U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANA S. VAUGHAN and DEPARTMENT OF THE AIR FORCE, DAVID GRANT MEDICAL CENTER, TRAVIS AIR FORCE BASE, CA

Docket No. 00-1942; Submitted on the Record;
Issued January 9, 2002

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant developed a left carpal tunnel syndrome causally related to her federal employment; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for her right carpal tunnel condition after April 4, 1993.

On June 24, 1988 appellant, then a 37-year-old secretary, filed an occupational disease claim asserting that she developed carpal tunnel syndrome while in the performance of her duties. Following medical advice, she ceased typing and other repetitive-motion duties on April 26, 1988.

On June 21, 1988 Dr. Kenneth S. O'Rourke, appellant's attending internist specializing in rheumatology, reported that appellant had bilateral carpal tunnel syndrome. On August 31, 1988 he reported that appellant suffered from bilateral carpal tunnel syndrome "which was probably caused and definitely aggravated by her work as a typist." Because conservative therapy was ineffective, the next treatment option was surgery.

On October 18, 1988 appellant underwent a right carpal tunnel release with epineurotomy. On November 8, 1988 Dr. O'Rourke reported that left carpal tunnel release was pending.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Allan A. Konce, a Board-certified orthopedic surgeon, for a second opinion. On March 27, 1989 Dr. Konce reported that the diagnosis was not definitely established: The operative report was requested but not yet received. He stated that the diagnosis of carpal tunnel syndrome was not yet proved pending appellant's response to the surgical release on the right. Dr. Konce speculated that appellant's weight gain from 1980 to 1985 might have precipitated symptoms suggestive of carpal tunnel syndrome, but since the right carpal tunnel release was done, her symptoms might now be related to scarring. "It is, therefore, felt that the diagnosed condition of the right wrist and hand are related to factors of employment by aggravation,"

Dr. Konce reported. He stated that the aggravation was temporary and should cease within three to six months. Dr. Konce further reported that surgery on the left wrist was not indicated because the diagnosis of carpal tunnel syndrome was not yet established. In an addendum, Dr. Konce noted that a magnetic resonance imaging (MRI) study dated April 5, 1989 showed no definite evidence of impingement of the right median nerve at the carpal tunnel. Dr. Konce added: "I feel that [appellant's] left wrist is not industrially related."

On June 15, 1989 the Office notified appellant that it had accepted her claim for the condition of right carpal tunnel syndrome and she received compensation.

On October 27, 1989 the Office provided Dr. Konce with a copy of the October 18, 1988 operative report and requested an opinion on disability and causal relationship. Dr. Konce replied on November 16, 1989:

> "It appears that the disability of the right arm was causally related to employment factors and was aggravated by the surgery. This aggravation is permanent and the underlying condition has been changed by scar tissue in the left[1] wrist. This changed it into a chronic condition. There is no direct evidence that [appellant] has sustained a carpal tunnel syndrome in the left arm. She does not have a carpal tunnel syndrome on the left due to employment."

The Office thereafter accepted appellant's claim for aggravation of right carpal tunnel syndrome, for right carpal tunnel release with epineurotomy and for permanent aggravation of right carpal tunnel syndrome secondary to scarring from surgery.[2]

On October 6, 1992 an Office hearing representative found that a conflict in medical opinion existed between Dr. O'Rourke who reported that appellant had bilateral carpal tunnel syndrome probably caused and definitely aggravated by her work as a typist and Dr. Konce who found no direct evidence that appellant had sustained carpal tunnel syndrome in the left arm. The hearing representative remanded the case to the Office for a rationalized opinion from a Board-certified specialist on whether appellant sustained a bilateral carpal tunnel syndrome as a result of her federal employment[3] and on the extent and duration of any disability due to the accepted employment-related condition.

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[1] Because appellant's surgery was on the right, it appears that Dr. Konce mistakenly referred to scar tissue in the "left" wrist, on which surgery was not performed.

[2] The Office's FECA nonfatal summary form indicates that the Office accepted bilateral carpal tunnel syndrome, though the entry is in parentheses with the word "bilateral" apparently added at a later date. An Office memorandum dated January 16, 1992, prepared for an entirely different issue, states that the Office accepted bilateral carpal tunnel syndrome. The memorandum, however, makes no reference to the permanent aggravation of right carpal tunnel syndrome secondary to scarring from surgery, which the Office unquestionably accepted. An Office hearing representative subsequently reviewed the case and found that the Office had in fact accepted an aggravation of a right carpal tunnel syndrome and a permanent aggravation of the carpal tunnel syndrome of the right wrist secondary to scarring from surgery.

[3] As Dr. Konce's October 27, 1989 report makes clear, there is no conflict on whether appellant's right carpal tunnel condition was employment related. Dr. Konce and Dr. O'Rourke agree on this point.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. William J. Curtin, a Board-certified neurologist, for resolution of the conflict and an opinion on injury-related residuals. On January 5, 1993 Dr. Curtin related appellant's history, symptoms and complaints. After describing his findings on examination, he reported that there were no objective findings of an aggravation of right carpal tunnel syndrome; nonetheless, he stated as follows: "It is my opinion that [appellant] continues to suffer from residuals of alleged aggravation of the right carpal tunnel release operation and epineurotomy. This is based upon subjective symptoms and is without objective clinical findings nor electrophysiological confirmation in detailed studies." Dr. Curtin further reported:

> "I do not believe that [appellant] suffers from bilateral carpal tunnel syndrome at the present time, nor right carpal tunnel syndrome. There is no objective evidence for this. Furthermore, I do not believe the complaints involving the left wrist are related to federal employment. I do not believe [appellant] is disabled from her date of injury in her job as a secretary/typist for the Department of the Air Force. This is based upon the absence of any objective findings, either clinically or electrophysiologically. I do not believe [appellant] is disabled from all work and I do not believe there are any current work restrictions."

Dr. Curtin completed a work restriction evaluation form and stated that appellant could continue using the dorsal wrist cock-up splints that she was currently using: "I see no indication for any other course of treatment."

In a decision dated March 26, 1993, following notice, the Office terminated appellant's compensation benefits after April 4, 1993. The Office found that the weight of the medical opinion evidence rested with the impartial medical specialist, Dr. Curtin, who reported no objective findings of left carpal tunnel syndrome and no residuals of a permanent aggravation of the right carpal tunnel syndrome.

Appellant requested a hearing before an Office hearing representative, which was held on March 20, 1996. She submitted a January 15, 1996 report from Dr. William A. Bulley, Jr., an orthopedic surgeon. Dr. Bulley related appellant's history and his findings on examination. He concluded: "[Appellant] certainly does appear to have carpal tunnel syndrome or median nerve irritation." On March 28, 1996 he reported that he reviewed all of appellant's treatment records since 1988. He noted:

> "[Appellant] would like me to sign a statement that she has evidence of bilateral carpal tunnel syndrome. I am not sure that I can say this regarding the left side although, in 1989, she did have electromyographic evidence of carpal tunnel syndrome. I believe that I can say that, on the right side, she does more likely than not have residual effects of carpal tunnel syndrome and surgical treatment. For this reason, I think that her claim is valid at least on the right and she should be considered for vocational rehabilitation."

An April 10, 1996 note from Dr. John D. Stewart, an orthopedic surgeon specializing in hand surgery, stated: "I believe [appellant] has recurrent right carpal tunnel syndrome status post carpal tunnel release and left carpal tunnel syndrome."

In a decision dated July 22, 1996, the Office hearing representative affirmed the March 26, 1993 decision terminating appellant's compensation benefits. The hearing representative found that the additional medical opinion evidence lacked probative value, as they provided no opinion with medical rationale to show how the condition found was related to the accepted injury and as they showed no awareness of Dr. Curtin's findings.

Appellant requested reconsideration and submitted additional evidence to support her claim.

On November 4, 1996 Dr. Stewart reported that appellant had a recurrent carpal tunnel syndrome on the right and a persistent left carpal tunnel syndrome. He discussed the repeat surgery on the right on October 23, 1996 during which he found the median nerve encased in scar tissue within the carpal tunnel. Dr. Stewart noted that after surgery appellant had better sensation in her hand. He added: "In the past she has had normal electrodiagnostic studies done by Dr. Patrice Stevenson [on] February 26, 1996, so the abnormal studies subsequently did demonstrate worsening of her condition."

On November 14, 1996 Dr. Stewart reported that he had reviewed Dr. Curtin's January 5, 1993 evaluation. He stated that he was in disagreement with Dr. Curtin's conclusions "in view of my exam[ination] and findings at this time." Dr. Stewart continued:

> "[Appellant] has undergone a repeat right carpal tunnel release now by me by a hypothenar fat pad flap. At the time of surgery the median nerve was densely adherent to the underside of the radial aspect of the transverse carpal ligament and bound down in scar. There were good objective findings that correlated well with her declining clinical condition.
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> "Dr. Patrice Stevenson, as you know, performed electrodiagnostic studies on [appellant] on September 26, 1996 which did show bilateral carpal tunnel syndrome.[4] She has also had bilateral positive Phalen's signs and bilateral positive Tinel's signs preoperatively.
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> "[Appellant] will be undergoing a left carpal tunnel release in about two weeks."

In a report dated December 30, 1996, Dr. O'Rourke indicated that he had reviewed appellant's medical records dating back to 1986, including Dr. Curtin's report of January 5, 1993. He related appellant's history and medical course. Dr. O'Rourke noted that appellant underwent a left carpal tunnel release on November 26, 1996. After describing his findings on examination, Dr. O'Rourke diagnosed the following: Bilateral carpal tunnel syndrome, with history of intermittently positive as well as intermittently negative nerve

[4] The electrodiagnostic report of September 26, 1996 showed an abnormal nerve conduction study on the right and left median nerve. The nerve conduction study from February 26, 1996 was noted to be within normal limits.

conduction velocity studies at each wrist, now status post carpal tunnel release times two on the right and most recently left-sided carpal tunnel release times one. In view of appellant's overall history of carpal tunnel syndrome, Dr. O'Rourke made the following comments:

> "At that time I would continue to say that her initial symptoms, when seen by me in 1987 and 1988, were consistent with carpal tunnel syndrome and my opinion as to their association with her work habits are unchanged. I did believe at that time that her job as a clerk typist was associated with her symptoms. I cannot change my opinion regarding this at this time.
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> "Her interim history as noted above, following the last time I saw her up until today's visit is not inconsistent with continued similar problems. She definitely states that her symptoms were far less severe when her hands and wrists were not active but she has spent the majority of her time in a relatively inactive state as compared to when she was working as a typist. It is not, therefore, surprising that her [nerve conduction velocities] (NCVs) could be unremarkable at various times. Thus, I would disagree overall with the 'point' evaluation of Dr. Curtin in January 1993 that she had no ongoing carpal tunnel syndrome problems. I think it is possible that she could have continued to have a problem with continued subjective symptoms yet relatively unremarkable NCVs.
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> "Her CTS [carpal tunnel syndrome] seems well-documented, particularly most recently wherein the repeat surgery shows the right-sided median nerve to be encased in scar tissue in association with positive NCVs, as well as the presence of positive nerve testing on the left hand side. However, I have no record with me at this time of the pathology report or the operative report of either wrist, rather just the comments of the orthopedic surgeon in Washington State.
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> "Overall, I would suggest that the patient is employable if a position could be found for her to accommodate her hand and wrists symptoms, yet would stand by my clinical opinion that the course of her hand and wrist symptoms over the past [eight] years or so is not inconsistent with a continued problem with carpal tunnel syndrome bilaterally that first began in 1987 or 1988 at a minimum."

On February 4, 1997 Dr. Edward C. Hughes, a Board-certified orthopedic surgeon, reported that he examined appellant on December 19, 1996. He had first examined her on August 24, 1988. Noting her employment as a typist and bilateral surgeries, Dr. Hughes stated that appellant "has I would expect the typical diagnosis of overuse syndrome." From his recollection in 1988, appellant had the classic symptoms of carpal tunnel syndrome. Other medical conditions that would mimic or aggravate carpal tunnel syndrome, except for exogenous obesity, appeared not to be present. "Therefore," Dr. Hughes reported, "I would expect that this patient has a history of work-related overuse syndrome, appears to be medically stable without signs of diabetes or endocrine problems and feel that the etiology of her carpal tunnel syndrome relates to the work position as secretary at Travis which was the reason that I examined her in 1988."

In a decision dated October 21, 1997, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that the weight of the medical opinion evidence rested with Dr. Curtin, the impartial medical specialist, who found no continuing employment injury-related carpal tunnel syndrome or disability at the time of his examination.

The Board finds that appellant has not met her burden of proof to establish that she developed a left carpal tunnel syndrome causally related to her federal employment.

A claimant seeking compensation under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[6] including that she is an "employee" within the meaning of the Act[7] and that she filed her claim within the applicable time limitation.[8] The claimant must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[9]

As the Office has not accepted that appellant sustained a left carpal tunnel syndrome while in the performance of her duties, appellant bears the burden of proof on this issue. As the hearing representative found in her October 6, 1992 decision, a conflict in medical opinion arose between appellant's physician, Dr. O'Rourke, who reported that appellant had bilateral carpal tunnel syndrome that was probably caused and definitely aggravated by her work as a typist and the Office referral physician, Dr. Konce, who reported that there was no direct evidence that appellant had sustained a carpal tunnel syndrome in the left arm and that surgery on the left wrist was not indicated because the diagnosis of carpal tunnel syndrome was not yet established.

Section 8123(a) of the Act provides in part: "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."[10]

To resolve the conflict in opinion between Dr. O'Rourke and Dr. Konce on whether appellant developed a left carpal tunnel syndrome causally related to her federal employment, the Office referred appellant to Dr. Curtin. He reported that appellant did not currently suffer from left carpal tunnel syndrome, as there was no current objective evidence either clinically or electrophysiologically. Further, he reported that he did not believe that appellant's complaints

[5] 5 U.S.C. §§ 8101-8193.

[6] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[7] *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357 (1951); *see* 5 U.S.C. § 8101(1).

[8] *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954); *see* 5 U.S.C. § 8122.

[9] *Elaine Pendleton*, 40 ECAB 1143 (1989); *see Daniel R. Hickman*, 34 ECAB 1220 (1983).

[10] 5 U.S.C. § 8123(a).

involving the left wrist were related to federal employment and that appellant was not disabled from her date-of-injury position as a secretary/typist.

When 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.[11] Dr. Curtin offered medical reasoning to support his conclusion and the medical record, together with the statement of accepted facts, provided him a proper factual foundation from which to work. The Board finds that his opinion with respect to the issue of left carpal tunnel syndrome is entitled to special weight and resolved the outstanding conflict between Dr. O'Rourke and Dr. Konce.

Appellant submitted additional evidence, however, to support her claim for left carpal tunnel syndrome. Dr. Stewart reported that appellant had a persistent left carpal tunnel syndrome. He noted that electrodiagnostic studies on September 26, 1996 did show bilateral carpal tunnel syndrome. Appellant also had bilateral positive Phalen's and Tinel's signs prior to her repeat surgery on the right. Further, the record indicates that appellant underwent a left carpal tunnel release on November 26, 1996. Dr. Hughes, who had examined appellant in 1988, reported on February 4, 1997 that appellant had a history of work-related overuse syndrome and that the etiology of her carpal tunnel syndrome related to her work as secretary at the employing establishment.

Objective evidence of carpal tunnel syndrome, particularly direct evidence, such as may be found in an operative report, is critical in this case. Appellant has submitted evidence demonstrating positive objective findings on the left, including the nerve conduction studies obtained on September 26, 1996 and the positive Phalen's and Tinel's signs reported by Dr. Stewart. Although this evidence is supportive of her claim, appellant has not submitted an operative report for the November 26, 1996 left carpal tunnel release. Without this evidence and without a reasoned medical opinion based on the operative findings, the Board finds that appellant has not met her burden of proof.[12] The Board will affirm this aspect of the Office's October 21, 1997 decision.

The Board also finds that the Office properly terminated appellant's compensation benefits for her right carpal tunnel condition after April 4, 1993.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[13] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

[11] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[12] The Board notes that Dr. O'Rourke was one of the physicians who created the conflict in medical evidence on the issue of left carpal tunnel syndrome, which Dr. Curtin resolved. For this reason, additional opinion by Dr. O'Rourke on the issue of left carpal tunnel syndrome is insufficient to overcome the weight accorded the opinion of the referee medical specialist or to create a conflict therewith. *See John M. Tornello*, 35 ECAB 234 (1983).

[13] *Harold S. McGough*, 36 ECAB 332 (1984).

without establishing that the disability has ceased or that it is no longer related to the employment.[14]

The Office accepted appellant's claim for aggravation of right carpal tunnel syndrome, for right carpal tunnel release with epineurotomy and for permanent aggravation of right carpal tunnel syndrome secondary to scarring from surgery. By decision dated March 26, 1993, the Office terminated appellant's compensation benefits after April 4, 1993. The Office, therefore, bears the burden of proof to justify the termination.

Following the hearing representative's instructions, the Office referred appellant to Dr. Curtin not only to resolve the conflict that had arisen with respect to appellant's claim for left carpal tunnel syndrome but also to provide an opinion on disabling residuals of the accepted conditions on the right. On this latter issue Dr. Curtin did not serve as a referee medical specialist: There was no conflict with respect to the right wrist. He instead served as an Office referral or second opinion physician. Nonetheless, his opinion -- that there were no residuals of a permanent aggravation of the right carpal tunnel syndrome -- was medically reasoned and based on a proper factual background. The Board finds that it was sufficiently probative to justify the termination of appellant's compensation benefits after April 4, 1993.

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.[15]

Subsequent to the termination of her benefits, appellant submitted additional probative medical opinion evidence to support residuals of the accepted employment injury. On November 14, 1996 Dr. Stewart reported that he had reviewed Dr. Curtin's January 5, 1993 evaluation and disagreed with his conclusions in view of current findings. Dr. Stewart explained that he had performed a repeat right carpal tunnel release and at the time of surgery the median nerve was densely adherent to the underside of the radial aspect of the transverse carpal ligament and bound down in scar. Further, there were good objective findings that correlated well with her declining clinical condition. Electrodiagnostic studies on September 26, 1996 showed bilateral carpal tunnel syndrome and appellant had bilateral positive Phalen's and Tinel's signs preoperatively.

Dr. O'Rourke reported on December 30, 1996 that he, too, had reviewed Dr. Curtin's January 5, 1993 report and diagnosed bilateral carpal tunnel syndrome, with history of intermittently positive as well as intermittently negative nerve conduction velocity studies at each wrist, now status post carpal tunnel release times two on the right and left-sided carpal tunnel release times one. His opinion on the causal relationship between appellant's symptoms of carpal tunnel syndrome and her work habits remained unchanged. He explained that it was

[14] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[15] *Maurice E. King*, 6 ECAB 35 (1953); *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

not surprising that her NCVs could be unremarkable at various times, considering her relatively inactive state compared to when she was working as a typist. Dr. O'Rourke expressly disagreed with Dr. Curtin's "point" evaluation that appellant had no ongoing carpal tunnel syndrome problems. Appellant's carpal tunnel syndrome seemed well documented, particularly by the repeat surgery, which showed the right-sided median nerve to be encased in scar tissue in association with positive NCVs.

The Board finds that a conflict in medical opinion exists between Dr. Curtin, in his capacity as an Office referral or second opinion physician and Drs. Stewart and O'Rourke, as appellant's physicians, on the issue of whether appellant continues to suffer residuals of the accepted right carpal tunnel condition. The Board will set aside the Office's October 21, 1997 decision on this issue and remand the case for referral to a referee medical specialist pursuant to 5 U.S.C. § 8123(a). Following such further development as may be necessary,[16] the Office shall issue an appropriate final decision on the issue of injury-related residuals and disability.

The October 21, 1997 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
January 9, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[16] Because further development is required in this case, the Office may consolidate matters by requesting the operative report for the left carpal tunnel release on November 26, 1996 and obtaining an opinion from the referee medical specialist (who on the issue of left carpal tunnel syndrome can act only as an Office referral or second-opinion physician) on whether appellant developed a left carpal tunnel syndrome causally related to her federal employment.