United States Department of Labor
Employees' Compensation Appeals Board

MELVIN C. STEWART, Appellant	)	
and	)	**Docket No. 05-699**
	)	**Issued: August 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Lexington, KY, Employer	)	

Appearances:
Geoffrey P. Damon, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 31, 2005 appellant, through his attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 4, 2004, terminating his compensation on the grounds that he had no further employment-related disability and a nonmerit decision dated December 8, 2004, denying his request for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the December 8, 2004 nonmerit decision.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation effective August 8, 2004 on the grounds that he had no further disability causally related to his accepted employment injury; (2) whether the Office properly terminated authorization for medical treatment; and (3) whether the Office properly denied appellant's request for reconsideration of the claim under section 8128.

FACTUAL HISTORY

On March 30, 1999 appellant, then a 49-year-old custodial laborer, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome of the right hand and arm causally related to factors of his federal employment. The Office accepted the claim for an aggravation of bilateral carpal tunnel syndrome. Appellant did not stop work. On July 26, 1999 Dr. Deborah A. Blades, a neurosurgeon and appellant's attending physician, performed a left carpal tunnel release. Appellant returned to work with restrictions on August 17, 1999. The Office accepted that he sustained a recurrence of disability and placed him on the periodic rolls effective September 1, 2001.

An electromyogram (EMG) performed for Dr. Blades on September 17, 2001 showed median neuropathy of the wrist with both nerves "mildly improved from the study of March 15, 1999." The EMG revealed moderate carpal tunnel syndrome on the right side.

In a report dated September 24, 2001, Dr. Robert L. Keisler, a Board-certified orthopedic surgeon and Office referral physician, discussed in detail the history of appellant's symptoms, including numbness in both hands following a 1995 motor vehicle accident and numbness in the left hand in 1997 after using a buffer. He diagnosed "multiple level severe degenerative dis[c] disease of [the] cervical spine, secondary multiple level spinal stenosis and foraminal stenosis, status post fusion C6-7." Dr. Keisler stated:

> "The location of the symptoms described in the records as well as by [appellant] cannot be explained by carpal tunnel syndrome. It is doubtful if such a syndrome ever existed. It should also be noted that use of a buffer is not a repetitive movement of the flexor tendons of the wrist and would not be a form of trauma that can produce a carpal tunnel syndrome (assuming a preexisting structural problem was there). [Appellant] does have a serious problem in the cervical spine…. I can find no relationship to a work[-]related trauma."

He concluded that the "diagnosis of carpal tunnel syndrome [was] incorrect" and that there was "no residual disability as a result of any accepted occupational disease."

By letter dated December 11, 2001, the Office requested that Dr. Keisler review and comment on the September 17, 2001 EMG. In another letter of the same date, the Office enclosed Dr. Keisler's report for Dr. Blades to review and discuss.

In an addendum dated December 27, 2001, Dr. Keisler opined that the EMG findings did not alter his opinion and that there "most likely is a media nerve involvement, at least a radiculopathy, readily explained by the cervical spine disorder and/or cervical outlet origin."

In a report dated February 8, 2002, Dr. Blades related that appellant had received treatment since 1997 and noted that she had ruled out cervical radiculopathy. She stated:

> "At that time he reported upper extremity numbness, which was exacerbated by a fall at his place of employment in addition to his work-related duties, running a buffer. He has undergone extensive work-up to include multiple electro-diagnostic studies in addition to cervical MRI [magnetic resonance imaging]

> [scan] to evaluate his symptoms and signs over the course of time…. Repeat electrodiagnostic studies indicate moderate carpal tunnel syndrome and repeat surgical intervention was recommended."

The Office determined that a conflict in medical opinion existed between Dr. Keisler and Dr. Blades and referred appellant, together with the case record and a statement of accepted facts, to Dr. Scott A. Riley, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated July 11, 2003, Dr. Riley discussed the history of injury and reviewed the medical evidence of record. He diagnosed degenerative disc disease of the cervical spine, status post fusion at C6-7, mild bilateral carpal tunnel syndrome "confirmed on multiple electrodiagnostic tests" and "[s]ymptoms of ulnar neuropathy primarily in the left hand." Dr. Riley opined that appellant's symptoms were not directly caused, but might be aggravated by his employment. He stated, "I believe it is possible that there can be a case made for a temporary aggravation of [an] underlying medical condition manifesting as carpal tunnel syndrome." He noted that a March 1998 electrodiagnostic study revealed that appellant "had an anatomic variant of median to ulnar nerve anastomosis in the forearm" but that later studies did not show this variation. Dr. Riley indicated that appellant's objective studies showed carpal tunnel syndrome but his complaints were primarily "on the ulnar nerve side of his hand." He stated:

> "I believe that the only way a case of aggravation could be made in [appellant's] claim is that if there is firm objective electrodiagnostic evidence of an anatomic variation which includes evidence for sensory fiber crossover variations so that [his] ulnar[-]sided symptoms could be explained by nerve compression within the confines of the carpal canal…. If found, a case for aggravation of an underlying medical condition could be made. If not found I do not believe that [his] symptomatology which was primarily ulnar[-]sided in nature, in his hand could be explained by carpal tunnel syndrome."

Dr. Riley indicated that appellant's current complaints were "more compatible with the underlying disease process in his cervical spine." He recommended an examination and objective studies by a neurologist to determine if appellant had an anatomic variation in the nerves of his hand.

In a report dated August 13, 2003, Dr. Charles C. Johnson, an osteopath, diagnosed an aggravation of carpal tunnel syndrome and found that appellant had permanent disability.

By letter dated March 5, 2004, the Office referred appellant to Dr. Greg N. Smith, a Board-certified neurologist, for a neurological evaluation and electrodiagnostic testing as requested by the impartial medical examiner.

In a report dated March 30, 2004, Dr. Smith reviewed the medical evidence of record and the results of an EMG performed on that date. He stated:

> "[Appellant] has evidence of peripheral neuropathy. Both median nerves are abnormal and both ulnar nerves are abnormal. [Appellant's] clinical examination discloses reduced sensation in all digits in both hands as well as in the feet,

> distally near the toes. This is most likely related to his history of diabetes mellitus. He does not have evidence of a median to ulnar nerve connection in either forearm (Martin Gruber connection). I believe that [his] ulnar region symptoms in the left hand are related to the ulnar involvement of his peripheral neuropathy."

In a report dated April 30, 2004, Dr. Thad Jackson, a neurosurgeon, opined that appellant's symptoms were consistent with left-sided ulnar neuropathy and recommended against a repeat carpal tunnel release.

By letter dated May 18, 2004, the Office requested that Dr. Riley review and address whether appellant's accepted condition of an aggravation of carpal tunnel syndrome was due to his employment and, if so, when the aggravation ceased and the extent of any disability.

In an addendum dated May 25, 2004, Dr. Riley indicated that Dr. Smith had found "no evidence of any anatomic variation which could explain [appellant's] symptoms…." He noted that Dr. Smith believed appellant's symptoms were due to peripheral neuropathy. Dr. Riley opined that "there is no case that can be made for causal aggravation of [appellant's] current ulnar[-]sided symptomatology in relation to [his] previously accepted carpal tunnel syndrome." Regarding work restrictions, Dr. Riley stated:

> "It is my understanding that [appellant] had [a] function capacity evaluation test done in September 1999, which put him at the light[-]duty classification with no lifting greater than 25 pounds. It is my feeling that the work restriction should remain in [e]ffect and the work injury would not prevent [him] from working an eight[-]hour day as long as those restrictions are in place."

On July 2, 2004 the Office notified appellant that it proposed to terminate his compensation and entitlement to medical treatment on the grounds that he had no further employment-related disability or residual condition.

In an unsigned report dated July 26, 2004, Dr. James Templin, who specializes in occupational medicine, diagnosed bilateral carpal tunnel syndrome and bilateral peripheral neuropathies. He opined that appellant's carpal tunnel syndrome arose from his diabetes and was exacerbated by his work activities. Dr. Templin stated, "I believe his work activities clearly resulted in the development of bilateral carpal tunnel syndrome and an exacerbation of the peripheral neuropathy."

By decision dated August 4, 2004, the Office terminated appellant's compensation effective August 8, 2004 on the grounds that the weight of the medical evidence, as represented by the impartial medical examiner, Dr. Riley established that he had no further disability or condition due to his accepted employment injury.

Appellant requested reconsideration on August 10, 2004 and resubmitted Dr. Templin's July 21, 2004 report and a duty status report by him of the same date. He further submitted physical therapy reports.

In a decision dated December 8, 2004, the Office denied appellant's request for merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that the disability has ceased or that it is 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]

Section 8123(a) of the Federal Employees' Compensation Act[4] provides, "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 and examination."[5] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

In this case, the Office found a conflict in medical opinion between appellant's attending physician, Dr. Blades, and Dr. Keisler, who performed a second opinion examination, on the issue of whether he had any further residuals of his employment injury. The Office referred him to Dr. Riley for an impartial medical examination.

Where there exists a conflict in medical opinion and the case is referred to an impartial medical 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.[7] The Board finds, however, that Dr. Riley's reports are insufficient to show that appellant had no further employment-related disability effective August 8, 2004. In his July 11, 2003 report, Dr. Riley diagnosed degenerative disc disease of the cervical spine, mild bilateral carpal tunnel syndrome and symptoms of left-sided ulnar neuropathy. He noted that, while objective studies showed carpal tunnel syndrome, appellant's complaints were around "the ulnar

[1] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[2] *Barbara J. Warren*, 51 ECAB 413 (2000).

[3] *James M. Frasher*, 53 ECAB 794 (2002).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8123(a).

[6] *See Willie M. Miller*, 53 ECAB 697 (2002).

[7] *Glen E. Shriner*, 53 ECAB 165 (2001).

nerve side of his hand." Dr. Riley recommended an evaluation by a neurologist to determine if appellant had an anatomic variation such that his "ulnar[-]sided symptoms could be explained by nerve compression within the confines of the carpal canal…." He opined that if appellant did not have the variation then his symptoms could not be due to carpal tunnel syndrome.

On March 30, 2004 Dr. Smith performed a neurological examination and EMG on appellant at the Office's request. He diagnosed peripheral neuropathy probably due to diabetes mellitus. Dr. Smith concluded that appellant did not have an anatomic variation in the "median to ulnar nerve connection." He opined that his left-sided ulnar symptoms were due to peripheral neuropathy.

In an addendum dated May 25, 2005, Dr. Riley noted that Dr. Smith had not found an anatomic variation which would explain appellant's symptoms and that his current ulnar symptoms were not due to his "previously accepted carpal tunnel syndrome." He found that appellant could perform light-duty employment lifting 25 pounds or less. Dr. Riley stated, "It is my feeling that the work restriction should remain in [e]ffect and the work injury would not prevent [him] from working an eight[-]hour day as long as those restrictions are in place."

While Dr. Riley opined that appellant's current symptoms were not related to his carpal tunnel syndrome, he further found that appellant required continued work restrictions due to his employment injury. He provided no explanation for the apparent discrepancy in his conclusions. Additionally, while Dr. Riley found that appellant's current symptoms were due to peripheral neuropathy, he did not affirmatively opine that his accepted employment injury of bilateral carpal tunnel syndrome had resolved such that he had no further disability or need for continuing medical treatment.[8] As he found that appellant required continuing restrictions due to his work injury, his opinion is insufficient to negate causal relationship. Thus, the Office has failed to meet its burden of proof to establish that appellant had no employment-related condition or disability effective August 8, 2004.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and authorization for medical treatment effective August 8, 2004 on the grounds that he had no further disability or condition causally related to his accepted employment injury. The Board further finds that, in view of its disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.

[8] The Office, in its letter to Dr. Riley dated May 18, 2004, requested that he address whether appellant's accepted condition of carpal tunnel syndrome was causally related to his employment. It thus, appears that the Office was attempting to rescind acceptance of his condition. The Office, however, did not inform appellant that it was contemplating rescission, nor did it actually rescind acceptance of his bilateral carpal tunnel syndrome in its termination decision. The Office must inform a claimant correctly and accurately on the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein. *John M. Pittman*, 7 ECAB 514 (1955). The Office may not, therefore, finds that residuals of an accepted employment injury have ceased by a particular date when the evidence upon which the Office's decision rests tends to support that, in fact, the injury never occurred.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 8 and August 4, 2004 are reversed.

Issued: August 2, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board