

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVATORE FERRARA and U.S. POSTAL SERVICE,
POST OFFICE, Armonk, NY

*Docket No. 03-2043; Submitted on the Record;
Issued November 24, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective September 7, 2002.

On January 12, 1996 appellant, then a 22-year-old letter carrier, filed a notice of occupational disease alleging that beginning November 2, 1995 he developed a bilateral wrist condition due to repetitive motions at work. The Office accepted appellant's claim for bilateral wrist tendinitis and paid appropriate compensation benefits.

The employing establishment offered appellant a position of router/nixie mail distributor on October 4, 1996 and appellant accepted the position. Appellant's treating physician, Dr. Jeffrey Passick, a Board-certified orthopedic surgeon, reviewed the position and agreed that appellant could perform those duties, however, appellant failed to appear for work when scheduled.

By decision dated October 12, 1996, the Office terminated appellant's compensation benefits on the grounds that he refused or neglected to work after suitable work was offered. Appellant ultimately returned to work on November 2, 1996 in an eight-hour limited-duty position.

In a report dated April 13, 1998, Dr. Passick stated that there was no appreciable change in appellant's condition and that he was capable of continuing work in a limited-duty capacity as long as he maintained a 20-pound lifting restriction.

On February 25, 2000 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on February 12, 2000 he had a worsening in his condition since the employing establishment did not adhere to his physician's work restrictions.

In a February 17, 2000 report, Dr. Passick indicated that appellant continued to have difficulty with his right wrist and hand and opined that appellant should not return to work.

By decision dated April 13, 2000, the Office accepted appellant's claim for recurrence of disability and began paying appropriate compensation benefits.

The Office referred appellant to a second opinion physician, Dr. Robert Roffman, a Board-certified orthopedic surgeon, to determine the extent of appellant's bilateral tendinitis condition and whether appellant could perform his date-of-injury job as a letter carrier.

Dr. Roffman reviewed a statement of accepted facts, the medical reports of record, a job description and performed a physical examination of appellant. In a report dated October 9, 2000, he indicated that appellant continued to experience pain over the volar aspects of both wrists and distal third of the forearms, right greater than the left, which was exacerbated by active use or motion, in addition to experiencing pain and tingling in the right thumb. Upon examination, Dr. Roffman found that range of motion of the elbows and forearms was unrestricted and pain free and that range of motion of the wrists was minimally restricted, right greater than the left. He stated:

"There is mild increase in pain on resisted wrist flexion and/or digital flexion. Tinel sign over the median nerves at the wrist is negative. Phalen sign is positive bilaterally, productive of paresthesia of the long and ring fingers bilaterally, right greater than left. Finkelstein sign is positive on the right. No atrophy of the intrinsic of the hand. No sensory deficit."

Dr. Roffman diagnosed appellant's condition as chronic bilateral flexor tendinitis of the wrists with secondary carpal tunnel syndrome. He opined that appellant should be treated with surgical intervention and stated that even though appellant was incapable of performing his usual and customary job responsibilities, he was capable of working 8 hours per day with limitations with no repetitive pushing, pulling and lifting and a weight restriction of under 10 pounds. Based on Dr. Roffman's report that appellant was able to work in a limited-duty capacity, appellant was referred to a vocational rehabilitation program.

In a work capacity evaluation dated October 30, 2001, Dr. Passick noted that appellant still had pain and swelling in both wrists and was unable to tolerate any repetitive motion of the hands or fingers. He stated that appellant was not advised to return to work.

Due to the conflict in medical opinion between Drs. Roffman and Passick, the Office referred appellant to Dr. George Burak, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Burak reviewed the medical evidence of record, a statement of accepted facts, a preinjury job description and examined appellant. In a report dated March 25, 2002, he indicated that appellant continued to have pain in both forearms with pain localized to the radial aspect of both wrists, as well as both thumbs and that excessive use of his hands caused him more pain and discomfort. Upon examination of both forearms, Dr. Burak indicated that appellant complained of discomfort on palpation over the volar aspect of both forearms. He noted, however, that upon comparing measurements of his right upper arm to his left upper arm and right forearm to the left

forearm, there was no evidence of atrophy. He stated: “I could not demonstrate any evidence of crepitation on palpation about either [appellant’s] right or left forearm.” Dr. Burak stated:

“On examination of both wrists, he had a negative Tinel’s sign at the right wrist, as well as the left wrist. He had a negative Phalen’s test of both upper extremities. Today, there was no evidence of dysesthesia involving his hands. I could not demonstrate any evidence of atrophy of the abductor pollicis brevis muscles of both hands. There was no evidence of deformity of his hands. He had excellent strength in both upper extremities comparing flexor and extensor strength of the right upper extremity to the left upper extremity. On movement of the thumbs, he complained of pain localized to the carpometacarpal joints, as well as the MP [metatarsophalangeal] joints. However, no instability or deformity of the thumbs could be identified.”

He continued:

“[Appellant] has been diagnosed with having developed flexor tendinitis in both forearms. At the present time, I do not find any evidence of mechanical or inflammatory problems in his upper extremities.

“In my opinion, he should be able to return to work at his previous occupation at the [p]ost [o]ffice [d]epartment with certain restrictions trying to avoid excessive repetitive use of his upper extremities.

“[T]here is no evidence of any type of ongoing pathology in his upper extremities. Certainly, there is no evidence of underlying carpal tunnel syndromes in his upper extremities. There was no evidence of any type of deformities involving his thumbs, which would account for his complaints. I do not find any evidence of flexor tenosynovitis in his forearms.

“He does not require any form of active treatment. He only requires symptomatic follow-up in the future.”

The Office requested that Dr. Burak clarify his statement that appellant should refrain from doing repetitive activities at work. In an addendum report dated May 24, 2002, he stated that appellant had “no evidence of ongoing disability, which would preclude him from doing his work as a letter carrier” and that he could return to work as a postal employee.

On July 17, 2002 the Office issued a notice of proposed termination of appellant’s compensation benefits on the grounds that the weight of the medical evidence indicated that appellant was no longer disabled for work and could return to work with no restrictions. The Office afforded appellant 30 days to submit additional evidence showing that he continued to be disabled.¹ By decision dated August 21, 2002, the Office terminated appellant’s compensation benefits effective September 7, 2002.

¹ By decision dated July 17, 2002, the Office vacated the decision dated October 22, 1996.

By letter dated December 2, 2002, appellant requested reconsideration and submitted a brief and a medical report from Dr. Passick dated October 18, 2002.²

By decision dated July 25, 2003, the Office denied appellant's request on the grounds that the evidence submitted did not overcome the weight of the medical evidence afforded to independent medical examiner, Dr. Burak.³

The Board finds that the Office properly terminated appellant's compensation benefits effective September 7, 2002.

Under the Federal Employees' Compensation Act,⁴ once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁷ In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.⁸

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.⁹ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁰

In this case, appellant's treating physician, Dr. Passick, stated that appellant still had pain and swelling in both wrists and was unable to perform any repetitive motion of hands or fingers and opined that appellant should not return to work. Dr. Roffman on the other hand, opined that

² By decision dated March 19, 2003, the Office issued a decision regarding attorney's fees.

³ The Office noted that as Dr. Passick was on one side of the conflict resolved by the impartial medical examiner, his additional report was insufficient to overcome the weight afforded to the impartial medical examiner or to create a new conflict. *Howard Y. Miyashiro*, 43 ECAB 1101 (1992). The Office also pointed out that there is a difference between Dr. Burak stating that appellant should avoid repetitive activities and stating that he still suffers from residuals from his work-related injury.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁶ *Id.*

⁷ *Virginia Davis-Banks*, 44 ECAB 389 (1993).

⁸ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁹ *H. Adrian Osborne*, 48 ECAB 556 (1997); *Lawrence C. Parr*, 48 EAB 445 (1997).

¹⁰ *Charles M. David*, 48 ECAB 543 (1997); *Lawrence C. Parr*, *supra* note 9.

even though appellant was incapable of performing his usual and customary work duties, he could work 8 hours per day with no repetitive pushing, pulling or lifting and with a weight restriction of under 10 pounds. As a result of this conflict in medical opinion appellant was referred to an impartial medical examiner, Dr. Burak.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

The Board finds that the Office properly terminated appellant's compensation effective September 7, 2002, because the weight of the medical evidence at the time of termination was represented by the thorough and well-rationalized opinion of Dr. Burak. In his March 25, 2002 report, Dr. Burak provided a history of appellant's condition and complaints of pain and reviewed the medical reports of record. He stated that appellant currently complained of pain in both forearms and pain localized in the area of the wrists, as well as both thumbs. He noted that appellant occasionally had numbness in both hands in the morning. On examination of the forearms, Dr. Burak indicated that appellant complained of discomfort to the touch, specifically in the area of the palms, however, he noted that when comparing measurements of the right upper arm and forearm to the left upper arm and forearm, he could not find any evidence of atrophy or demonstrate any evidence of crepitation on palpation. On examination of the wrists Dr. Burak stated that there was a negative Tinel's sign at the right and left wrist and a negative Phalen's sign of both extremities. He also noted that he could find no evidence of dysesthesia or deformity in both hands and that appellant had excellent strength in both upper extremities comparing flexor and extensor strength. Dr. Burak stated that appellant complained of pain in the thumbs but that he could find no evidence of instability or deformity. After a complete examination of appellant and of the medical record, Dr. Burak concluded that there was no evidence of any type of ongoing pathology in appellant's upper extremities. In his May 24, 2002 report, Dr. Burak opined that appellant was not disabled for his date-of-injury position. The Board finds that Dr. Burak provided a reasoned medical opinion that appellant did not have a continuing disability or residuals of the employment injury. At the time the Office terminated appellant's compensation benefits effective September 7, 2002, the weight of the medical opinion evidence rested with the thorough and well-rationalized report of the impartial medical examiner, Dr. Burak.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.¹²

Appellant requested reconsideration and submitted an October 18, 2002 report from Dr. Passick. In his report, Dr. Passick did not indicate that appellant was disabled and that he

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990).

¹² *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

could not return to work. He stated that appellant continued to have difficulty with left greater than right flexor tenosynovitis with some pain and swelling and had difficulty with repetitive use of the hands. Dr. Passick suggested that appellant undergo operative exploration of the flexor compartment, as well as carpal tunnel release and stated that he should not perform any repetitive manual work. Dr. Passick merely restated his conclusions in this report from previous reports already in the record. He also did not provide a rationalized medical opinion that appellant was disabled and unable to return to work. In addition, Dr. Passick did not relate appellant's few, current symptoms to the accepted work injury of November 1, 1995. It is, therefore, insufficient to outweigh the well-rationalized opinion of Dr. Burak. His report is also insufficient to overcome the weight accorded to Dr. Burak's report or to create a new conflict with it, as Dr. Passick was on one side of the conflict that Dr. Burak was selected to resolve.¹³ Dr. Passick's October 18, 2002 report is insufficient to establish that appellant had continuing residuals or disability for work after September 7, 2002, the date the Office terminated his compensation benefits.

Therefore, the July 25 and March 19, 2003 and August 21, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 24, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹³ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).