U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALMA Z. BEACH and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Salem, Va.

Docket No. 95-3125; Submitted on the Record;
Issued January 26, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant's employment as a phlebotomist resulted in disability for work beginning October 4, 1990 or in the surgery she underwent on her left wrist on June 28, 1991.

As evidenced by its January 18, 1991 letter to appellant, the Office of Workers' Compensation Programs accepted that appellant's tendinitis of the left hand was causally related to her employment as a phlebotomist at the employing establishment. Appellant resigned her position at the employing establishment effective October 4, 1990, and claimed compensation beginning that date.

Appellant's attending physician, Dr. Hugh J. Hagan, III, a Board-certified orthopedic surgeon, performed surgery on appellant's left wrist on June 28, 1991, which he described as a release of the left carpal tunnel and a release of the left Guyon's canal. Dr. Hagan explained why he concluded that appellant, despite negative nerve conduction studies, had carpal tunnel syndrome. Dr. Hagan also explained why he believed this condition was related to her employment, stating that "the repetitive nature of her injury elicited a flexor tenosynovitis in her wrist which then produced swelling and that led to compression of the nerves in her wrists and her subsequent symptoms." Dr. Hagan also concluded that appellant was disabled for her position as a phlebotomist.

The Office referred appellant to Dr. S. Curtiss Mull, a Board-certified orthopedic surgeon, for a second opinion. Dr. Mull concluded that "there is no evidence that she had a carpal tunnel syndrome as the result of the industrial related injury in April 1990," based on her normal nerve conduction studies. Dr. Mull also concluded that appellant's "job as a phlebotomist, it would seem to me, would be possible since her left hand is the nondominant hand."

The Office recognized that there was a conflict of medical opinion between its referral physician and appellant's physician, and requested that its Office medical adviser refer appellant to a Board-certified orthopedic surgeon for an impartial medical examination. The Office referred appellant, the case record and a statement of accepted facts to Dr. Robert R. Bowen, a Board-certified orthopedic surgeon, but advised appellant and Dr. Bowen that this referral was for a second opinion examination. In a report dated February 23, 1995, Dr. Bowen concluded:

> "My impression is that the patient probably has tendinitis of the left wrist, she did not have carpal tunnel syndrome. Her present pain and tenderness of the left wrist is due to scar tissue from the operative procedure and not due to carpal tunnel syndrome. I do not feel her problem was due to her job at the [employing establishment].
>
> "My impression is that she can probably do some type of work with her left hand but will not be able to return to her former job as phlebotomist."

By decision dated August 3, 1995, the Office noted that appellant was referred to Dr. Bowen for an independent medical examination "due to the conflicting medical evidence," and found, based on Dr. Bowen's report, that appellant's carpal tunnel syndrome was not related to her employment activities.

The Board finds that the case is not in posture for a decision due to an unresolved conflict of medical opinion.

The opinions of appellant's attending physician, Dr. Hagan, and the Office's referral physician, Dr. Mull, both Board-certified orthopedic surgeons, conflict on the diagnosis of appellant's condition and whether it was disabling for work. The Office attempted to resolve this conflict of medical opinion with its referral to Dr. Bowen pursuant to section 8123(a) of the Federal Employees' Compensation Act.[1] The Office's referral letter, however, did not advise appellant of the existence of a conflict of medical opinion. Such notice is required by the Office's procedure manual, which further states, "Notification that the examination is being arranged under the provisions of 5 U.S.C. § 8123 will give the claimant an opportunity to raise any objection to the selected physician prior to the examination."[2] As appellant was not notified that Dr. Bowen would examine her as an impartial medical specialist, she was deprived of the opportunity to present any objections to the selection of Dr. Bowen. Accordingly, Dr. Bowen cannot serve as the impartial specialist resolving the conflict of medical opinion, and this conflict remains unresolved.[3]

[1] 5 U.S.C. § 8123(a) states in pertinent part: "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 examination."

[2] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(c) (March 1994).

[3] *Henry J. Smith, Jr.*, 43 ECAB 524 (1992); *reaff'd on recon.*, 43 ECAB 892 (1992).

The Office therefore should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist to resolve the conflict of medical opinion. The Office should request that this specialist provide a reasoned medical opinion whether appellant was disabled for work beginning October 4, 1990 due to an employment-related condition, whether it be tendinitis or carpal tunnel syndrome, and whether the surgery appellant underwent on June 28, 1991 was for an employment-related condition.

The decision of the Office of Workers' Compensation Programs dated August 3, 1995 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
January 26, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member