United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 10-134**
	)	**Issued: September 27, 2010**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Decatur, AR, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant, through her attorney, filed a timely appeal from an August 27, 2009 merit decision of the Office of Workers' Compensation Programs terminating her compensation and authorization for medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective March 14, 2009 on the grounds that she had no further disability due to her accepted work injury; and (2) whether the Office properly terminated her authorization for medical benefits.

FACTUAL HISTORY

On April 17, 2007 appellant, then a 60-year-old food safety inspector, filed a claim for injuries to her hands and left knee occurring on that date when she slipped and fell. She stopped

work on April 17, 2007 and did not return. The Office accepted the claim for bilateral carpal tunnel syndrome and a tear of the medial meniscus of the left knee. Appellant received compensation for total disability beginning July 8, 2007.

On May 24, 2007 Dr. Horace R. Petersen, an attending osteopath, performed a right carpal tunnel release and tenosynovectomy. He diagnosed a comminuted tibial fracture on the right and carpal tunnel syndrome. In a duty status report dated August 6, 2007, Dr. Peterson released appellant to resume work for four hours a day with restrictions. The employing establishment, however, did not have work available within her physical restrictions.

On August 28, 2007 the Office referred appellant to Dr. Brian R. Briggs, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 19, 2007, Dr. Briggs discussed her complaints of pain in her right wrist joint and extensor forearm and pain to her left hand at the distal palmar crease and palmar aspect. He noted that appellant described her left knee as "okay" with only occasional popping. Dr. Briggs attempted to perform nerve conduction studies to determine whether she had either carpal tunnel syndrome or diabetic polyneuropathy but had to stop the test because she "stated that this noninvasive test was too painful for her and she refused further testing." He diagnosed diabetic polyneuropathy and bilateral osteoarthritis and a ganglion cyst of the right wrist by magnetic resonance imaging (MRI) scan study. Dr. Briggs found no evidence of bilateral carpal tunnel syndrome or a left knee meniscal tear. He opined that appellant's current complaints were unrelated to her April 17, 2007 work injury but instead due to diabetic neuropathy. In a supplemental report dated January 10, 2008, Dr. Briggs found that she had no further conditions resulting from her April 17, 2007 work injury.[1]

On May 13, 2008 the Office requested that Dr. Peterson review and comment on Dr. Briggs' opinion. In a May 21, 2008 response, Dr. Peterson related that he did not believe that appellant could resume her usual employment and that he found a positive Phalen's test and Tinel's sign on examination. He opined that the origin of her symptoms was "a bit of an enigma" and could be due to diabetic neuropathy or exaggeration. Dr. Peterson stated:

> "I still believe that [appellant] has an impairment that was secondary to her injury at work as well as exacerbated by that injury her previous existing problem of diabetic neuropathy. I do not believe that she is capable of returning to the previous employed status and this may be more in line with the fact that she has diabetic neuropathy and problems with persistent weakness of her dominant extremity."

On June 16, 2008 the Office determined that a conflict in medical opinion arose between Dr. Peterson and Dr. Briggs regarding whether appellant had any disabling residuals of her work injury and whether she could resume her usual employment. It referred her, together with the case record and a statement of accepted facts, to Dr. Terry Sites, a Board-certified orthopedic surgeon, for an impartial medical examination.

[1] On November 15, 2007 the Office referred appellant to vocational rehabilitation.

In a report dated July 17, 2008, Dr. Sites discussed appellant's current complaints and reviewed the medical reports of record. On examination he found a Tinel's sign at the wrist and elbow with subjective numbness and tingling to touch. Two-point examination was noted as unreliable. Dr. Sites measured full range of motion of the upper extremities. On examination of the lower extremities, he found no loss of range of motion and no swelling, tenderness, atrophy or instability. Dr. Sites diagnosed neuropathy and probable peripheral polyneuropathy, but noted that he made the diagnosis "with reservations stemming from the fact that we have no real evidence in the medical record that [appellant] has diabetes…." He explained that she required an electromyogram (EMG) and nerve conduction study (NCS) to receive an accurate diagnosis but that she refused such testing. Dr. Sites discussed appellant's diagnosis of carpal tunnel syndrome as the result of a fall. He opined that while it was possible to sustain a contusion of the median nerve after a fall, "such a contusion would more-likely-than-not result in a neurapraxia, which is a self-limited injury to a peripheral nerve which resolves over days to weeks." Dr. Sites determined that the operative notes provided findings "more consistent with a chronic, underlying type of compression neuropathy" than a single trauma. He also advised that appellant's lack of improvement after surgery was "not consistent with a diagnosis of a median neuropathy at the wrist and more consistent with [an] other underlying neurological condition." Dr. Sites related:

> "Thus, based on the objective evidence in the medical records available, it is more-likely-than-not that she had a preexisting neuropathy, and less-likely-than-not a median neuropathy at the wrist. I am also concerned that [appellant] may have had a component of reflex sympathetic dystrophy or complex regional pain syndrome following her surgery, given her degree of pain postoperatively, swelling, stiffness and hypersensitivity. This may have resulted in some of the residual stiffness in her wrist and fingers, which appears stable at this time."

Dr. Sites found no absolute objective findings to indicate carpal tunnel syndrome. He opined that it was "less-likely-than-not that [there] should be any ongoing carpal tunnel syndrome as a result of the injury sustained on April 17, 2007." Dr. Sites found that appellant had no need for further medical treatment due to the April 17, 2008 injury as "the most likely injury to have occurred from such a fall is a contusion which would have resolved long ago." Dr. Sites related that the only residual of her April 17, 2007 work injury was a slight loss of range of motion of the wrist and right index finger and that she required no employment-related work restrictions. He advised that appellant was unable to resume her usual employment due to her peripheral neuropathy, which he found less likely than not unrelated to her April 17, 2008 work injury. Dr. Sites also found no restrictions due to a left knee condition. He stated, "Thus, there are no work restrictions resulting from [appellant's] accepted work-related condition, as such a condition as outlined above would have resolved long ago. Whatever impairments she may have and which would affect her ability to do full[-]duty work are more-likely-than-not unrelated to her work injury [on] April 17, 2007."

On December 22, 2008 the Office notified appellant of the proposed termination of her wage-loss compensation and authorization for medical benefits on the grounds that she had no further employment-related disability or condition requiring medical treatment. By letter received January 12, 2008, appellant expressed her disagreement with the proposed termination,

noting that since April 17, 2007 she had experienced sensory problems with her feet, legs and hands and pain in her wrists and arms.

By decision dated March 5, 2009, the Office terminated appellant's compensation and authorization for medical benefits effective March 14, 2009. It found that Dr. Sites' opinion constituted the weight of the medical evidence.

On March 11, 2009 appellant, through her attorney, requested a telephone hearing, held on June 9, 2009. She related that she experienced a needle-like sensation in her feet, legs and hands.[2] Appellant's attorney argued that Dr. Sites disagreed with the Office's acceptance of bilateral carpal tunnel syndrome and did not base his opinion on the accepted determination. Counsel also argued that Dr. Sites found that appellant may have sustained reflex sympathetic dystrophy or a complex regional pain syndrome as a result of her authorized carpal tunnel surgery and maintained that the case should be accepted for these conditions.

By decision dated August 27, 2009, the hearing representative affirmed the March 5, 2009 termination of compensation.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[3] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Section 8123(a) provides that, 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.[6] The implementing regulations state 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 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.[7] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[2] Appellant retired from the employing establishment on April 9, 2009.

[3] *Elaine Sneed*, 56 ECAB 373 (2005).

[4] *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[5] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[6] 5 U.S.C. § 8123(a).

[7] 20 C.F.R. § 10.321.

the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and a tear of the medial meniscus of the left knee on April 17, 2007 when she slipped and fell. It paid her compensation for total disability beginning July 8, 2007.

The Office determined that a conflict arose between Dr. Peterson, appellant's attending physician, and Dr. Briggs, a second opinion examiner, regarding whether she had any further disability or residuals of her accepted conditions. On June 16, 2008 it referred her to Dr. Sites for an impartial medical examination.

Where there exist 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 upon a proper factual background, must be given special weight.[9] The Board finds that the opinion of Dr. Sites, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Sites accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.[10] In a report dated July 17, 2008, Dr. Sites reviewed the medical evidence of record, including the results of diagnostic studies. On examination, he found a Tinel's sign at the wrist and elbow and subjective numbness. Dr. Sites diagnosed neuropathy and probable polyneuropathy. He explained that appellant required an EMG and NCS to determine whether she had a diabetic polyneuropathy or a compression neuropathy but noted that she refused to undergo the necessary testing. Dr. Sites discussed appellant's diagnosis of carpal tunnel syndrome subsequent to a fall and related that while it was not impossible to sustain a median nerve contusion due to a fall it would most likely cause a limited injury to the peripheral nerve that would resolve in days or weeks. He also found that the operative report showed findings of a chronic rather than traumatic compression neuropathy. Dr. Sites further asserted that appellant's failure to improve after the surgery was inconsistent with median neuropathy. He concluded that it was "more-likely-than-not that she had a preexisting neuropathy, and less-likely-than-not a median neuropathy at the wrist." Dr. Sites provided rationale for his opinion by noting that her persistent symptoms and the findings on the operative report were inconsistent with a continued traumatic injury and more consistent with an underlying peripheral nerve disorder. Dr. Sites found that appellant was unable to work due to peripheral neuropathy but determined that this was less likely than not unrelated to her employment injury. He further listed normal findings on examination of the left knee and determined that she had no residuals of her medial meniscal tear. Dr. Sites concluded that there was no objective evidence of carpal tunnel syndrome. While he stated the majority of

[8] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

[9] *Id*.

[10] *Manuel Gill*, 52 ECAB 282 (2001).

his findings as "more-likely-than-not" and "less-likely-than-not," terms such as probably, most likely or more likely need not constitute a speculative opinion, depending upon the context of usage. Such words may mean that the physician is expressing a reasonable certainty, as opposed to absolute certainty.[11] Dr. Sites use of the phrases "more-likely-than-not" and "less-likely-than-not" express reasonable certainty rather than speculation. Additionally, while he found that appellant required diagnostic testing to definitively determine whether her current condition was diabetic neuropathy or carpal tunnel syndrome, he thoroughly explained why he believed that her current symptoms resulted from an underlying neuropathy and why any traumatic compression neuropathy would have resolved. Dr. Sites' report is detailed, well rationalized and based on a proper factual background. His opinion is entitled to the special weight accorded an impartial medical examiner. The Office met its proof to terminate appellant's compensation benefits for the accepted condition of bilateral carpal tunnel syndrome and a left medial meniscal tear.

Dr. Sites, however, found that appellant may have developed some reflex sympathetic dystrophy or complex regional pain syndrome after her surgery for carpal tunnel syndrome. If medical treatment is performed as a result of an employment injury, an injury caused by such treatment would constitute a consequential injury and any related disability is compensable.[12] Accordingly, the case will be remanded for the Office to obtain a supplemental report from Dr. Sites regarding whether appellant sustained reflex sympathetic dystrophy or complex regional pain syndrome as a result of her authorized surgery and, if so, whether she has any resulting disability.

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[13] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[14]

ANALYSIS -- ISSUE 2

The Office met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Sites, the impartial medical examiner, who found that appellant had no need for further medical treatment. He explained that based on his physical examination and the results of the operative report, she had no further employment-related condition. As Dr. Sites' opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of her accepted employment injury.

[11] *S.T.*, 60 ECAB ___ (Docket No. 08-1675, issued May 4, 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.4(a)(5) (September 1993).

[12] *See Melody Friery*, 48 ECAB 525 (1997); *Ruey J. Yu*, 49 ECAB 256 (1997).

[13] *Pamela K. Guesford*, 53 ECAB 727 (2002).

[14] *Id*.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and authorization for medical benefits effective March 14, 2009 on the grounds that she had no further disability due to her accepted work injury. The case is remanded for the Office to determine whether she sustained reflex sympathetic dystrophy or complex regional pain syndrome as a result of treatment for her employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2009 is affirmed. The case is remanded for further proceedings consistent with this decision regarding the issue of consequential injury.

Issued: September 27, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board