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

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| **E.H., Appellant** | ) | |
| **and** | ) | **Docket No. 08-589** |
| | ) | **Issued: September 9, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 6, 2007, terminating his compensation for wage loss. 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 effective September 6, 2007.

### ***FACTUAL HISTORY***

The record indicates that two claims for compensation were administratively combined under OWCP File No. 060617121. Appellant filed an occupational illness claim (Form CA-2) on July 5, 1994 alleging his carpal tunnel syndrome was causally related to his federal employment as a letter sorting machine clerk. On February 2, 1995 he filed a Form CA-2 alleging that he sustained a left elbow cubital tunnel injury as a result of his letter sorting

machine activities. The accepted conditions, according to Form CA-800 (FECA Nonfatal Summary) were bilateral carpal tunnel syndrome, right cubital tunnel syndrome and left elbow cubital tunnel syndrome. An October 31, 2006 statement of accepted facts reported that the accepted conditions included left lateral epicondylitis and right ulnar nerve lesion.

On February 16, 1996 the Office issued a schedule award for a 12 percent right arm impairment and a 6 percent left arm impairment. Appellant received a schedule award for a 10 percent permanent impairment to his left arm on November 6, 1997. He retired from federal employment in May 2005 and began receiving compensation for wage loss.

The attending physician, Dr. Luis Pagani, a neurologist, opined in a June 29, 2006 report that the left lateral epicondylitis and bilateral carpal tunnel syndrome had not resolved. He opined that appellant was totally disabled and he expected the disability to be permanent. Dr. Pagani also indicated that appellant was disabled due to a service-connected post-traumatic stress disorder and was being treated at a Veterans' hospital.

The Office referred appellant for a second opinion examination by Dr. Richard Sheridan, an orthopedic surgeon. In a report dated November 28, 2006, Dr. Sheridan provided results on examination and reviewed medical evidence. He stated that the objective findings supporting residuals of the compensable conditions were positive Phalen signs bilaterally, hypesthesia in the median and ulnar nerves, positive Froment sign on the right and tenderness over the left lateral epicondyle. Dr. Sheridan completed a work capacity evaluation (OWCP-5c) indicating that appellant could work eight hours with restrictions of 10 pounds lifting, pushing and pulling. In a report dated January 4, 2007, Dr. Pagani disagreed with Dr. Sheridan as to appellant's disability for work. He reiterated that appellant was totally disabled.

The Office found that a conflict in medical opinion arose between Dr. Pagani and Dr. Sheridan. Appellant was referred to Dr. Martyn Goldman, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated February 21, 2007, Dr. Goldman provided a history and results on examination. He stated that the objective findings to support residuals for the compensable conditions were decreased two-point discrimination in both hands. Dr. Goldman opined that most of appellant's present symptomatology was related to a chronic pain syndrome, which was not related to the compensable injury. He completed an OWCP-5c, checking a box "no" regarding whether appellant could work eight hours with restrictions. In the section of the form regarding specific limitations, however, Dr. Goldman appeared to indicate that appellant could work eight hours sitting. He also checked restrictions as to reaching, pushing, pulling, lifting and repetitive movements of the wrist and elbow.

On March 15, 2007 the Office requested Dr. Goldman provide an additional report regarding an employment-related disability. By report dated April 2, 2007, Dr. Goldman noted that the two-point discrimination did produce results outside normal limits. As to work restrictions, he indicated that he would withdraw restrictions such as reaching above shoulder, as pain was not to be considered, and the restrictions against pushing, pulling and lifting were based on the back examination, which was not an accepted condition. Dr. Goldman concluded that the remaining restrictions would be against repetitive wrist movements. He completed an OWCP-5c dated April 25, 2007 and again checked a box "no" as to working eight hours with restrictions.

Dr. Goldman checked a limitation on wrist and elbow movement, without indicating the number of hours. He did not provide further information.

Thereafter, the Office referred appellant for a second referee examination by Dr. Martin McTighe, a Board-certified orthopedic surgeon. In a report dated July 2, 2007, Dr. McTighe provided a history and results on examination. He reported diffuse tenderness in the cervical spine, shoulders, arms and hands, noting pressure appeared to cause a disproportionate degree of pain. Dr. McTighe reported dysesthesias distributed in a nearly equal degree over the ulnar, radial and median nerve, with Phalen's and Tinel's inconclusive due to global hypersensitivity. He further stated:

> "It is my opinion that this individual demonstrates no objective findings to support disability from the compensable injury as listed on the statement of [accepted] facts. In my opinion the claimant is capable of performing his regular duties as a letter sorting machine operator without restrictions as far as the compensable injuries are concerned. Objective findings in this examination appeared to be exclusively those of a hypersensitivity that is the result of chronic pain syndrome. This individual has reached maximum medical improvement and the limitations resulting from his chronic pain syndrome are permanent. It is my opinion that further medical treatment for the compensable injuries is unwarranted. The need for psychiatric intervention is not excluded."

By letter dated August 3, 2007, the Office notified appellant that it proposed to terminate his compensation for wage loss. Appellant submitted a July 2, 2007 report from Dr. Pagani that indicated appellant continued to report pain. In an August 11, 2007 statement, he alleged that he suffered harassment from his supervisors and his employment exacerbated his post-traumatic stress disorder. Appellant indicated that he had to retire in May 2005 because of his emotional issues.

By decision dated September 6, 2007, the Office terminated compensation for wage loss based on the weight of the medical evidence.

## ***LEGAL PRECEDENT***

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

It is well established that when a case is referred to an impartial medical specialist 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.[2]

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

[2] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

## ***ANALYSIS***

In this case, there was a conflict in the medical evidence regarding the nature and extent of appellant's continuing employment-related disability. The attending physician, Dr. Pagani, reported that appellant was totally disabled from his employment injuries, while the second opinion physician, Dr. Sheridan, indicated that appellant could work with restrictions. 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.[3]

The Office initially referred appellant to Dr. Goldman for the referee examination. His reports, however, did not resolve the conflict. In a February 21, 2007 report, Dr. Goldman reported decreased two-point discrimination in both hands, but he also stated that most of appellant's symptoms were related to chronic pain syndrome, which is not an accepted employment-related condition. As to employment-related disability, the February 21, 2007 OWCP-5c did not provide a clear opinion as to appellant's capacity for work. Dr. Goldman appeared to indicate that appellant could work a sedentary position with restrictions at eight hours a day, as he reported that appellant could sit for eight hours. On the other hand, he checked a box "no" regarding appellant's ability to work eight hours with restrictions. The Office properly requested clarification from Dr. Goldman. On April 2, 2007 he indicated his belief that some of the limitations previously noted on his OWCP-5c would not be considered employment related, but the April 21, 2007 OWCP-5c did not clarify the issue presented. Although it listed fewer limitations, it did not explain how many hours appellant could work with the reported limitations on wrist and elbow movements. Dr. Goldman's reports did not clearly establish the nature and extent of any continuing employment-related disability.

Since the Office was unable to obtain clarification from Dr. Goldman, it referred appellant for referee examination by Dr. McTighe.[4] In his July 2, 2007 report, Dr. McTighe noted findings such as dysesthesias over the ulnar, radial and median nerve, but he found the results to be causally related to a chronic pain syndrome. The diagnosed condition of chronic pain syndrome is not accepted as an employment-related condition. Dr. McTighe explained that there were no findings related to the employment injuries, and appellant was not prevented from performing his letter sorting machine duties because of an employment-related condition.

As noted above, a rationalized medical report from a referee physician is entitled to special weight. The Board finds that Dr. McTighe's report resolves the conflict in the medical evidence and is entitled to special weight. Dr. McTighe's provided an unequivocal opinion that the only objective examination finding was hypersensitivity related to a chronic pain syndrome, not the accepted employment injuries. It represents the weight of the evidence, and the Office met its burden of proof to terminate compensation for wage loss effective September 6, 2007.

[3] 5 U.S.C. § 8123(a). This is called a referee examination according to 20 C.F.R. § 10.321 (2008).

[4] Office procedures indicate the Office may seek a second referee examination if the original referee physician fails to provide an adequate and clear response to a specific request for clarification. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(a)(2) (November 1996).

The Board notes that appellant appeared to indicate that he felt his inability to work as of May 2005 was related to an emotional condition resulting from actions of his supervisors. Appellant may pursue a claim for an emotional condition, but that issue is not before the Board on this appeal and the Board offers no opinion on the merits of a hypothetical claim.

## ***CONCLUSION***

The Office met its burden of proof as the weight of the medical evidence was sufficient to establish that employment-related disability had ceased as of September 6, 2007.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 6, 2007 is affirmed.

Issued: September 9, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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