

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE D. DABBS and DEPARTMENT OF THE ARMY,
CAMP SMITH, Peekskill, NY

*Docket No. 98-1583; Submitted on the Record;
Issued February 22, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective September 19, 1996 on the grounds that she had no further disability causally related to her January 11, 1995 employment injury; (2) whether appellant has established that she had any continuing disability after September 19, 1996 causally related to her January 11, 1995 employment injury; and (3) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

Appellant then a 30-year-old secretary, filed a claim for a traumatic injury to her right hand when she hit the top of her hand on a file cabinet. The Office accepted appellant's claim for a contusion of the right hand and tenosynovitis of the right wrist.

In a report dated March 20, 1995, Dr. Steven R. Small, a Board-certified orthopedic surgeon, opined that appellant could return to work for four hours per day.

On May 15, 1995 Dr. Winshih Chang, a Board-certified orthopedic surgeon and appellant's attending physician, performed a de Quervain's release of her right wrist. Subsequent to the surgery, appellant stopped work and did not return.

In a report dated November 17, 1995, Dr. Chang diagnosed carpal tunnel syndrome and found that appellant was totally disabled.

In a report dated November 20, 1995, Dr. Albert Cook, a Board-certified neurosurgeon and Office referral physician, discussed appellant's history of injury and reviewed the medical reports of record. He noted that an April 6, 1995 bone scan and September 22, 1995 electromyogram (EMG) were both normal. Dr. Cook found "subjective complaints of sensory loss over the entire right hand and palm." He diagnosed "[s]tatus post de Quervain's release for right traumatic tenosynovitis, with symptoms magnification. In my opinion, there is no objective

evidence of reflex sympathetic dystrophy, carpal tunnel syndrome or neurological compromise of the right hand. She had normal EMG's and bone scans." In an addendum dated January 14, 1996, Dr. Cook opined that appellant could return to work without restrictions.

In a progress note dated January 10, 1996, Dr. Chang related:

"[Appellant] has continued right forearm pain. She is eight months status post release of right de Quervain's tendinitis work-related injury. The first dorsal compartment is no longer painful. She has pain over the outcropping muscle in the dorsal forearm region. The pain is quite severe on deep palpation and has crepitus on gentle movement over the top of the out-cropping region...."

Dr. Chang opined that appellant "may be suffering from continu[ed] tendinitis within her right forearm outcropping muscle (intersection syndrome)."

In a progress note dated January 26, 1996, Dr. Chang found that appellant had continued pain in her right forearm "with crepitus and some swelling" and requested Office approval for a release of the extensor tendon of her right forearm.

In a report dated March 13, 1996, Dr. Chang diagnosed "[r]ight forearm extensor tendinitis, outcropping intersection syndrome," noted findings on pain and crepitus on palpation and opined that appellant was totally disabled from employment.

By letter dated March 29, 1996, the Office requested that Dr. Jay E. Selman, a Board-certified neurologist, perform an impartial medical examination on appellant.

In a report dated April 29, 1996, Dr. Selman reviewed the medical reports of records and listed the following finding on physical examination:

"No Horner's syndrome. [Appellant] held the right arm with the left arm, flexed at the elbow with the hand mid-way between pronation and supination with the fingers mildly flexed. The right forearm and hand were slightly cooler than the left and the right arm appeared slightly paler than the left, but there was no difference in the color between the right and left hands. There was minimal to mild swelling over the dorsum of the right wrist and dorsum of the right hand. There was no evidence of any trophic changes in any of the fingers...."

Dr. Selman indicated that appellant complained of pain on palpation and problems with sensory perception. He found that appellant's "sensory examination showed significant inconsistencies which cannot be explained by a known neurophysiological process." Dr. Selman stated that the "accepted condition of the contusion of the right hand is not a neurological condition. Therefore, I cannot render an expert opinion concerning its present status." He further noted that appellant "appears to have a soft tissue problem affecting the right arm." Dr. Selman found that the objective evidence revealed no neurological abnormality and that from a neurological standpoint appellant could resume regular employment. Dr. Selman further stated that he could not "comment upon the need for surgery, since it is not being requested for

neurological problems” and concluded that appellant’s “problems are causally related to the accident of January 11, 1995.”

On May 10, 1996 the Office referred appellant to Dr. Jay Winokur, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant’s need for a surgical release of the extensor tendon of the right forearm.

In a report dated June 3, 1996, Dr. Winokur related:

“There is no objective evidence of localizing neurologic deficit throughout the right upper extremity and [appellant]s complaints and physical findings cannot be explained on the basis of any single orthopedic lesion.

“There is no objective evidence of carpal tunnel syndrome or reflex sympathetic dystrophy. There is no objective evidence of orthopedic disability, which is causally related to the incident of January 11, 1995.”

In a form report dated June 4, 1996, Dr. Chang diagnosed right forearm extensor tendinitis and possible carpal tunnel syndrome and checked “yes” that the present condition was due to the condition for which compensation was claimed.

In a notice dated July 23, 1996, the Office informed appellant that it proposed to terminate her benefits on the grounds that the weight of the medical evidence established that she had no further disability or condition causally related to her accepted employment injury.

By decision dated September 13, 1996, the Office terminated appellant’s compensation benefits effective that date on the grounds that the medical evidence supported a finding that she had no further employment-related disability.

In a letter dated October 9, 1996, appellant, through her representative, requested a hearing before an Office hearing representative. Appellant further submitted additional medical evidence.

In a decision dated November 10, 1997, the hearing representative affirmed the Office’s September 13, 1996 decision terminating appellant’s compensation benefits. The hearing representative further found that appellant had not established that she had any continuing disability after September 19, 1996 causally related to her employment injury.

By letter dated December 8, 1997, appellant requested reconsideration of her claim. In a decision dated March 17, 1998, the Office denied merit review of its prior decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation effective September 13, 1996.

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

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

establishing that the disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

In the instant case, the Office terminated appellant's compensation benefits based, in part, on the report of Dr. Selman, a Board-certified neurologist to whom the Office referred her for an impartial medical examination after determining that a conflict in the medical evidence existed between Dr. Cook, a Board-certified neurosurgeon and Dr. Chang, a Board-certified orthopedic surgeon and appellant's attending physician.

Where there exists a conflict in medical opinion and the case is referred to an impartial 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.⁴ Owing to the special weight accorded to these opinions, the Office's procedure manual sets out certain specific requirements, among which is the requirement that certain information be sent to appellant. The Office's procedure manual provides that when an employee is referred for a referee (impartial) medical examination pursuant to section 8123 of the Federal Employees' Compensation Act, the following specific information must be provided to the claimant and to the claimant's representative.

"Information sent to claimant: The [Office] will contact the physician directly and make an appointment for examination, then notify the claimant and representative of the following;

(1) *The existence of a conflict* in the medical evidence and the specific nature of the conflict. Notification that the examination is being arranged under provisions of 5 U.S.C. § 8123 will give the claimant an opportunity to raise any objection to the selected physician prior to examination."⁵

In this case, the Office stated in its March 29, 1996 letter to Dr. Selman that he had been selected as an impartial referee physician for the purpose of resolving a conflict in the medical evidence. However, the March 29, 1996 letter instructing appellant to report to Dr. Selman for an examination did not state that the examination was for the purpose of resolution of a conflict in the medical record, or for an impartial medical evaluation and ultimately to determine whether appellant was entitled to further compensation and medical benefits. Consequently, Dr. Selman cannot serve as an impartial medical examiner in this case and a conflict of opinion still exists between Dr. Cook and Dr. Chang.⁶

² *Id.*

³ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *Roger Dingess*, 47 ECAB 123 (1995).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examination*, Chapter 3.500.4(d)(1) (October 1995).

⁶ *Henry J. Smith, Jr.*, 43 ECAB 524 (1992); *reaff'd on recon*, 43 ECAB 892 (1992).

Moreover, the Board notes that Dr. Selman specifically indicated that he could not comment on whether appellant's accepted condition of a contusion of the wrist had resolved or whether she required a surgical release of the extensor tendon of her right forearm as those conclusions were orthopedic in nature rather than neurological. On examination, Dr. Selman noted findings of minimum to mild swelling of the dorsum of the right wrist and found that appellant "appears to have a soft tissue problem affecting the right arm." Dr. Selman attributed appellant's condition to her January 11, 1995 employment injury. While Dr. Cook opined that appellant had no objective evidence of disability, Dr. Chang found that appellant was totally disabled from employment due to tendinitis with intersection syndrome and noted objective findings of swelling and crepitus on palpation. As Dr. Selman was not properly selected as an impartial medical specialist there is an unresolved conflict in medical opinion, the Office did not meet its burden of proof to terminate appellant's compensation benefits.⁷

The decision of the Office of Workers' Compensation Programs dated March 17, 1998 is set aside and the decision dated November 10, 1997 is hereby reversed.

Dated, Washington, D.C.
February 22, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ In view of the Board's reversal of the Office's termination of appellant's benefits, the issues of whether appellant has established that she has any continuing disability after September 19, 1996 causally related to her January 11, 1995 employment injury whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 are moot.