

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

D.V., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TRAVIS
AIR FORCE BASE, CA, Employer**

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**Docket No. 07-2123
Issued: September 8, 2008**

Appearances:
Gordon Reiselt, Esq., for the appellant
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 August 15, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 27, 2007. 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 appellant had any employment-related disability on or after April 4, 1993.

FACTUAL HISTORY

The case was before the Board on prior appeals. In a decision dated January 9, 2002, the Board found that, although the Office had properly terminated compensation for wage-loss and medical benefits as of April 4, 1993, appellant had submitted sufficient evidence to create a conflict with respect to whether she continued to be entitled to compensation after April 4, 1993.¹ By order dated August 4, 2006, the Board remanded the case on the grounds that

¹ Docket No. 00-1942 (issued January 9, 2002).

the referee physician, Dr. Britt Daniel, failed to provide an opinion on the issue presented.² The history of the case is provided in the Board's prior decision and order and is incorporated herein by reference.

In an April 20, 2007 letter to Dr. Daniel, the Office advised that he was not asked to give a work capacity determination regarding the accepted employment injury. It sent Dr. Daniel a work capacity evaluation (Form OWCP-5c). Dr. Daniel completed the form on April 25, 2007 and indicated that appellant could work with restrictions.

The Office then referred appellant for referee examination by Dr. Sandy Kimmel, an osteopath Board-certified in neurology. Dr. Kimmel provided a history and results on examination. She indicated that appellant had subjective complaints of sensory loss with no atrophy or weakness. Dr. Kimmel completed an OWCP-5c indicating appellant could work four hours per day.

By letter dated June 11, 2007, the Office requested that Dr. Kimmel discuss objective findings and explain the limitation of four hours per day. In a report dated June 18, 2007, Dr. Kimmel stated that she was unable to confirm whether the current findings were related to the employment injury. She stated the basis for work limitations were appellant's subjective complaints of hand numbness and weakness, and repetitive activity seemed to exacerbate symptoms. The Office again requested clarification in a June 26, 2007 letter, stating there was no compensation for wage loss due to pain and prophylactic restrictions were not acceptable. In a report dated June 29, 2007, Dr. Kimmel stated that the objective findings included a right median sensory neuropathy, which was not seen on a previous nerve conduction velocity test. She stated the work limitations were due to appellant's multiple subjective complaints.

In a decision dated July 27, 2007, the Office found that the weight of the medical evidence did not demonstrate disability for any period after April 4, 1993 in connection with the right carpal tunnel syndrome. In reviewing the case, the Office claims examiner noted the January 9, 2002 Board decision had remanded the case for evaluation by a referee, but "I am unable to interpret this seemingly contrary conclusion as the Board has unequivocally stated that the left carpal tunnel syndrome was not part of this claim and that there was no evidence of temporary total disability after April 4, 1993, thereby affirming the prior decision." The Office stated that Dr. Kimmel concluded that appellant was capable of working full time.

LEGAL PRECEDENT

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 implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is

² Docket No. 06-529 (issued August 4, 2006).

³ 5 U.S.C. § 8123(a).

called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁴

ANALYSIS

The July 27, 2007 Office decision appears to have misunderstood the Board's prior decision and order in this case. In reviewing the Board's January 9, 2002 decision, the Office stated that the Board had found "no evidence of temporary total disability after April 4, 1993." The Board's holding was that, although the Office had met its burden of proof to terminate compensation in its March 26, 1993 decision, additional evidence submitted by appellant had created a conflict as to whether appellant had established a continuing employment-related disability after April 4, 1993.⁵ It appears the Office interpreted the Board's decision as having resolved the issue of disability after April 4, 1993 and therefore a remand to resolve the conflict was found to be a "seemingly contrary conclusion." The issue must be resolved by the referee physician.

The Office again failed to secure medical evidence to resolve the issue. It is not sufficient for the referee physician to discuss only appellant's current disability. The physician must address the issue of employment-related disability from April 4, 1993 to the present. Dr. Kimmel was not asked to address the issue and therefore did not render a rationalized opinion on the relevant issue. With respect to current disability, the Board notes that, while the Office stated that Dr. Kimmel found appellant capable of working full time, her opinion on employment-related disability is not clear from her reports. Dr. Kimmel stated that she was unable to confirm whether the current findings were related to the employment injury, and did not provide a rationalized medical opinion.

On remand the Office should submit a complete statement of accepted facts and relevant medical records to a referee physician for an opinion that properly resolves the conflict in the medical evidence. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The conflict in the medical evidence as to an employment-related disability on or after April 4, 1993 remains unresolved.

⁴ 20 C.F.R. § 10.321 (1999).

⁵ Once the Office has met its burden of proof to terminate compensation, the burden shifts to appellant. *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 27, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 8, 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