

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

C.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chattanooga, TN, Employer**

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**Docket No. 07-1186
Issued: October 4, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 29, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 29, 2006, with respect to the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate compensation for wage loss and medical benefits effective April 17, 2005.

FACTUAL HISTORY

Appellant filed an occupational disease claim on July 14, 2000 alleging that she sustained bilateral carpal tunnel syndrome causally related to her duties as a data conversion operator. The Office accepted the claim for bilateral carpal and cubital tunnel syndromes. Appellant underwent a left carpal tunnel release surgery on September 28, 2000, right carpal tunnel release

on November 9, 2000, left ulnar nerve release at the elbow on January 25, 2001 and a right ulnar nerve release at the elbow on February 15, 2001.

Appellant returned to a light-duty job in June 2001. By decision dated June 12, 2002, the Office granted a schedule award for 40 percent permanent impairment to each arm. The period of the award was 124.8 weeks from February 28, 2002. The record also contains a June 12, 2002 decision finding that her light-duty job had wages equal to the date-of-injury job and her actual earnings fairly and reasonably represented appellant's wage-earning capacity.

In a report dated January 6, 2004, an attending orthopedic surgeon, Dr. W. Carl Dyer, diagnosed recurrent left carpal tunnel syndrome, right tardy ulnar nerve palsy and bilateral medial and lateral epicondylitis. He opined that appellant's job injury had not resolved and she should be in a light-duty status with no repetitive gripping and pulling. Dr. Dyer indicated that the current work restrictions were basically the same as restrictions effective March 2002.

On March 30, 2004 the employing establishment offered appellant a new light-duty position. Appellant stopped working on March 31, 2004 and filed a notice of recurrence of disability (Form CA-2a). Following the expiration of the schedule award on May 15, 2004, appellant began receiving compensation for temporary total disability.

The Office referred appellant, a statement of accepted facts and medical records, to Dr. Neil Spitalny, an orthopedic surgeon, for a second opinion examination. In a report dated September 16, 2004, Dr. Spitalny provided a history and reviewed the medical record. He noted that an electromyogram (EMG) performed in July 2003 was normal. Dr. Spitalny provided results on examination and diagnosed postoperative scarring of the median and ulnar nerves, cervical spondylosis and fibromyalgia. In response to a question as to objective residuals attributable to the work injury, Dr. Spitalny stated: "There are no residuals attributable to work injury and residuals are related to her underlying fibromyalgia, her cervical spondylosis and her multiple surgical procedures." He concluded that he did not find that appellant had any objective residuals attributable to a work injury and any work restrictions were not based on any work-related injury.

The Office determined that a conflict in the medical evidence existed. Appellant was referred to Dr. Richard Bagby, Jr., a Board-certified orthopedic surgeon. In a report dated February 8, 2005, Dr. Bagby provided a history and results on examination. He diagnosed continued subjective symptoms of pain, numbness and weakness. Dr. Bagby stated that it was reasonable to assign some of appellant's pain or symptoms to scar tissue following numerous surgeries, but this was not confirmed neurodiagnostically or even on the basis of internally consistent symptoms. His reported findings of an essentially normal examination were inconsistent with subjective symptoms of work and activity intolerance. Dr. Bagby further stated:

"In retrospect and knowing the outcome of [appellant's] numerous surgeries, a knowledg[e]able physician would conclude that she probably never really had surgically treatable work induced carpal tunnel syndrome of cubital syndrome and that any continuing symptoms she had had, without surgery, would not be work related. However, she has had the surgeries and has had the manipulation of the

tissues and scarring and it is now not possible to apportion postoperative effects from preoperative or nonoperative symptoms of whatever other cause. It is clear that she does n[ot] currently have carpal tunnel syndrome, or cubital tunnel syndromes, or functional nerve damage either from the surgery, or from other causes either.”

He concluded that appellant had no current objective residuals directly attributable to the work injuries.

By letter dated February 23, 2005, the Office notified appellant that it proposed to terminate her compensation based on the weight of the medical evidence. Appellant submitted a March 9, 2005 electromyogram/nerve conduction velocity (EMG/NCV) report from Dr. David Rankine who reported persistent ulnar nerve motor delay at the wrist.

The Office requested that Dr. Bagby review the evidence and provide a supplemental report. In a report dated March 30, 2005, Dr. Bagby noted that Dr. Rankine did not make a diagnosis based on the diagnostic report. He stated that the EMG/NCV evidence was the least reliable element in making a diagnosis because it is often inconsistent and relies in part on the interpretation of the testor. Dr. Bagby noted the normal results in July 2003 and reaffirmed his prior opinion. In a report dated April 14, 2005, an Office medical adviser opined that he was in agreement with Dr. Bagby.

By decision dated April 20, 2005, the Office terminated compensation for wage loss and medical benefits effective April 17, 2005.

Appellant requested a review of the written record and submitted additional evidence. In a report dated September 7, 2005, Dr. Dyer diagnosed bilateral recurrent carpal tunnel syndrome. He opined that the diagnosis was directly related to the original work injury. In a report dated May 5, 2005, Dr. Bruce Kaplan, a neurologist, who had previously provided a July 30, 2003 EMG report, stated that there was no evidence of either carpal tunnel syndrome or ulnar neuropathy at the time of his study. He explained that, while “inching” studies (such as the March 9, 2005 study) may uncover milder cases of each disorder, he was reluctant to use the technique due to a high number of false positive results. Dr. Kaplan stated that appellant did not have anything approaching severe or moderately severe forms of these disorders given the normalcy of the earlier results.

By decision dated November 21, 2005, an Office hearing representative affirmed the April 20, 2005 decision. The hearing representative found that the weight of the evidence was represented by Dr. Bagby.

In a report dated September 11, 2006, Dr. Rankine opined that appellant could not do repetitive work. By report dated September 21, 2006, Dr. Dyer again diagnosed recurrent bilateral carpal tunnel syndrome, right tardy ulnar palsy and bilateral medial and lateral epicondylitis. He stated that appellant’s conditions were related to her injuries and subsequent surgeries.

In a decision dated December 29, 2006, the Office reviewed the case on its merits and denied modification of the November 21, 2005 decisions.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.² The right to medical benefits is not limited to the period of entitlement to disability. 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.³

It is well established that when a case is referred to a referee examiner 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.⁴

ANALYSIS

In the present case, the Office accepted bilateral carpal tunnel syndrome and cubital tunnel syndrome as causally related to appellant's federal employment as a data conversion operator. Appellant had stopped working as of March 31, 2004 and was receiving compensation for wage loss. It is, therefore, the Office's burden to establish that disability from the accepted conditions had ceased. Since the Office also terminated medical benefits, it is the Office's burden to establish that residuals of the accepted injuries had ceased.

The Office found that a conflict existed in the medical record with respect to the accepted conditions. Dr. Dyer, an attending physician, opined that appellant continued to have a recurrent carpal tunnel syndrome. Dr. Spitalny, the second opinion examiner, did not diagnose carpal tunnel syndrome or cubital tunnel syndrome and found no objective evidence of these conditions. To resolve the conflict, appellant was referred to Dr. Bagby as a referee examiner.⁵

Dr. Bagby clearly indicated that he found no evidence of a continuing carpal tunnel syndrome or cubital tunnel syndrome. While he stated that, in view of the outcome of surgeries, a physician would conclude that appellant probably never had a surgically treatable employment-related condition, he did not base his opinion as to the current condition on the belief that appellant never had an employment-related condition. Dr. Bagby noted that the results of the

¹ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

² *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

³ *Frederick Justiniano*, 45 ECAB 491 (1994).

⁴ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁵ The Federal Employees' Compensation Act provides that, if 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 the examination. 5 U.S.C. § 8123(a). The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

July 2003 diagnostic testing and offered an unequivocal opinion that appellant did not currently have carpal or cubital tunnel syndrome. He reviewed the March 9, 2005 diagnostic study and reaffirmed his opinion in a March 30, 2005 supplemental report. The Board finds that Dr. Bagby provided a reasoned medical opinion that is entitled to special weight as a referee examiner. The weight of the medical evidence supported the Office's termination of compensation for wage-loss and medical benefits effective April 17, 2005.

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.⁶ Appellant submitted additional evidence after the April 20, 2005 termination, but it is not sufficient to establish a continuing employment-related condition or disability. Dr. Dyer opined in a September 7, 2005 report that appellant had recurrent bilateral carpal tunnel syndrome related to her original injury, without providing a rationalized medical opinion.⁷ Dr. Kaplan reaffirmed in his May 5, 2005 report that there was no evidence of carpal tunnel syndrome at the time of his July 30, 2003 report.

The Board notes that in the development of the medical evidence the issue of whether there was a consequential injury as a result of surgery authorized for the accepted conditions was raised. Dr. Spitalny, for example, diagnosed postoperative scarring of the median and ulnar nerves, without providing additional explanation. It is appellant's burden of proof to establish that she sustained an injury causally related to surgeries performed for the accepted conditions.⁸ Dr. Bagby noted the possibility that some of appellant's symptoms were related to scarring from surgeries performed, but he stated that he could not confirm this neurodiagnostically or on the basis of consistent symptoms. Dr. Dyer briefly stated in his September 21, 2006 report that appellant's conditions were due in part to prior surgeries, without providing a reasoned medical opinion. The evidence of record is not sufficient to establish a consequential injury resulting from surgeries authorized for the accepted conditions.

CONCLUSION

The Office met its burden of proof to terminate compensation for wage loss and medical benefits based on the weight of the medical evidence as represented by Dr. Bagby, the referee examiner.

⁶ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

⁷ Additional reports from a physician on one side of the conflict that is properly resolved by an impartial specialist are generally insufficient overcome the weight accorded the referee's report or create a new conflict. *See Harrison Combs, Jr.*, *supra* note 4; *Dorothy Sidwell*, 41 ECAB 857 (1990).

⁸ *See Kathy A. Kelley*, 55 ECAB 421 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 29, 2006 is affirmed.

Issued: October 4, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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