

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA C. PAMPILIS and U.S. POSTAL SERVICE,
POST OFFICE, Gary, IN

*Docket No. 99-2266; Submitted on the Record;
Issued March 1, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective June 24, 1995.

The Office accepted that appellant, a 30-year-old letter sorting machine clerk, developed bilateral carpal tunnel syndrome and cubital tunnel syndrome as a result of her employment. The Office authorized surgery for right cubital tunnel syndrome, right hand carpal tunnel release and surgery to the left hand. Appellant was paid appropriate compensation for the periods of disability she returned to a limited-duty position as a modified clerk with restrictions for four hours per day. By decision dated September 3, 1991, the Office found that the position of a part-time modified clerk fairly and reasonably represented appellant's wage-earning capacity and placed appellant on the periodic rolls. The Office terminated appellant's compensation benefits by decision dated June 15, 1995 effective June 24, 1995. By decision dated June 27, 1996, an Office hearing representative affirmed the June 15, 1995 decision. The Office denied modification on August 5, 1997, February 20, 1998 and April 23, 1999.¹

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.²

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

¹ The record reflects that appellant had filed a claim for an occupational cervical disease under claim number A9-406644, which the Office denied in a March 13, 1996 decision.

² *Patricia A. Keller*, 45 ECAB 278 (1993).

In a February 7, 1994 report, Dr. George J. Volan, a hand surgeon and appellant's treating physician, opined that appellant has a recurrent carpal tunnel syndrome which required surgery. In an OWCP-5 form dated February 3, 1994, Dr. Volan indicated that appellant could work eight hours per day restricted duty.

In a February 17, 1994 letter, the Office authorized a repeat electromyography (EMG) testing. They also requested Dr. Volan to provide additional rationale explaining whether appellant was capable of work eight hours per day.

In a March 29, 1994 medical report, Dr. Volan stated that appellant had an EMG study on March 8, 1994 which confirmed the diagnosis of recurrent carpal tunnel syndrome. He further noted that he had reviewed a job description which would require appellant to inspect and check mail for label errors and missorted mail as well as tag errors. Dr. Volan noted that it was his understanding, from appellant's descriptions, that this type of work required repetitive motions of the hands and wrists. He stated that, if this was true, then it was his opinion that this work could worsen appellant's condition. A copy of the March 4, 1994 job offer based on Dr. Volan's February 3, 1994 work restrictions was attached.

The report from the March 8, 1994 nerve conduction studies and EMG stated that the tests revealed an abnormal study consistent with a median nerve entrapment at the right wrist as well as an ulnar neuropathy. No slowing was noted of the ulnar nerve at the elbow, but the wrist was strongly suggested to be a possible location for entrapment.

In an April 4, 1994 letter, the employing establishment advised Dr. Volan that it received the physician's report of March 29, 1994 and that the modified job consisted of a variety of duties which were to be alternated by appellant to reduce any possibility of marked repetition and a worsening of her condition. A copy of the March 4, 1994 job offer was attached for Dr. Volan's review.

Dr. Volan disapproved of the job offer. In an April 8, 1994 letter, Dr. Volan stated that appellant came to his office on April 7, 1994 bringing a description of different duties than included in the typed version of the job description. Dr. Volan stated that, if appellant's description was accurate, then "it is obvious that this type of work will have detrimental effect on the patient's hands."

In a letter of May 6, 1994, the Office requested that Dr. Volan again review the job offer and explain what specific job duties appellant was unable to perform and to make any recommendations/changes which would enable appellant to work eight hours a day.

In a May 13, 1994 letter, Dr. Volan again reiterated that, if appellant's description of the job duties was correct, it was his opinion that it would adversely affect appellant.

In a March 25, 1995 medical report, Dr. Hilliard E. Slavick, a Board-certified neurologist and Office referral physician, reviewed appellant's medical records and noted that appellant was working limited duty, four hours per day. He noted the findings of his neurological examination, which included negative Tinel's and Phalen's signs. Dr. Slavick opined that appellant was status post four operations, two in each upper limb, without any residual deficits. Appellant has

multiple subjective complaints, but no objective findings. He found no evidence clinically that appellant suffered from a peripheral neuropathy or entrapment neuropathy. The mild changes seen on a prior set of EMG studies were not diagnostic and could not be identified on clinical examination. Dr. Slavick opined that appellant should be able to perform the normal duties of her job as identified in the job description the Office provided for review. He further opined that appellant no longer had any residual deficits from her accepted conditions and there were no objective physical findings. Dr. Slavick opined that appellant could work eight hours a day without any work restrictions based on the physical findings, or lack thereof, identified during his examination.

On May 10, 1995 the Office issued a notice of proposed termination of compensation wherein it was recommended that compensation and medical benefits be terminated on the grounds that the evidence established that appellant had no continuing work-related disability from her date-of-injury job. Appellant was advised that, if she disagreed with the proposed action, she should submit additional evidence or argument within 30 days.

In a May 31, 1995 letter, appellant alleged that Dr. Slavick did not administer the Tinel's and Phalen's tests and offered statements regarding whether she could work her current four-hour modified job or an eight-hour job with restrictions.

In a May 24, 1995 report, Dr. Charles L. Tremaine, an orthopedic surgeon, stated that he examined appellant on April 28 and May 19, 1995 for right shoulder and neck complaints. He noted that appellant was working as a sorter and appeared to be suffering from fibromyalgia or muscle inflammatory conditions. Dr. Tremaine stated that appellant returned on May 19, 1995 complaining that her symptoms were exacerbated by working on ripped up mail in a repetitive fashion. Her major concern, however, was over the possibility that she would be required to work as a keyer, which in the past had provoked a carpal tunnel syndrome and required surgery. On the basis of an examination and appellant's past history and symptomatology, Dr. Tremaine stated that he felt appellant might have an overuse syndrome of the upper extremity. He noted that such syndromes were commonplace in activities such as keyers. Dr. Tremaine stated that appellant had significant strength deviations between her right and left arm to the point of producing chronic and possibly permanent muscle differences. He stated that this translated into a decreased ability to handle repetitive action activities leading to chronic pain syndrome. Dr. Tremaine stated that whether or not appellant had carpal tunnel syndrome is irrelevant as her significant difference in terms of overall strength was a predisposition to a permanent and chronic injury if she was placed on a repetitive hand activity work such as is required in a keyer.

By decision dated June 15, 1995, the Office terminated appellant's compensation benefits effective June 24, 1995 on the grounds that the weight of the medical evidence of record established that her injury-related disability and need for any further injury-related medical care had ceased.

In a letter dated June 23, 1995, appellant requested a hearing. Appellant's attorney submitted a summary of her claim including all treatment and job duties appellant performed, and an August 11, 1995 occupational disease claim for overuse of the shoulder which the Office had denied. This claim was assigned A9-406644. Additional medical evidence was also submitted.

In a June 30, 1995 report, Dr. Tremaine stated that appellant had occupational cervical disease. He stated that recent examinations of appellant, which were conducted in physical therapy, indicated that she would redevelop her symptoms as soon as she returned to the keyer position. This syndrome was due to her original position on the keyer and would be reproduced if she returned to this position. Dr. Tremaine stated that, although appellant's carpal tunnel resolved, carpal tunnel was a problem related to appellant's cervical brachial disorder, and having resolved carpal tunnel in no way resolved the cervical brachial disorder.

In a November 27, 1995 report, Dr. Tremaine again diagnosed an upper extremity overuse syndrome due to significant differences in the right arm as compared to the left arm. He said that appellant would physically fatigue and sustain injury in a shorter time with the right arm and this weakness translated overall into a significant weakness based upon age relative to the norms. Dr. Tremaine indicated both arms could ultimately be injured by repeated use due to fatigue. He described symptoms of inflammation in the periscapular and cervical muscles as well as the shoulder and arm muscles. Dr. Tremaine stated that, given appellant's past history, it would be reasonable to assume that her job as a keyer was the instigating event from which she had never fully recovered. He opined that the carpal tunnel and cubital tunnel syndromes appellant subsequently manifested were due to the overuse of her muscles, which continued to be a problem. Dr. Tremaine stated that appellant's disability had resulted in the carpal tunnel syndrome, which was cured with the repeated operations she underwent. He stated she could not work as a keyer since she had chronically weakened muscles that were, therefore, susceptible to trauma from repeated usage in cyclic activities.

In a March 13, 1996 report, Dr. Kenneth O. Fetrow, a Board-certified orthopedic surgeon, noted that he first examined appellant on December 12, 1995 and she related a history of her December 1987 injury and the subsequent surgeries and symptoms. Following the December 12, 1995 examination, Dr. Fetrow referred appellant for a work capacity evaluation. He stated that the evaluation indicated that certain tests were delayed because of appellant's need for rest or not performed because of appellant's pain. He recommended an intensive physical therapy regime followed by a work-hardening program. In a March 18, 1996 report, Dr. Fetrow stated that appellant could return to her eight-hour shift, light duty, but no work as a keyer.

By decision dated June 27, 1996, an Office hearing representative found that Dr. Slavick's opinion constituted the weight of medical opinion and affirmed the June 15, 1995 termination decision.

In a letter dated May 15, 1997, appellant requested reconsideration of her claim. Appellant contended that the Office should have included the fact that she had underwent a left cubital surgery and listed that as part of her accepted conditions. Appellant again alleged that Dr. Slavick did not provide a thorough medical examination and that she disagreed with his opinion.

By decision dated August 5, 1997, the Office denied modification of its June 27, 1996 decision. The Office noted that, although it omitted reference to the August 1988 left cubital surgery from the statement of accepted facts, this omission did not prejudice appellant's claim as Dr. Slavick acknowledged the left cubital tunnel surgery as part of the accepted conditions and

specifically opined that there was no disabling residuals from any of appellant's upper limb surgeries.

In a letter dated January 15, 1998, appellant requested reconsideration and submitted a December 8, 1997 report from Dr. Marvin E. Gold, a Board-certified orthopedic surgeon. In his report, Dr. Gold noted that he previously examined appellant in March 1989 and was familiar with her history. He stated that in his recent examination, there was positive Phalen's and Tinel's signs for carpal tunnel syndrome bilaterally. There was hypesthesia of all the fingers of both hands. There was no atrophy of the thenar musculature. Dr. Gold stated that appellant had recurrent bilateral carpal tunnel syndromes in both wrists, residuals of her work-related upper extremity problems. He suggested that repetitive use of the upper extremities be avoided.

By decision dated February 20, 1998, the Office denied modification of its prior decisions finding that Dr. Gold's report was not sufficient to overcome the weight of the medical opinion as represented by Dr. Slavick's March 25, 1995 medical report.

In a letter dated January 21, 1999, appellant again requested reconsideration of her claim and submitted an argument concerning the weighing of the medical evidence. Included with the reconsideration requests were a March 28, 1989 medical report from Dr. Gold, a November 6, 1990 report from Dr. Donald Kucharzyk and a November 5, 1990 report from Dr. Antonio Zelay.

By decision dated April 23, 1999, the Office denied modification of its previous decisions.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

Section 8123 of the Federal Employees' Compensation Act³ provides that if there is disagreement between the physician making the examination, for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁴

In this case, the Board finds there is a conflict in the medical opinion evidence between the reports of Drs. Volan and Slavick. The Board notes that the Office terminated benefits based on Dr. Slavick's March 25, 1995 medical report that appellant had no residual disability from her accepted conditions and could return to full-time regular duties as a mail sorter. The Board notes that, at the time the Office received Dr. Slavick's report, Dr. Volan had indicated that appellant had a recurrent carpal tunnel syndrome which required surgery. This was supported by a March 8, 1994 nerve conduction study and EMG studies which indicated a right median nerve entrapment, a possible wrist entrapment, as well as an ulnar neuropathy. Dr. Slavick, however, opined that appellant no longer had any residuals from her accepted conditions and there were no objective physical findings. Thus there existed a conflict in medical opinion as to whether appellant had any residual disability due to her accepted conditions.

³ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8123(a); 20 C.F.R. § 10.408.

⁴ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

Thus, the Office had improperly terminated compensation as there existed a conflict in medical opinion.

The April 23, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
March 1, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member