

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. BENNETT and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, Ark.

*Docket No. 97-290; Submitted on the Record;
Issued January 7, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained a recurrence of total disability on or after December 10, 1993.

The Board has duly reviewed the case record and finds that this case is not in posture for a decision.

In the present case, the Office of Workers' Compensation Programs has accepted that appellant, a letter carrier, fell on November 24, 1989 and sustained a laceration to his right index finger, abrasion to the right knee, aggravation of bilateral carpal tunnel syndrome, disc herniation at L5-S1. Appellant underwent surgical release procedures of the right and left median nerves on January 29 and March 4, 1991, which the Office also accepted were causally related to the November 24, 1989 injury. Appellant was paid appropriate wage-loss compensation until he returned to work in a modified clerk position on October 4, 1993. On December 7, 1993 the Office determined that appellant's actual earnings in the position of modified mail clerk, effective October 4, 1993, fairly and reasonably represented his wage-earning capacity. Appellant stopped work on December 9, 1993 and alleged a recurrence of total disability. Appellant alleged that the repetitive tasks he performed with his hands from October 5 through December 9, 1993 caused his hands to ache continuously and his fingers to lock up, and that he also had back pain. Appellant underwent a left ulnar nerve transfer on April 19, 1994 and a right ulnar nerve transfer on November 16, 1994.

The Office denied appellant's notice of recurrence of disability on August 24, 1994 on the grounds that the evidence of record failed to demonstrate that the claimed disability was causally related to the injury of November 24, 1989. An Office hearing representative, by decision dated November 28, 1994, set aside the denial of the claim. The hearing representative found that appellant had submitted medical reports from his treating physicians Dr. William Rutledge, a Board-certified orthopedic surgeon, and Dr. Robert Abraham, a Board-certified neurologist, indicating that he was totally disabled beginning December 10, 1993, that he was

unable to perform the modified mail clerk position, and that his disability was due to his accepted back and upper extremity conditions. The hearing representative also found that Dr. Evans, the physician to whom the Office had referred appellant, had failed to answer the specific question posed by the Office and had not offered an opinion as to whether appellant was capable of performing the modified clerk position after December 9, 1993. The hearing representative remanded the case to the Office for referral of appellant to an appropriate medical specialist for a second opinion evaluation as to whether appellant had been disabled since December 10, 1993 from performing the modified clerk position for six hours a day. The hearing representative stated that the Office should also undertake any necessary development to make a determination as to whether the left ulnar nerve surgery performed on April 19, 1994, and the proposed right ulnar nerve transfer were causally related to appellant's November 24, 1989 injury. The hearing representative stated that following receipt of the medical specialist's report, and after any additional development deemed necessary, the Office should make a *de novo* decision concerning appellant's entitlement to compensation for total wage loss on or after December 10, 1993. On remand the Office referred appellant to Dr. Stuart B. McConkle, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office, by decision dated February 14, 1995, found that Dr. McConkle's second opinion report established that the ulnar nerve surgical procedures performed in 1994 were causally related to appellant's accepted November 24, 1989 injury, but that appellant was entitled to disability wage-loss benefits only for two week periods following his April 19 and November 16, 1994 ulnar nerve transfer procedures. The Office awarded appellant wage-loss benefits for such periods, but otherwise denied appellant's notice of recurrence of disability for benefits after December 9, 1993. By decision dated May 8, 1996, an Office hearing representative affirmed the February 14, 1995 decision. The Office thereafter denied appellant's applications for review on September 5 and September 27, 1996.

The Board finds that this case is not in posture for a decision as a conflict exists in the medical opinion evidence regarding the period of appellant's disability after December 9, 1993.

As determined by the Office hearing representative in his November 28, 1994 decision, appellant's treating physicians, Dr. Rutledge and Dr. Abrams, did report that appellant was totally disabled due to his accepted hand and back conditions after December 9, 1993. In a further narrative report dated September 21, 1995, Dr. Rutledge explained that after appellant returned to work in October 1993 he was seen on October 25, 1993 for complaints of hands locking up with pain in the volar wrist bilaterally and both forearms, shoulder stiffness, and low back pain. Dr. Rutledge stated that he treated appellant conservatively and admonished him to work within his medical restrictions. Appellant was seen again on December 9, 1993 by Dr. Rutledge "in pain and distress." Dr. Rutledge described appellant's bilateral hand dysfunction in spite of previous carpal tunnel releases, with exacerbation of ankylosing, stiffness, pain, diminished grip strength and he noted that appellant had continuing low back pain. He stated that appellant was advised not to return to work. Dr. Rutledge explained that appellant was diagnosed with bilateral ulnar nerve entrapment and thereafter underwent the ulnar nerve transpositions in April and November 1994. He concluded that appellant had been totally disabled from meaningful work from December 9, 1993 to the present due to chronic bilateral hand dysfunction, bilateral carpal tunnel syndrome, bilateral ulnar nerve transfers, chronic low back pain and diabetes. The Office's second opinion physician, Dr. McConkle, however, opined

in his report dated January 12, 1995, that by history appellant's diagnoses were carpal tunnel and ulnar neuritis of both hands, which were aggravated by his November 24, 1989 employment injury. Regarding the issue of disability, Dr. McConkle stated "the only medical evidence that he was disabled from doing his modified clerk job since December 1993 is the fact that he has had an ulnar nerve transposition on both sides which apparently has improved at least the left hand. However, he should have been able to work at a modified work position over the last year as normally the nerve transposition does not cause a significant aggravation of the hand and he should not have been off work for more than a week or two following each operation." Dr. McConkle noted that appellant's left ulnar nerve procedure should be considered a success as the numbness of appellant's little finger had practically cleared, however, on the right side, it had not cleared as of yet. He opined that appellant would make a full recovery, but with residual weakness and some residual nerve loss. Dr. McConkle concluded that he would recommend that appellant's 1992 to 1993 work restriction be continued.

When an employee, who is disabled from the job he or she held when injured on the account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

In this case, appellant has alleged and has submitted medical evidence from his treating physicians supporting a finding that following his return to work in October 1993 appellant's bilateral upper extremity complaints increased and necessitated bilateral ulnar nerve transpositions which were performed in April and November 1994 and which were accepted by the Office as causally related to the accepted employment injury. The issue to be resolved is the period of disability to which appellant is entitled to compensation. Appellant has submitted medical evidence that he was totally disabled from December 9, 1993 due to conditions resulting from the accepted injury. Dr. McConkle has opined, however, that appellant would only have been disabled for a two-week period following each surgical procedure performed in 1994. The Board notes that although requested to do so by the hearing representative in his November 28, 1994 decision, Dr. McConkle did not specifically address whether appellant was disabled from December 9, 1993 until the surgical procedures. The Board also notes that while Dr. McConkle opined that one could usually return to work one to two weeks following ulnar nerve transposition surgery, he did not specifically address whether appellant, given his continued complaints, could have returned to his modified position within two weeks following each surgical procedure.

Section 8123 of the Federal Employees' Compensation Act,² provides that if there is disagreement between the physician making the examination for the United States and the

¹ *Mary A. Howard*, 45 ECAB 646 (1994).

² 5 U.S.C. § 8123.

physician of the employee, the Secretary shall appoint a third physician who shall make an examination.³

In this case, an unresolved conflict of opinion exists as to whether appellant was totally disabled after December 9, 1993 due to the accepted conditions for any additional periods of time. On remand the Office should refer appellant for an impartial medical evaluation to resolve the conflict of medical opinion. After such further development as necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated September 27, September 5 and May 8, 1996 are hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
January 7, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

³ *Shirley L. Steib*, 46 ECAB 309 (1994).