

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL LINCKS and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Miami, Fla.

*Docket No. 97-2682; Submitted on the Record;
Issued June 28, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she was disabled for the period January 13 through June 15, 1992, due to her accepted condition of temporary aggravation of bilateral osteoarthritis of the thumbs, wrists and hands; (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation entitlement effective October 23, 1996, finding that her temporary aggravation had ceased; (3) whether the Office abused its discretion by denying appellant's request for an oral argument; and (4) whether the Office properly denied appellant's request for surgery.¹

On October 1, 1994 appellant, then a 67-year-old immigration inspector, filed a claim alleging that repetitive writing, stapling, stamping, packaging and computer use over the years caused arthritic problems in her hands, wrists and arms. The Office accepted that appellant sustained temporary aggravation of bilateral osteoarthritis of the thumbs, hands and wrists, and began to pay compensation on July 2, 1995. Appellant was placed on the periodic rolls on December 20, 1994.

By report dated January 13, 1995, Dr. M. Felix Freshwater, a Board-certified plastic surgeon with additional certification in surgery of the hand and microsurgery, recommended additional bilateral upper extremity surgery for appellant's continuing pain problems.

On February 28, 1995 the Office asked Dr. Freshwater if appellant's aggravation of bilateral osteoarthritis was temporary or permanent. By response dated March 9, 1992, he opined that appellant's aggravation was permanent, and he explained: "ostoeoarthritis is a permanent, progressive and irreversible condition. Joints that have worn out cannot be repaired,

¹ Appellant has not appealed the May 23, 1997 Office decision determining that she was without fault in the creation of an overpayment in the amount of \$833.84 which occurred due to Office error in premiums deduction, and has not requested waiver, but has agreed to devise a reasonable repayment plan from income not related to continuing compensation benefits.

they can only be replaced by artificial means.” In response to a question regarding appellant’s also previously diagnosed condition of cubital tunnel syndrome, Dr. Freshwater opined that it was probably preexisting, but was no longer present, and therefore was temporary in nature.

On March 24, 1995 an Office medical adviser reviewed Dr. Freshwater’s responses and opined that they were contradictory and therefore did not support the need for surgery. The Office medical adviser compared his responses on January 13, 1995 regarding appellant’s osteoarthritis, which indicated that even after surgery appellant would not be able to return to the same work and that she had permanent impairment, with his March 9, 1995 responses regarding appellant’s cubital tunnel syndrome, a different and unaccepted condition, which he found was temporary in nature and was no longer present, and found them inconsistent, such that the need for surgery was not supported.

On December 12, 1995 the Office referred appellant for a second opinion on the relationship of her present condition to the accepted employment condition and to determine the extent of any remaining disability, to Dr. Richard L. Glatzer, a Board-certified orthopedic surgeon not specializing in hand surgery or arthritis.

By report dated January 8, 1996, Dr. Glatzer stated that he could not attribute appellant’s osteoarthritic degeneration to her job duties, however, it was possible that the long hours of stamping and the use of a 357 magnum would aggravate her preexisting problems. He opined that he did not believe her job duties made her problems worse because, with the disease process, they would have gotten worse regardless. Dr. Glatzer opined that appellant was not in need of surgery but might be in need of surgery some time in the future. He opined that appellant’s present disability was not causally related to her job, but noted that her job may have aggravated her preexisting problems. Dr. Glatzer then stated that appellant’s job duties did not increase the inevitability of her disease process, and opined: “I do not feel that there is a causation by the employment, albeit possible aggravation. In this case, the aggravation would be permanent. She will not return to her preinjury status.” Dr. Glatzer then stated that repetitive use would aggravate appellant’s condition and increase her subjective complaints, but that it would not increase the disease process itself.

By letter dated January 27, 1996, the Office requested clarification as to whether appellant’s aggravation was temporary or permanent. By response dated February 2, 1996, Dr. Glatzer opined that appellant’s aggravation ceased when she ceased being exposed to the employment factors.

On February 9, 1996 the Office received a January 9, 1996 report from Dr. Mark J. Sinnreich, a Board-certified orthopedic surgeon, who agreed with Dr. Freshwater and opined that appellant had cystic changes in the base of the metacarpal as well as degenerative changes which could, within reasonable medical probability, be associated with her work as a result of accumulative trauma over the years.

Thereafter the Office determined that a conflict in medical opinion existed between Dr. Glatzer, the Office’s second opinion specialist, and appellant’s physicians on the issues of aggravation, residuals and the need for surgery. The Office referred appellant, together with the

complete case record, a statement of accepted facts and questions to be answered, to Dr. Howard Kurzner, a Board-certified orthopedic surgeon not specializing in hand surgery.

By report dated April 30, 1996, Dr. Kurzner reviewed appellant's history and the records, examined appellant and discussed her x-rays. He concluded, regarding temporary versus permanent aggravation and residuals: "I think she does have advance degenerative arthritis and osteoarthritis of both hands and wrist which was not caused by her occupation but may have increased some of her difficulty because of the excessive use of her hands. The degenerative arthritis had to do with her general make-up and preexisted her involvement." Regarding the need for surgery, Dr. Kurzner stated: "As far as surgery is concerned, if she continues to have pain, I would have no objection to the operative procedure." He further opined that appellant would probably benefit from a fusion surgery rather than an anchovy procedure that she had previously had on her left side, but that he did not see how a surgical procedure would give her total relief.

By letter dated July 1, 1996, the Office requested clarification on the issue of causal relation of the accepted aggravation, on whether appellant's underlying condition had returned to her baseline, and on whether appellant needed surgery as recommended by her treating physician.

By response dated July 15, 1996, Dr. Kurzner restated his opinion on causal relation, opined that appellant's degenerative changes bilaterally in the thumb area would not limit her from returning to her normal activities or her job, and opined that he would be very reluctant to go ahead with surgery at the present time, due to appellant's age, her retirement and her lack of response to conservative treatment.

By letter dated September 10, 1996, the Office advised appellant that her request for surgery was denied.² The Office stated that the weight of the medical opinion evidence rested with second opinion physician, Dr. Glatzer.³

On September 23, 1996 the Office issued appellant a notice of proposed termination of compensation finding that it had met its burden of proof to terminate compensation with the reports of Drs. Glatzer and Kurzner. As rationale for this decision, the Office quoted several statements from the physician's reports on causation and on surgery. No analysis was provided, temporary versus permanent aggravation was not addressed and the presence of residuals was not discussed. The Office gave appellant 30 days within which to respond if she disagreed.

By letter dated October 18, 1996, appellant, through her representative, objected to the termination proposal, and claimed that her condition had been permanently aggravated and

² This letter was not presented in the form of a formal final decision; it did not state that it was a formal final decision and it was not accompanied by appellant's appeal rights. It merely denied appellant's request for surgery without providing any recourse except for offering a telephone number for clarification.

³ As this letter does not constitute a formal final appealable decision, the issue of whether appellant's request for surgery should be authorized has not been appropriately adjudicated by the Office and is therefore not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

accelerated by her employment. Appellant's representative stated that Dr. Freshwater was in agreement and that within 10 days another report from him would be forthcoming.

By letter dated October 23, 1996, the Office advised appellant's representative that his arguments could not be taken into consideration as appellant's file did not contain a release signed by her designating him as her representative.

By decision also dated October 23, 1996, the Office terminated appellant's compensation entitlement effective that date.

By letter dated October 29, 1996, appellant, through her representative, requested reconsideration and in support she submitted an October 21, 1996 narrative report from Dr. Freshwater. He noted that none of the three orthopedic surgeons who examined appellant, Drs. Glatzer, Sinnreich and Kurzner, were Board-certified in hand surgery, nor had they completed any fellowship in hand surgery. He noted that Dr. Glatzer did not provide quantitative measurements in support of his conclusions and that his January 8, 1996 statement on aggravation was inherently contradictory, and that his February 2, 1996 statement was illogical based on well-known medical facts. Dr. Freshwater stated that the fact that appellant had stopped working did not obviate the fact that employment related use of her hands resulted in further progression of her arthritis. He further commented on Dr. Kurzner's suggestion of the type of surgery that would be appropriate for appellant, noting that the fusion surgery Dr. Kurzner proposed was only occasionally performed and then only for young working men, not for a 69-year-old female, and that the anchovy procedure Dr. Kurzner suggested would not be effective, was not the surgery Dr. Freshwater was proposing, which was a ligamentous reconstruction procedure. Dr. Freshwater also indicated that just because appellant was of retirement age, this was not a determinative factor contraindicating surgery.

By letter dated November 22, 1996, appellant, through her representative, requested an oral hearing.

By decision dated December 4, 1996, the Office denied modification of the termination decision finding that the weight of the medical evidence was constituted by the "well-rationalized" report of the impartial medical examiner, Dr. Kurzner, and that Dr. Freshwater was on one side of the conflict resolved by the impartial medical examiner.

By decision dated December 19, 1996, the Office denied the request for a hearing finding that since appellant had previously received reconsideration under 5 U.S.C. § 8128, she was not, by right, entitled to a hearing, and that she could equally well address the issue by requesting reconsideration by the Office and by submitting further evidence or argument.

On February 2, 1997 the Office received appellant's claim for compensation for the period January 13 through June 15, 1992. By letter dated February 21, 1997, the Office requested that appellant submit medical evidence establishing disability during the claimed period.

In support appellant submitted a Form SF-50 effective August 23, 1992, and a form signed by Dr. Freshwater which noted that appellant first consulted him on February 13, 1992

for bilateral basilar joint arthritis and cubital tunnel syndrome as a result of repetitive microtrauma, and was also treated on March 12, April 9 and June 2, 1992. The form noted that appellant was disabled from December 20, 1994 for an indefinite period. Also in the record was a March 9, 1992 form report from Dr. Freshwater diagnosing osteoarthritis but not identifying disability for the period January 13 through June 15, 1992.

By letter dated March 21, 1997, appellant, through her representative, again requested reconsideration, and argued the merits of the case, claiming that Dr. Sinnreich's report was not considered.

By decision dated March 24, 1997, the Office rejected appellant's claim for compensation for the period January 13 through June 15, 1992, finding that the evidence of record did not support such disability.

By decision dated May 21, 1997, the Office denied modification of the prior decision, finding that the evidence submitted in support of the request was insufficient to warrant modification. The Office found that Dr. Sinnreich's report was speculative and did not provide a history of appellant's specific job duties.

By letter dated July 7, 1997, appellant, through her representative, requested reconsideration of the March 24, 1997 decision. Enclosed with this request was an April 17, 1997 letter from Dr. Freshwater which stated: "please accept this letter as confirmation that [appellant] was totally disabled throughout the period of time from January 13 to June 15, 1992."

By decision dated September 24, 1997, the Office denied modification of the March 24, 1997 decision, finding that the evidence submitted in support was insufficient. However, as the Board took jurisdiction of the case and a final decision on this issue on August 19, 1997, the Office's September 24, 1997 decision is null and void for lack of jurisdiction.

The Board finds that Office did not meet its burden of proof to terminate appellant's compensation effective October 23, 1996, finding that her temporary aggravation had ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ 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.⁵ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *Marlene G. Owens*, 39 ECAB 1320 (1988).

related condition that require further medical treatment.⁷ The Office did not meet either burden in this case.

In the present case, the Office did not meet its burden of proof to terminate compensation due to an unresolved conflict in medical opinion evidence on the issue of whether appellant's accepted aggravation of bilateral osteoarthritis of the hands, wrists and thumbs was temporary or permanent, and on whether appellant continued to have injury residuals.⁸ Dr. Freshwater stated that, appellant's accepted aggravation was permanent, and hence she had disabling residuals, but Dr. Glatzer opined that it had ceased with the cessation of appellant's employment. The case was then referred to an impartial medical examiner for resolution of these conflicts.

The reports of Dr. Kurzner, the impartial specialist, do not resolve the question at issue, namely whether appellant's accepted aggravation was temporary or permanent and whether appellant had injury residuals. When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question. Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Federal Employees' Compensation Act⁹ will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁰

In this case, Dr. Kurzner did not address whether appellant's accepted aggravation was temporary or permanent, even after receiving a request for clarification, but instead repeated his opinion on causal relation. As this issue was not in dispute, Dr. Kurzner's reports were not sufficient to resolve the conflict in medical opinion.

⁷ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

⁸ The Board notes that the issue of causation, upon which Drs. Glatzer and Kurzner spent much discourse, was not at issue as it had already been determined by the Office to exist. Further, the Board notes that the Office has not issued a formal final decision on the issue of denial of the requested surgery, such that that issue has not been determined.

⁹ 5 U.S.C. § 8123(a) provides the following: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. 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."

¹⁰ *Harold Travis*, 30 ECAB 1071 (1979).

As Dr. Kurzner's report and subsequent clarification did not resolve the question of whether appellant's aggravation of osteoarthritis was temporary or permanent, or whether she had residuals from the aggravation, the conflict in medical opinion evidence still exists and the Office did not meet its burden of proof to terminate compensation.

However, the Board finds that appellant did not meet her burden of proof to establish that she was disabled for the period January 13 through June 15, 1992.

An individual who claims disability due to an accepted employment injury or condition has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury or condition. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹¹ Causal relationship is a medical issue and can be established only by medical evidence.¹²

In the instant case, appellant has not submitted any probative, rationalized medical evidence supporting that she was disabled due to aggravation of bilateral osteoarthritis during the period January 13 to June 15, 1992. Therefore, she has not met her burden of proof to establish this period of disability.

¹¹ See *i.e.*, *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

¹² See *i.e.*, *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 21, 1997 and October 23 and December 4, 1996 are hereby reversed; the decision dated December 19, 1996 is consequently rendered moot; and the decision dated March 24, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 28, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member