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

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| **DAVID ALFANO, Appellant** | ) | |
| **and** | ) | **Docket No. 05-353** |
| | ) | **Issued: May 16, 2005** |
| **U.S. POSTAL SERVICE, Vehicle Maintenance Facility, New York, NY, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

### *JURISDICTION*

On November 23, 2004 appellant, through his attorney, filed an appeal from an August 18, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs, affirming the termination of his compensation on the grounds that he had no further disability due to his accepted employment injury.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUES*

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation on the grounds that he had no further disability due to his June 29, 2000 employment injury; (2) whether the Office properly terminated appellant's authorization for medical treatment; and (3) whether appellant has established that he had any further employment-related disability subsequent to the termination of his compensation.

[1] The hearing representative also finalized a finding that appellant received an overpayment of compensation in the amount of $1,053.82 and was not eligible for waiver. He has not appealed this aspect of the case and, therefore, it is not before the Board at this time.

## ***FACTUAL HISTORY***

On June 29, 2000 appellant, then a 37-year-old seven-ton motor vehicle operator, filed a claim for a traumatic injury to his right wrist occurring on that date in the performance of duty. The Office accepted his claim for a right wrist sprain and right distal radius fracture. Appellant stopped work on June 29, 2000 and returned to limited-duty employment on November 15, 2000.

Appellant filed a notice of recurrence of disability on July 12, 2002 causally related to his June 29, 2000 employment injury. The Office accepted that he sustained a recurrence of disability and paid him compensation beginning July 12, 2002.

On October 7, 2002 Dr. David J. Bozentka, a Board-certified orthopedic surgeon, performed a right de Quervain's release and wrist arthroscopy with partial synovectomy. In a progress note dated January 7, 2003, he opined that appellant could return to work with restrictions in February 2003. The employing establishment offered him a limited-duty position on February 13, 2003.

In a report dated February 25, 2003, Dr. James B. Kim, an osteopath who specializes in rehabilitation medicine and is an attending physician, found that appellant was unable to perform the offered position and that he was totally disabled from employment.

On March 24, 2003 the Office referred appellant to Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated April 24, 2003, he opined that appellant's physical examination was normal and that he had no limitations due to his employment injury or resulting surgery.

In a report dated May 9, 2003, Dr. Kim disagreed with Dr. Salem's report and found that appellant could not perform work "that requires right upper extremity use at this time."

The Office found a conflict of medical opinion between Dr. Kim and Dr. Salem. By letter dated May 30, 2003, it referred appellant to Dr. Charles R. Levine, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a report dated June 16, 2003, he reviewed the medical evidence of record and the history of injury. On physical examination he stated:

> "[Appellant's] hands appear of equal volume. There is no visual difference to color, there is no temperature change to palpation. [Appellant's] musculature [is as] hard in the right hand as in the left. He has supple joints. There is no effusion in his wrist. There is no effusion in the MCP's [metacarpophalangeal] or IP's [interphalangeal]. [Appellant] grimaces when he makes a fist on the right but none the less is able to make a fist. He has nonanatomic distribution of sensory findings to light touch and pin prick testing in his right upper extremity. [Appellant] has n[o] reflex changes. He specifically states that his index finger tingles when I tap on his ulnar nerve at his elbow. [Appellant] specifically complains that his 5$^{th}$ finger, right hand, tingles when I tap on his median nerve at the wrist. He has a negative Finkelstein test. There is no palpable or visual

tenosynovitis of the hand or wrist. [Appellant] has no sensory deficits that are explainable organically."

Dr. Levine concluded:

"In my opinion [appellant] has recovered from what ever injury may or may not have occurred. He appears to be an angry malingerer. [Appellant] has no findings to indicate that he has ongoing tenosynovitis or ongoing de Quervain's disease. I would place no work restrictions on him at this time. [His] prognosis is good. I do not feel that any further medical treatment is required. I feel that [appellant] should have been able to return to work, if only to modified work, approximately 10 days following surgery. I do not feel that [he] has any work restrictions at this point in time and should be able to return to his regular job as a truck driver for the [employing establishment]."

On July 21, 2003 the Office notified appellant that it proposed to terminate his compensation on the grounds that the weight of the medical evidence showed that he had no further employment-related disability.

Appellant submitted form reports and progress notes from Dr. Kim dated July and August 2003. In form reports dated July 15 and August 15, 2003, Dr. Kim diagnosed a right distal radius fracture with chronic pain and checked "yes" on the form that the condition was caused or aggravated by employment. He found that appellant remained disabled. In a progress report dated July 23, 2003, Dr. Kim discussed appellant's complaints and found that he was status post a right de Quervain's tenosynovitis release, a "[d]istal radius fracture with ligamentous injury and chronic pain and weakness" and had "[i]ntermittent neuropathic symptoms." In a progress note dated August 1, 2003, Dr. Kim opined that appellant could only perform "modified work with occasional or very little use or no use of the right arm and hand." He found that appellant was unable to perform his usual employment.

Appellant returned to full-time regular employment at the employing establishment on August 4, 2003.

By decision dated September 5, 2003, the Office terminated appellant's compensation and entitlement to medical benefits on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Levine, established that he had no further employment-related disability or residual condition.

In a letter dated September 10, 2003, appellant, through his attorney, requested an oral hearing.[2]

[2] On September 24, 2003 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of $1,053.82, because he received compensation after he returned to work for the period August 4 to 15, 2003. The Office found that he was not at fault in the creation of the overpayment and provided him with the information necessary to request waiver. Appellant, on October 18, 2003 submitted an overpayment recovery questionnaire with supporting documentations and requested a hearing on the overpayment.

In a progress report dated November 18, 2003, Dr. Bozentka found that appellant could continue working as a truck driver and that "he may require some restrictions for lifting.…"

At the hearing, held on May 25, 2004, appellant's attorney argued that Dr. Levine's report was insufficient as he did not discuss his specific job duties as a truck driver, did not measure range of motion of the wrist and did not fully understand appellant's surgery as he stated that he could return to work 10 days after the surgery. Counsel noted that appellant was in a cast for six weeks after the operation.

Subsequent to the hearing, appellant submitted progress reports from Dr. Kim dated November 7, 2003 to May 3, 2004.[3] On November 7, 2003 he noted that appellant had returned to work and recommended he "protect his right hand from any repetitive activities." On February 6, 2004 Dr. Kim discussed his complaints of right hand, wrist and elbow pain when he performed work activities of loading and unloading. He noted findings of a positive Finkelstein's test on the right and recommended that appellant "not do his push and pull activities." On May 3, 2004 Dr. Kim discussed his complaints of right wrist pain and listed findings of a right positive Finkelstein's sign. Dr. Kim related that he should "continue his activities at work with restrictions."

In a decision dated August 18, 2004, the hearing representative affirmed the Office's September 5, 2003 termination decision.[4]

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

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[5] 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] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which would require further medical treatment.[7]

Section 8123(a) of the Federal Employees' Compensation Act[8] provides, "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

[3] Appellant also resubmitted progress notes from Dr. Kim dated November 6, 2002 to August 1, 2003.

[4] The hearing representative finalized the finding that appellant was without fault in the creation of an overpayment of $1,053.82 and that he was not entitled to waiver.

[5] *Paul L. Stewart*, 54 ECAB ___ (Docket No. 03-1107, issued September 23, 2003).

[6] *Elsie L. Price*, 54 ECAB ___ (Docket No. 02-755, issued July 23, 2003).

[7] *James F. Weikel*, 54 ECAB ___ (Docket No. 01-1661, issued June 30, 2003).

[8] 5 U.S.C. §§ 8101-8193.

examination."[9] 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.[10]

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

The Office accepted that appellant sustained a right wrist sprain and distal radius fracture due to a June 29, 2000 employment injury. He returned to limited-duty employment on November 15, 2000. The Office accepted that appellant sustained a recurrence of total disability on July 12, 2002. He underwent a right de Quervain's release and wrist arthroscopy with partial synovectomy on October 7, 2002. The Office determined that a conflict of medical opinion arose between Dr. Salem, an Office referral physician, and Dr. Kim, appellant's physician, regarding residuals and the extent of his employment-related disability. The Office referred appellant to Dr. Levine for an impartial medical examination to resolve the conflict in opinion.

Where there exists a conflict in medical opinion 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 upon a proper factual background, is entitled to special weight.[11] The Board finds that the opinion of Dr. Levine, a Board-certified orthopedic surgeon, selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history; thus, it is entitled to special weight. He accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.[12] On examination Dr. Levine found that appellant had hands of equal volume and similar musculature. He found that appellant had no effusion of the wrist or reflex changes. Dr. Levine noted his complaints of tingling of the index and fifth finger but found "no sensory deficits that are explainable organically." He further found "no palpable or visual tenosynovitis on the hand or wrist." Dr. Levine concluded that appellant had recovered from his injury, had no work restrictions and could resume his usual employment. He provided rationale for his opinion by explaining that there were no findings on examination that revealed an ongoing condition. As Dr. Levine's report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner and is sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits.[13]

The remaining evidence of record submitted subsequent to Dr. Levine's report and prior to the Office's termination of compensation is insufficient to overcome the weight accorded him as the impartial medical examiner. Appellant submitted form reports dated July 15 and

[9] 5 U.S.C. § 8123(a).

[10] *Barbara J. Warren*, 51 ECAB 413 (2000).

[11] *See Willie M. Miller*, 53 ECAB 697 (2002).

[12] *Manuel Gill*, 52 ECAB 282 (2001).

[13] *See Barbara J. Warren*, *supra* note 10.

August 15, 2003 from Dr. Levine, who diagnosed a right distal radius fracture with chronic pain and indicated "yes" on the form that the condition was employment related. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causal relationship.[14] Appellant further submitted progress notes from Dr. Kim, including a report dated August 1, 2003 in which Dr. Kim opined that he was unable to perform his usual employment duties. His reports, however, were similar to his prior reports and insufficient to overcome the opinion of the impartial medical specialist or create a new conflict as Dr. Kim was on one side of the conflict that the impartial medical specialist resolved.[15]

In a progress report dated November 18, 2003, Dr. Bozentka noted that appellant could work as a truck driver but "may require some restrictions for lifting…." His finding, however, that appellant "may require" lifting restrictions is speculative in nature and, thus, of diminished probative value.[16]

On appeal, appellant's attorney contends that Dr. Levine's report demonstrated bias as he did not believe appellant's complaints, but instead called him an "angry malingerer." He further contended that Dr. Levine's finding that he could have returned to employment 10 days after his surgery "demonstrates his disdain towards [a]ppellant and his bias towards his condition." Appellant, however, has not submitted any evidence that would establish bias on behalf of Dr. Levine. The Board has held that unsubstantiated allegations of bias are not sufficient to exclude or diminish the probative value of an impartial medical examiner's report.[17]

Counsel further argued that Dr. Levine did not support his findings with adequate medical reasoning and failed to specifically find that appellant had no residuals of his surgery. As discussed above, however, the Board finds that Dr. Levine's opinion is sufficiently detailed and well rationalized to be entitled to special weight as the impartial medical examiner.

## ***LEGAL PRECEDENT -- ISSUE 2***

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[18] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[19]

[14] *Gary J. Watling*, 52 ECAB 278 (2001).

[15] *William Morris*, 52 ECAB 400 (2001).

[16] *Ricky S. Storms*, 52 ECAB 349 (2001).

[17] *Geraldine Foster*, 54 ECAB ___ (Docket No. 02-66, issued February 28, 2003).

[18] *Pamela K. Guesford*, 53 ECAB 727 (2002).

[19] *Id*.

## ***ANALYSIS -- ISSUE 2***

In this case, the Office met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Levine, the impartial medical examiner, who found that appellant had recovered from his accepted condition. He provided rationale for his opinion by explaining that the findings on physical examination showed no continuing right wrist condition. Dr. Levine concluded that appellant needed no additional medical treatment.

## ***LEGAL PRECEDENT -- ISSUE 3***

Once the Office meets its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that she had disability causally related to his accepted injury.[20] To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.[21] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[22] Rationalized medical evidence is evidence which includes a physician's rationalized medical 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 rationalize explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[23] Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[24]

## ***ANALYSIS -- ISSUE 3***

Subsequent to the Office's termination of compensation, appellant submitted progress reports dated November 7, 2003 to May 3, 2004 from Dr. Kim. In his progress report dated November 7, 2003, Dr. Kim recommended appellant "protect his right hand from any repetitive activities." In a report dated February 6, 2004, he found that appellant should not engage in "push and pull activities." In a report May 3, 2004, Dr. Kim discussed his complaints of right wrist pain and listed findings of a right positive Finkelstein's sign. He related that appellant should "continue his activities at work with restrictions." As the additional reports from Dr. Kim merely repeat his prior assessment of appellant's ability to perform his usual employment and he was on one side of the conflict that Dr. Levine resolved, his additional reports are insufficient to

[20] *Manuel Gill*, *supra* note 12.

[21] *Id*.

[22] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[23] *Leslie C. Moore*, 52 ECAB 132 (2000).

[24] *Ernest St. Pierre*, 51 ECAB 623 (2000).

overcome the special weight accorded Dr. Levine's opinion or to create a new conflict.[25] Appellant, consequently, has not met his burden of proof to establish continuing employment-related disability.

## ***CONCLUSION***

The Board finds that the Office met its burden of proof to terminate appellant's compensation and authorization for medical treatment on the grounds that he had no further disability due to his June 29, 2000 employment injury. The Board further finds that appellant has not established that he had any further employment-related disability subsequent to the termination of his compensation.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 18, 2004 is affirmed.

Issued: May 16, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[25] *Alice J. Tysinger*, 51 ECAB 638 (2000).