

On appeal, appellant's counsel contends that the impartial medical specialist's opinion is insufficient to resolve the conflict in the medical opinion evidence as it is not based on the statement of accepted facts and is inconsistent.

FACTUAL HISTORY

On October 26, 2000 appellant, then a 44-year-old mail handler, filed an occupational disease claim alleging that on October 21, 2000 she first realized that her right wrist, hand and arm condition was employment related. On November 2, 2001 the Office accepted her claim for right median nerve neuropathy. By decision dated October 31, 2005, it accepted appellant's recurrence claim beginning October 2, 2005 due to the withdrawal of her light-duty job. The Office placed her on the periodic rolls for temporary disability by letter dated November 3, 2005. Appellant returned to light-duty work on April 25, 2006.

In reports dated March 7 and May 2, 2007, Dr. Scott M. Fried, a treating osteopath, reported appellant's condition was unchanged and that she continue to work a modified eight-hour job. A physical examination revealed distal tenderness of the right median wrist and right radial forearm tenderness Tinel's testing with compression testing.

On July 9, 2007 Dr. Robert A. Smith, a second opinion Board-certified orthopedic surgeon, reviewed the medical record and statement of accepted facts and conducted a physical examination. A physical examination of the right hand revealed full range of motion, no atrophy, negative Tinel's and Phalen's signs and normal grip strength. Dr. Smith stated that he was unable to verify any employment-related right hand neuropathy based on his clinical findings. He opined that appellant required no further medical treatment and was capable of performing her date-of-injury position.

On September 13, 2007 the Office referred appellant to Dr. Douglas Palma, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Smith and Dr. Fried on whether she continued to have any residuals or disability due to her accepted employment injury.

On October 3, 2007 Dr. Mohammad Kamali, a Board-certified orthopedic surgeon, reviewed the statement of accepted facts and medical record and performed a physical examination. He diagnosed right mild carpal tunnel syndrome with moderate upper brachial plexus neuropathy. A physical examination revealed weaker right grip strength, full wrist and finger range of motion with complaints of pain on right wrist flexion sign test and no atrophy. Dr. Kamali concluded that appellant's condition had resolved and that her problems were due to her right brachial plexus neuropathy.

On December 17, 2007 the Office issued notice proposing to terminate appellant's compensation benefits based upon the opinion of Dr. Kamali. By decision dated January 22, 2008, it finalized the termination of her compensation.

By decision dated August 28, 2008, the Office hearing representative set aside the January 22, 2008 decision terminating appellant's compensation and remanded the case to the Office. The hearing representative found that as the Office referred her to Dr. Palma to resolve

the conflict in the medical opinion evidence that Dr. Kamali could not be considered an impartial medical examiner and the conflict in the medical opinion evidence had not been resolved.

On October 6, 2008 the Office referred appellant to Dr. Andrew J. Gelman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence. In a report dated October 29, 2008, Dr. Gelman, reviewed a statement of accepted facts, list of questions and medical evidence and conducted a physical examination. He noted that appellant had been treated for cervical spondylosis, peripheral entrapment of the median nerve and brachial plexus neuropathy. A physical examination revealed full right elbow extension and flexion, full wrist, finger and thumb movement, no atrophy of the right hand and there was no change in skin temperature or color. Dr. Gelman related that he was unable to perform a Tinel's or Phalen's sign due to appellant complaint of pain. He opined that she demonstrated symptom exaggeration and that she is capable of using her right hand more than she claims.

In a supplemental report dated January 9, 2009, Dr. Gelman stated that he was unable to correlate appellant's peripheral entrapment diagnosis with diagnostic testing and that she displays symptom exaggeration. In an attached work capacity evaluation (Form OWCP-5) dated January 9, 2009, he indicated that she was capable of working with restrictions.

In a second undated supplemental report, Dr. Gelman reviewed an updated statement of accepted facts and light-duty job assignment. He stated that his opinion was unchanged in that he believed appellant's upper extremity impairment complaints to be idiopathic. Dr. Gelman also noted these complaints were unrelated to her accepted employment injury as they related to her neck, shoulder and hand. In concluding, he opined that appellant's right upper extremity complaints were unrelated to her employment duties.

On March 4, 2009 the Office issued a notice of proposed termination of compensation benefits based on the report of Dr. Gelman, the impartial medical examiner.

In a March 23, 2009 letter, appellant noted her disagreement with the proposal to terminate her compensation benefits.

By decision dated April 8, 2009, the Office finalized the termination of appellant's compensation benefits effective that day.

Subsequent to the termination decision the Office received a July 2, 2009 report from Dr. Fried.

On January 5, 2010 appellant's counsel requested reconsideration.

By decision dated March 24, 2010, the Office denied modification of the April 8, 2009 termination decision.

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.² After it has determined that, an employee has disability causally related to his 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.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁶

Section 8123(a) of the Act⁷ 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.⁸ When 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.⁹

ANALYSIS -- ISSUE 1

The Office determined that a conflict existed in the medical evidence as to whether appellant had any disability or residuals due to her right median nerve neuropathy. Appellant's treating physician, Dr. Fried, submitted reports indicating that she had continuing right median nerve neuropathy due to the accepted occupational injury, which limited her ability to work, while the second opinion physician, Dr. Smith, opined that she could work full-time regular duty without restrictions as she had no objective or physical evidences of right median nerve neuropathy. The Office initially referred appellant to Dr. Palma for an impartial examination to resolve the medical conflict. However, Dr. Kamali, a colleague of Dr. Palma, performed the examination. The Office properly found that a referral to a second impartial examiner was

² *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁴ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁵ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁶ *Kathryn E. Demarsh*, *supra* note 5; *James F. Weikel*, 54 ECAB 660 (2003).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8123(a); *Geraldine Foster*, 54 ECAB 435 (2003); *see J.J.*, Docket No. 09-27 (issued February 10, 2009).

⁹ *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, *supra* note 4; *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

required as Dr. Kamali had not been selected to resolve the conflict.¹⁰ Thus, it properly referred appellant to Dr. Gelman for a second impartial medical examination.

The Board finds that Dr. Gelman's October opinions are equivocal and not well rationalized. Therefore, they are insufficient to resolve the conflict between Drs. Smith and Fried. In an October 29, 2008 report, Dr. Gelman reported that appellant had been treated for cervical spondylosis, peripheral entrapment of the median nerve and brachial plexus neuropathy. He opined that she demonstrated symptom exaggeration and that she was capable of using her right hand more than she claims. Dr. Gelman did not directly address the issue of whether appellant's accepted right median nerve neuropathy had resolved or whether there were continuing residuals. In a January 9, 2009 supplemental report and work capacity evaluation, he listed her work restrictions without addressing whether the restrictions were due to her accepted employment injury. The only conclusion Dr. Gelman noted was his inability to correlate appellant's peripheral entrapment diagnosis with diagnostic testing and that she displayed symptom exaggeration. He provided a second supplemental report in which he noted reviewing appellant's modified job and an updated statement of accepted facts. Dr. Gelman indicated that his opinion was unchanged as he believed her upper extremity impairment complaints were idiopathic and unrelated to her accepted employment injury as they related to her neck, shoulder and hand.

The Board finds that Dr. Gelman did not adequately reconcile the apparent inconsistency between finding that appellant had fully recovered from her work injuries while providing work restrictions. He also failed to provide any rationale explaining his conclusions. Thus, Dr. Gelman's opinion is of diminished probative value as it contains insufficient medical rationale to support that appellant no longer has residuals or disability from her accepted condition.¹¹

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. There remains an unresolved conflict in the medical evidence.

¹⁰ See *D.A.*, Docket No. 09-936 (issued January 13, 2010) (the evidence supported appellant's contentions that the Office did not follow its procedures in selecting an impartial specialist where there were no notes from the PDS explaining the referral to the designated physician and where it appeared that another physician was actually selected to perform the examination); *Shirley L. Steib*, 46 ECAB 309 (1994) (where an associate of the physician selected by the Office to serve as an impartial medical specialist examined the claimant and provided an opinion, the Board found that the associate's opinion could not constitute the weight of the medical evidence as the associate was not selected as an impartial specialist according to Office procedures); *Vernon E. Gaskins*, 39 ECAB 746 (1988); *William C. Iadipaolo*, 39 EAB 530 (1988); *Leonard W. Waggoner*, 37 ECB 676 (1988).

¹¹ *F.T.*, Docket No. 09-919 (issued December 7, 2009) (medical opinions not fortified by rationale are of diminished probative value); *Willa M. Frazier*, 55 ECAB 379 (2004) (the Board has held that medical conclusions unsupported by rationale are of little probative value).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits for her right median nerve neuropathy effective April 8, 2009.¹²

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2010 is reversed.

Issued: May 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² In view of the Board's disposition of the first issue, the second issue on whether appellant has any continuing disability is moot.