and employment-related disability between her physicians, Drs. Fried, Valentino, and Eisner and OWCP's second opinion physician, Dr. Thompson, who opined that appellant's work-related conditions were within normal limits with no factors resulting in disability or impairment. OWCP referred appellant, a SOAF, and a list of specific questions to Dr. John Donahue, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Scott M. Fried examined appellant on November 3, 2015 due to her right shoulder and bilateral wrist conditions. He noted that appellant's left hand was waking her up during the night. Dr. Fried repeated his diagnoses and added sympathetically mediated pain syndrome. He opined that appellant was totally disabled.

In a report dated November 19, 2015, Dr. Donahue reviewed appellant's history of injury including her job duties as a mail handler. He noted that appellant was required to lift up to 70 pounds occasionally and 50 pounds frequently. Dr. Donahue reviewed appellant's medical treatment, including bilateral surgeries and shoulder injections. He performed a physical examination and noted that appellant reported right trapezius pain, radicular complaints, and intermittent chronic pain in the left wrist. Dr. Donahue determined that reflex, sensory, and motor examinations of appellant's upper extremities were all within normal limits. He found full ROM, normal strength, and normal stability in appellant's shoulders. Dr. Donahue reported symptom magnification as appellant had to be coaxed into performing shoulder movements, but was able to do so later without difficulty. He noted that appellant had no evidence of any thenar eminence weakness. Dr. Donahue reported appellant's subjective complaints of cramping during

Phalen's testing, but advised that Tinel's sign was negative bilaterally at the wrists. He opined that there were no objective findings on physical examination of appellant's accepted injuries of right shoulder strain/sprain and bilateral carpal tunnel syndrome. Dr. Donahue concluded that these conditions had completely resolved and required no further duty restriction or medical care.

On January 4, 2016 Dr. Fried conducted and reviewed a functional capacity evaluation. He found increased significantly increased symptoms in appellant's arms with actual work simulation activities. Dr. Fried determined that appellant's findings were valid.

In a letter dated February 11, 2016, OWCP recalled appellant's attention to the pre-termination notice and afforded her an additional 30 days to submit evidence or argument. Dr. Scott M. Fried completed a report on February 22, 2016 and again concluded that appellant remained symptomatic and could not return to regular work activities.

By decision dated March 17, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 3, 2016 based on Dr. Donahue's report.

On March 21, 2016 counsel requested an oral hearing from OWCP's Branch of Hearings and Review. He submitted a report from Dr. Scott M. Fried dated June 9, 2016 which continued to support appellant's ongoing conditions of bilateral carpal tunnel syndrome and right shoulder AC joint dysfunction. Dr. Fried indicated that appellant was partially disabled.

Appellant testified at the oral hearing on July 14, 2016. She noted that her right arm condition preexisted her 2011 occupational disease claim and began in 2003. Appellant underwent right elbow surgery in 2006. She indicated that currently her carpal tunnel syndrome was slight, but that she had developed tendinitis in her hands as a result of carpal tunnel syndrome. Appellant testified that Dr. Thompson did not examine her, but slammed the door and left the examining room when she could not lift as high as he wished. She described her employment duties including lifting up to 60 pounds. Appellant noted that she was required to lift over her head. Counsel argued that Dr. Donohue did not understand appellant's job responsibilities of repetitive lifting and stripping packages. He further contended that Dr. Donohue did not perform any testing and had no basis for his opinion.

Appellant had an EMG on April 30, 2015 which revealed mild left lower brachial plexus nerve impairment as well as significant bilateral ulnar nerve impairments at the medial elbow levels. It also showed mild residual bilateral median nerve impairments at the wrists.

By decision dated September 6, 2016, OWCP's hearing representative affirmed the March 17, 2016 decision finding that Dr. Donahue's report was entitled to the special weight of the medical evidence and established that appellant had no disability or medical residuals due to her accepted employment injuries.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³

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

After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

In situations where there are 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 on a proper factual background, must be given special weight.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 17, 2016.

Appellant's attending physicians, Drs. Liss, Valentino, Fried, and Eisner provided reports diagnosing continuing upper extremity conditions due to her employment and opining that appellant was disabled from work. OWCP referred appellant for a second opinion evaluation with Dr. Thompson and, in his January 30, 2015 report, he found that appellant's examination was normal and concluded that appellant was capable of working eight hours a day in her date-of-injury position.

The Board finds that due to the disagreement between appellant's physicians regarding her ongoing employment-related disability and medical residuals and OWCP's second opinion physician, Dr. Thompson, OWCP properly determined that there was a conflict of medical opinion evidence which required referral to an impartial medical examiner.

⁴ *Id.*

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

⁹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

OWCP referred appellant, a SOAF, and a list of specific questions to Dr. Donahue to resolve the conflict of medical opinion evidence. In his November 19, 2015 report, Dr. Donahue reviewed appellant's history of injury, including her job duties as a mail handler lifting up to 70 pounds occasionally and 50 pounds frequently. Dr. Donahue performed a physical examination and determined that reflex, sensory, and motor examination of appellant's upper extremities was all within normal limits. He also found that appellant had full ROM, normal strength, and normal stability in her shoulders. Dr. Donahue opined that there were no objective findings on physical examination of appellant's accepted injuries of right shoulder strain/sprain and bilateral carpal tunnel syndrome. He concluded that appellant's accepted conditions had completely resolved and required no further duty restriction or medical care.

The Board finds that this report is based on a proper factual background, included detailed findings on physical examination, and offered a clear opinion that appellant's employment-related residuals and disability had resolved. Dr. Donahue's report is well reasoned and is entitled the special weight accorded to an impartial medical examiner and constitutes the special weight of the medical evidence. Therefore, OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

On appeal counsel argues that Dr. Donahue's report was not based on a proper factual background as he did not provide a detailed review of appellant's date-of-injury position. The Board notes that Dr. Donahue reviewed the SOAF and indicated that he was well aware of the lifting requirements of appellant's position. Counsel also contends that Dr. Donahue failed to undertake necessary testing. Dr. Donahue utilized both Phalen's test and Tinel's signs which he found to be negative. The Board finds that Dr. Donahue's examination was sufficiently thorough and detailed to constitute the special weight of the medical opinion evidence and resolve the existing conflict of medical opinion evidence such that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits effective March 17, 2016, the burden shifts to appellant to establish that she had disability causally related to her accepted employment injury.¹⁰ To establish a causal relationship between the condition, as well as any disability claimed, and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its

¹⁰ *George Servetas*, 43 ECAB 424, 430 (1992).

probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹¹

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish any continuing disability or medical residuals on or after March 17, 2016 causally related to the accepted employment injuries.

Following the March 17, 2016 termination decision, appellant, through counsel, submitted additional medical evidence consisting of a report from Dr. Scott M. Fried dated June 9, 2016. In this report, Dr. Fried opined that appellant was partially disabled and diagnosed bilateral carpal tunnel syndrome and right shoulder AC joint dysfunction. The Board finds that this report is not sufficiently detailed and well reasoned to overcome the weight of the medical evidence as represented by Dr. Donahue's November 19, 2015 report. As previously found, Dr. Donahue explained that there were no objective findings on his physical examination which supported ongoing physical residuals or disability due to appellant's accepted employment injuries of bilateral carpal tunnel syndrome, aggravation of sprains of the right shoulder, upper arm, and AC joint. Furthermore, as Dr. Fried was on one side of the conflict that Dr. Donahue resolved, the additional report from Dr. Fried is insufficient to overcome the weight accorded Dr. Donahue's report as the impartial medical specialist or to create a new conflict.¹²

Appellant also submitted an April 30, 2015 EMG report which demonstrated mild residual bilateral median nerve impairments at the wrists. While this testing is suggestive of continued electrodiagnostic evidence of median nerve impairment at the wrist, this test result was not confirmed by Dr. Donahue's clinical findings on November 19, 2015 and is insufficient to establish appellant's claim for additional medical residuals or disability related to her accepted employment injuries.¹³

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 17, 2016 as Dr. Donahue's report was entitled to the special weight of the medical opinion evidence. The Board further finds that appellant did not meet her burden of proof to establish continuing disability or medical residuals due to her accepted employment injuries on or after March 17, 2016.

¹¹ *James Mack*, 43 ECAB 321 (1991).

¹² *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

¹³ See *B.F.*, Docket No. 10-0356 (issued October 19, 2010) (finding that probative medical evidence requires clinical findings corresponding to the electrodiagnostic testing).

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board