

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSETTA D. BOLAND and U.S. POSTAL SERVICE,
POST OFFICE, West Des Moines, IA

*Docket No. 99-2408; Submitted on the Record;
Issued November 2, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability on October 29, 1997 causally related to her accepted July 1, 1995 employment injury; (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she no longer had any continuing disability after October 29, 1997 causally related to her accepted employment injury; and (3) whether the Office abused its discretion in refusing to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a).

On October 23, 1995 appellant, then a 38-year-old data conversion clerk, filed an occupational disease claim assigned number A11-0144757, alleging that her carpal tunnel syndrome was due to repetitive typing.

By letter dated November 25, 1995, the Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized right carpal tunnel release on November 2, 1995 and April 22, 1997. The Office also authorized left carpal tunnel release on November 10, 1995 and April 3, 1997.¹

By letter dated July 16, 1997, the Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. Emile C. Li, an orthopedic surgeon, for an examination. He submitted a September 15, 1997 medical report, finding that appellant could perform some work with physical restrictions.

Dr. Samir R. Wahby, an orthopedic surgeon and appellant's treating physician, agreed with Dr. Li's opinion that appellant could return to work with restrictions. Appellant returned to limited-duty work on October 29, 1997.

¹ The Board notes that appellant was absent from work during the period October 30, 1995 through January 7, 1996. Appellant returned to full-duty work on January 8, 1996.

On November 3, 1997 appellant filed a claim alleging that she sustained a recurrence of disability on October 29, 1997 causally related to her July 1, 1995 employment injury.² Appellant stopped work on November 3, 1997 on the advice of Dr. Wahby, who stated that she could not go back to typing.

The Office found a conflict in the medical opinion evidence between Dr. Wahby and Dr. Li regarding appellant's disability. By letter dated November 18, 1997, the Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. L. T. Donovan, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Donovan submitted a December 9, 1997 medical report finding that appellant did not have any permanent impairment, that her work activities did not cause her current condition and that she did not require any further medical treatment. He completed a January 5, 1998 report indicating that appellant was capable of working full-duty eight hours a day beginning October 29, 1997 and that appellant's current condition was not a result of working.

By decision dated January 7, 1998, the Office found the evidence of record insufficient to establish that appellant had any continuing disability beginning October 29, 1997 due to her July 1, 1995 employment injury. The Office found that Dr. Donovan's opinion was sufficient to establish that appellant no longer had any residuals of her accepted employment injury. In a January 16, 1998 letter, appellant requested an oral hearing.

By decision dated March 3, 1999, the hearing representative remanded the case to the Office to obtain a supplemental report from Dr. Donovan on whether appellant's bilateral carpal tunnel syndrome prevented her from performing the requirements of her limited-duty position.

On remand, the Office, in a March 24, 1999 letter, advised Dr. Donovan to submit a supplemental report. In response, he submitted an April 6, 1999 report finding that appellant could perform the duties of her limited-duty position without any restrictions.

By decision dated April 26, 1999, the Office found the weight of the medical evidence sufficient to establish that appellant was not totally disabled beginning October 30, 1997 due to her July 1, 1995 employment injury and that she had no continuing residuals of her accepted employment injury. In a May 21, 1999 letter, appellant, requested reconsideration of the Office's decision.

In a June 21, 1999 decision, the Office denied appellant's request for a merit review of her claim because the evidence submitted was of a repetitious nature and thus, insufficient to warrant review of the prior decision.

The Board finds that this case is not in posture for a decision regarding the issue of whether appellant sustained a recurrence of disability on October 29, 1997 causally related to her July 1, 1995 employment injury.

² The Board notes that prior to the instant recurrence claim, appellant filed a recurrence claim, which was accepted by the Office.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.³ As part of her burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.⁴

Section 8123(a) of the Federal Employees' Compensation Act⁵ in pertinent part, provides: "[I]f 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."

In this case, the Office found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Wahby, who opined that appellant was disabled from performing the duties of her limited-duty position as a data conversion clerk and Dr. Li, a second opinion physician, who opined that appellant could perform the duties of her limited-duty position with certain physical restrictions. Consequently, the Office referred appellant to Dr. Donovan for an impartial medical examination. The Board, however, finds that there was no conflict between Drs. Wahby and Li to require an impartial medical examination by Dr. Donovan. Dr. Li's opinion was contained in his October 15, 1997 report, which was prepared prior to appellant's return to limited-duty work on October 29, 1997 and appellant's alleged recurrence of disability commencing on that date. The record does not reveal that Dr. Li treated appellant subsequent to her alleged recurrence of disability. Thus, Dr. Li's opinion is irrelevant to the issue of whether appellant sustained a recurrence of disability on October 29, 1997 causally related to her July 1, 1995 employment injury. The subsequent referral of appellant to Dr. Donovan by the Office, therefore, constitutes a referral to a second opinion physician rather than an impartial medical examiner. Inasmuch as Dr. Donovan opined in his April 6, 1999 supplemental report that appellant could perform the duties of her limited-duty position without restrictions, the Board finds a conflict in the medical opinion evidence between Drs. Donovan and Wahby. Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence.

On remand, the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on whether appellant sustained a recurrence of disability on October 29, 1997 causally related to her July 1, 1995 employment injury. After such further development as the Office deems necessary, the Office should issue a *de novo* decision regarding appellant's claim.

The Board further finds that the Office improperly terminated appellant's compensation benefits.

³ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Id.*

⁵ 5 U.S.C. § 8123(a).

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. 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.⁶ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁷ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁸ The Office did not meet its burden of proof to terminate medical benefits in this case due to an unresolved conflict in medical evidence.

Because a conflict existed in the medical opinion evidence between Drs. Wahby and Donovan, which the Office did not resolve with an impartial medical evaluation before terminating appellant's medical benefits, the Office did not meet its burden of proof to terminate appellant's compensation benefits.⁹

In view of the disposition of this case with regard to the merits of appellant's recurrence claim and the Office's termination of appellant's medical benefits, the issue is whether the Office abused its discretion in refusing to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a) is moot.

⁶ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁷ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁸ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

⁹ See *Warren L. Divers*, 47 ECAB 574 (1996).

The June 21 and April 26, 1999 decisions of the Office of Workers' Compensation Programs are hereby vacated in part and the case is remanded for further consideration consistent with this decision regarding the Office's finding that appellant failed to establish that she sustained a recurrence of disability on October 29, 1997 causally related to her July 1, 1995 employment injury. The decisions regarding the Office's termination of appellant's medical benefits are reversed.

Dated, Washington, DC
November 2, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member