

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MALEA A. GRIFFEY and U.S. POSTAL SERVICE,
POST OFFICE, Wichita, KS

*Docket No. 98-2092; Oral Argument Held January 4, 2001;
Issued February 16, 2001*

Appearances: *Beth Regier Foerster, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has met her burden of proof in establishing that she had a recurrence of disability after May 19, 1993 causally related to her accepted condition of bilateral carpal tunnel syndrome.

On July 2, 1988 appellant, then a letter sorting machine operator, filed a claim for bilateral carpal tunnel syndrome and tendinitis. She related her condition to keying zip codes at a rate of 100 to 180 strikes per minute for 45 minutes of every hour. Appellant reported that the pain, tingling and numbness in her arms began in December 1986 and that her job exacerbated her condition. She stated that on May 7, 1988 her left wrist popped as she was lifting a tray of mail.

The Office of Workers' Compensation Programs accepted appellant's claim for bilateral carpal tunnel syndrome and tendinitis of both wrists. Appellant was assigned to limited duty and lost intermittent time from work. She stopped working on June 29, 1991. The Office commenced payment of temporary total disability compensation. Appellant underwent surgery on her right wrist on July 30, 1991.

Appellant returned to limited-duty work, four hours a day, on May 16, 1992 but stopped working on May 27, 1992. On March 12, 1993 the employing establishment again offered appellant a limited-duty position for eight hours a day. The position included duties as a scale monitor, tour guide, revenue protection and telephone receptionist. Appellant accepted the position and returned to work on March 20, 1993. She stopped work again on May 17, 1993. On June 19, 1993 appellant filed a claim for recurrence of disability, indicating that her pay stopped on May 21, 1993.

In a May 26, 1995 decision, the Office denied appellant's claim for recurrence of disability, effective May 19, 1993, found that appellant had abandoned suitable work and, therefore, terminated further compensation.

Appellant requested a hearing before an Office hearing representative, which was conducted on March 6, 1997. In a May 9, 1997 decision, the Office hearing representative found that the limited-duty position offered appellant by the employing establishment was within the work restrictions set by her personal physician. She concluded that the medical evidence of record did not establish that appellant had sustained a material change in her condition, which rendered her disabled for the limited-duty position.

In a May 7, 1998 letter, appellant, through her attorney, requested reconsideration of the Office hearing representative's decision. In a May 27, 1998 merit decision, the Office denied modification of its prior decisions.

The Board finds that the case is not in posture for decision.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a limited or light-duty position or the medical evidence of record establishes that she 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 show that 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 a January 11, 1993 work restriction evaluation form, Dr. Jay S. Jones, appellant's treating physician, and a Board-certified orthopedic surgeon, indicated that she could sit, stand, bend, squat, kneel, twist and walk continuously, eight hours a day. He reported that appellant could lift up to 20 pounds for one hour a day, intermittently. Dr. Jones stated that appellant should avoid repetitive flexion and extension of her wrist while working. He concluded that appellant could work eight hours a day within restrictions. In a May 19, 1993 duty status report, Dr. Jones indicated that appellant was not advised to resume work.

In a July 1, 1993 report, he indicated that appellant was still having carpal tunnel symptoms with numbness at night that was waking her up. Dr. Jones noted that she had a positive Tinel's and a positive Phalen's tests at both the elbow and the wrist. He found crepitation with range of motion of the shoulder. Dr. Jones concluded appellant could not return to her previous job. He submitted a June 30, 1993 work restriction evaluation form, which contained restrictions similar to those of the January 11, 1993 form, with the change that appellant could perform five minutes of simple grasping and five minutes of fine manipulation. In an August 3, 1993 work restriction form, however, Dr. Jones concluded that appellant could not perform any work and could not work eight hours a day.

In a January 1, 1994 memorandum, the Office medical adviser noted that appellant had complained of pain in her arms since her return to work on March 12, 1993. He commented that

¹ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

her job duties involving the upper arms were minimal and were less than what she claimed to do at home. The Office medical adviser related that a September 21, 1993 note from the vocational rehabilitation specialist stated that appellant complained that her hands hurt whether she used them or not. He pointed out that the note was written four months after appellant stopped working at the limited-duty position. The medical adviser concluded that appellant's limited-duty position could not be aggravating her accepted condition of carpal tunnel syndrome. He stated that appellant had complained of generalized pain in both arms and was just as symptomatic in a nonwork status in September 1993 as she was when actually working.

The Office concluded that a conflict in the medical evidence existed between Dr. Jones and the Office medical adviser and referred appellant, together with a statement of accepted facts and the case record, to Dr. David Ball a Board-certified orthopedic surgeon. In an April 29, 1994 report, Dr. Ball noted incisional-type tenderness in appellant's right hand, which was a residual of her carpal tunnel syndrome and subsequent surgery. He suggested that appellant had entrapment of the superficial branch of the median nerve in the surgical incision, which would explain appellant's marked sensitivity in the incision and her complaints involving the palm of her right hand.

Dr. Ball stated that appellant also had signs of continued nerve root compression on the right. He thought appellant had a significant reflex sympathetic dystrophy in the right hand, which would be consistent with her history and her chronic problems in the right hand. Dr. Ball concluded that appellant could not be returned to gainful employment with the employing establishment. He stated that any work by appellant with her hands would probably result in increased subjective pain symptoms and would not be successful.

The Office requested a clarification from Dr. Ball, but did not receive a response. The Office then referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard Whitehead, a neurologist, for an examination to resolve the conflict in the medical evidence. In a December 21, 1994 report, Dr. Whitehead concluded that appellant had sustained bilateral carpal tunnel syndrome due to repetitive motion of her hands and wrists while using a keyboard. He commented that her current symptoms seemed to extend far beyond what would be expected in carpal tunnel syndrome.

Dr. Whitehead noted appellant's hypesthesia in the dorsum of the right hand, which would involve the radial nerve, which had not been questioned. He found no significant evidence of reflex sympathetic dystrophy. Dr. Whitehead concluded that appellant was capable of performing the job duties of the position that she returned to on March 20, 1993. In an accompanying work restriction evaluation form, he stated that appellant could not perform any repetitive activity and should not lift more than five pounds, perhaps four times an hour. He commented that appellant could start working at four hours a day, increasing to eight hours a day.

The Office subsequently received a June 12, 1995 report from Dr. Ball who stated that reflex sympathetic dystrophy was the primary diagnosis which kept appellant from returning to work. He added that this condition produced many subjective symptoms in appellant's right hand. Dr. Ball commented that reflex sympathetic dystrophy had an objective component, which was the basis for his conclusion that appellant could not return to work.

In an April 16, 1997 report, Dr. Jones stated that, when appellant was sent back to work, she was almost asymptomatic. However, after a few months she had a recurrence of her carpal tunnel syndrome with positive Tinel's and Phalen's signs and pain radiating into her shoulders and arms, which caused sleep interruption. He indicated that he took her off work at that time and she had not been able to return to that type of work since then. Dr. Jones stated that the recurrence of disability was directly related to ongoing carpal tunnel symptoms that stemmed from appellant's original injury. He explained that appellant, in her return to work, did essentially the same type of work, which caused recurrence of her symptoms. Dr. Jones noted that appellant had atrophy of the right hand due to the carpal tunnel syndrome and its progressive nature.

In the request for reconsideration, appellant's attorney submitted a May 5, 1998 report from Dr. Jones, who indicated that, when he examined appellant on May 19, 1993, she was unable to sleep at night due to numbness in her hands. He noted that appellant had been comfortable after her surgery. Dr. Jones reported aching radiating up to appellant's shoulders. He found positive Tinel's and Phalen's signs with crepitus around the shoulders.

Dr. Jones pointed out that these findings were a change from appellant's asymptomatic findings prior to her return to work. He related the change in appellant's condition to her return to work. Dr. Jones noted appellant had developed atrophy by the time of his December 26, 1997 examination, which would guarantee that she would more rapidly develop the symptoms than she had previously if she had been back to some type of light duty. He stated that the light duty accelerated the progression of appellant's carpal tunnel syndrome. Dr. Jones commented that it was a common finding that patients who had a carpal tunnel release and returned to the same job, even with restrictions, can have a recurrence of symptomatology. He noted that appellant had a positive nerve conduction study in the left arm and subclinical findings in the right arm which verified that, if she gone back to some type of gainful employment, her symptoms would have progressed at a more rapid rate.

The Office based its decision on the report of Dr. Whitehead, finding that he was the impartial medical specialist resolving a conflict in the medical evidence between Dr. Jones and the Office medical adviser. A conflict in the medical evidence, however, can occur only when the medical report from appellant's physician and the report from the government's physician are of virtually equal weight and rationale.²

In this case, the memorandum of the Office medical adviser had limited probative value. He concluded that appellant did not have a recurrence of disability because she had the same symptoms four months after she stopped working as she did when she was working. The Office medical adviser, however, based his report on the observation and recording of appellant's complaints by a vocational rehabilitation specialist.

A vocational rehabilitation specialist does not meet the definition of a physician under the Federal Employees' Compensation Act.³ The report of the vocational rehabilitation specialist on

² *Robert D. Reynolds*, 49 ECAB 561 (1998).

³ 5 U.S.C. § 8101(2).

appellant's condition and complaints, therefore, cannot be considered medical evidence. Because he did not examine appellant directly, the Office medical adviser must base his report on an analysis of competent medical evidence of record to be considered probative, substantial and reliable. The Office medical adviser, in relying on the report of the vocational rehabilitation specialist, therefore, did not base his opinion on competent medical evidence of record. When an Office medical adviser does not rely on medical evidence of record, his memorandum becomes a speculative opinion.

As the report of the Office medical adviser lacked probative value, it was insufficient to cause a conflict in the medical evidence. As a result, Dr. Whitehead's report cannot be accorded the special weight given to the report of an impartial medical specialist.⁴ Drs. Whitehead and Jones noted that appellant had positive Tinel's and Phalen's signs. Both physicians related appellant's condition to her employment. They disagreed on appellant's ability to return to the limited-duty assignment she held for two months in 1993. Dr. Jones concluded that appellant could never return to that type work, while Dr. Whitehead concluded that appellant could return to those duties part time at first, gradually increasing to full-time work. The case must, therefore, be remanded for referral of appellant to an appropriate impartial medical specialist for an examination and opinion on whether appellant could have continued to perform the light-duty assignment she held until May 19, 1993 or whether she had a recurrence of disability after that time. If the impartial medical specialist should find that appellant had a recurrence of disability due to the employment injury, he should give his opinion on whether appellant remains disabled for work due to her employment-related condition. After further development as it may find necessary, the Office should issue a *de novo* decision.

The May 27, 1998 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action as set forth in this decision.

Dated, Washington, DC
February 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁴ James P. Roberts, 31 ECAB 1010 (1980).