United States Department of Labor
Employees' Compensation Appeals Board

JESSE A. RODRIGUEZ, Appellant	)	
and	)	**Docket No. 04-978**
	)	**Issued: December 9, 2004**
DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, TX, Employer	)	

Appearances:
Jesse A. Rodriguez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 3, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 12, 2004, wherein the Office terminated appellant's compensation and medical benefits. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

This issue is whether the Office met its burden of proof to terminate appellant's compensation and authorization for medical benefits on the grounds that he had no further disability or condition causally related to his employment injury.

FACTUAL HISTORY

On April 11, 1994 appellant, then a 37-year-old sandblaster, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome in his right wrist as a result of the repetitive movement involved in his federal employment. By letter dated March 3, 1995, the Office accepted his claim for right carpal tunnel syndrome. On June 1, 1995 appellant

underwent a right carpal tunnel release. Appellant was paid appropriate medical and compensation benefits.[1]

Appellant's treating physician was Dr. Gene R. Smith, a Board-certified orthopedic surgeon. In an attending physician's report indicating appellant last visited him on March 10, 1998, Dr. Smith reported that appellant was "medically retired" on March 7, 1998 but that he had advised appellant in July 1997 that he could return to work.[2]

By letter dated December 21, 2001, the Office referred appellant for a medical examination. In a report dated February 6, 2002, Dr. Govindasamy Durairaj, a Board-certified internist, concluded that appellant's accepted condition of carpal tunnel syndrome was still causing partial disability, but that appellant could work full time with restrictions and that appellant was unable to return to his date-of-injury position as sandblasting involved repetitive hand movements.

By letter dated March 5, 2002, the Office referred appellant to Dr. David Willhoite, a Board-certified orthopedic surgeon. The Office indicated that this referral was necessary as a conflict existed regarding appellant's "WORK CAPABILITIES" and that Dr. Willhoite would be the referee physician. (Emphasis in the original.) In the questions propounded by the Office to Dr. Willhoite, the Office asked him to determine if there was any objective evidence that appellant's carpal tunnel syndrome in the right wrist was still active and causing disability to appellant, whether appellant could return to his date-of-injury job or was capable of performing light duty, and what appellant's restrictions were. In a medical report dated March 27, 2002, Dr. Willhoite reported:

> "PHYSICAL EXAMINATION: Examination of the right upper extremity reveals a well-healed incision in the palm of the right hand and wrist. Range of motion of his right wrist is as follows: Dorsiflexion is 60 [degrees], volar flexion is 35 [degrees], ulnar deviation is 35 [degrees] and radial deviation is 30 [degrees]. Range of motion in the left wrist is as follows: Dorsiflexion is 60 [degrees], palmar flexion is 50 [degrees], ulnar deviation is 40 [degrees] and radial deviation is 35 [degrees]. Grip strength on the right is as follows: 72, 58, and 78 pounds. Grip strength on the left is as follows: 88, 90 and 90 pounds. [Appellant] has normal range of motion of all the fingers in the right hand. There is normal two-point discrimination in the right hand.
>
> "DIAGNOSIS: Postop[erative] right carpal tunnel release with minimal residual weakness of the right hand.

[1] Effective May 28, 1996, appellant was reemployed in the position of a modified-duty sandblaster. The Office determined on March 26, 1997 that this position fairly and reasonably represented his wage-earning capacity.

[2] The record reveals that appellant retired on disability effective March 7, 1998.

"DISCUSSION:

> (1) The only objective evidence that this condition is currently presenting would be a slight decrease in grip strength on the right compared to the left. [Appellant] is right hand dominant. If this is a disability, I feel it would be a partial disability. However, I feel that the difference in grip strength in the upper extremities is very minimal and that he most likely could return to some type of occupation.
>
> (2) Again, the only objective evidence is a slight decrease in grip strength in the right hand compared to the left. I feel [appellant] can certainly do some work. However, I do not feel he should do any type of job that requires extensive repetitive type work using his hands.
>
> (3) He could certainly be able to work fulltime at some type of occupation that does not require repetitive use of his hands.
>
> (4) The work limitations form is filled out."

In a medical report dated March 12, 2002, Dr. Smith opined that appellant may have a radiculopathy, but that he was suggesting an electromyogram to rule out recurrent carpal tunnel disease and possible cubital tunnel syndrome.

An electromyogram (EMG) and nerve conduction study (NCS) was performed by Dr. Wilbur S. Avant, a Board-certified neurologist, on March 27, 2002. He noted that there was an indication of mild bilateral C6 acute motor radiculopathy by needle study and relative decrease in the C6 deep tendon reflexes clinically and an indication of significant slowing across the wrists bilaterally of the median, sensory and motor distal latencies. Dr. Avant further noted that despite a Tinel's sign over the ulnar nerves at the elbows, there were no significant ulnar abnormalities noted in the ulnar-innervated muscles by needle study, nor any significant slowing of the ulnar distal latencies or conduction times across the elbows. In an April 11, 2002 study, Dr. Avant noted that the tests indicated a slowing of both the median and ulnar nerves distally consistent with the patient's symptoms and the standard NCS showing median slowing at the wrists. There is an indication of right C7 sensory radiculopathy in addition to the left C6 slowing noted and these findings correlated with the patient's EMG showing mild bilateral C6 motor radiculopathy as well.

In an April 23, 2002 report, Dr. Smith indicated that appellant's tests showed that the upper extremity evoked potentials which correlated with his EMG showing mild bilateral C6 motor radiculopathy, as well as slowing of both the median and ulnar nerves distally consistent with his symptoms. He also noted that the NCS showed median slowing at the wrist bilaterally.

On January 8, 2004 the Office issued a notice of proposed termination, wherein it indicated that the work-related disability had ended. The Office stated that Dr. Willhoite indicated in his March 27, 2004 report that appellant no longer had a medical condition or disability as a result of his employment injury. Appellant did not respond to the proposed termination and, by decision dated February 12, 2004, the termination of his medical and compensation benefits was made final.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. The Office may not terminate or modify compensation without establishing that the disabling condition ceased or that it was 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]

With respect to the evaluation of the medical evidence, section 8123(a) of the Federal Employees' Compensation Act[5] provides in pertinent part: "If there is a 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."[6] The Board has held that when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.[7]

ANALYSIS

Initially, the Board finds that the Office improperly designated Dr. Willhoite as an impartial medical examiner. As was noted above, an impartial medical examiner is appointed to resolve a conflict between appellant's treating physician and the physician for the United States. At the time of the Office's referral to Dr. Willhoite on March 5, 2002, the last report of appellant's treating physician, Dr. Smith, in the record was dated March 10, 1998 and indicated that, although appellant was "medically retired," he had advised appellant in July 1997 that he could return to work, which at the time was in the position of a modified-duty sandblaster. Dr. Smith had made no comment on appellant's condition for four years before the referral. Furthermore, the only other report of record was that of Dr. Durairaj, the second opinion physician, who concluded that appellant's carpal tunnel syndrome was still causing partial disability and thereby precluding him from returning to his date-of-injury position as a sandblaster, but that he could work with restrictions. The Board notes that, although the questions propounded to Dr. Willhoite concerning appellant's work capabilities, there was no conflict to resolve as the state of the record at the time of the referral was that appellant could work with restrictions. Since there was no existing conflict in medical opinion at the time of the referral to Dr. Willhoite, the Board finds that Dr. Willhoite's opinion is not entitled to the special

[3] *David W. Green*, 43 ECAB 883 (1992).

[4] *Id.*

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8123(a).

[7] *Mary L. Barragy*, 47 ECAB 285 (1996).

weight given an impartial medical specialist when resolving a conflict, but can still be considered for its intrinsic value and can still constitute the weight of the medical evidence.[8]

The Board finds that Dr. Willhoite's report does not constitute the weight of the medical evidence. The Office improperly took statements made by Dr. Willhoite, applied its own rationale and concluded that his report supported that appellant no longer had a medical condition or disability as a result of the employment injury. His report merely indicates that there was a slight decrease in grip strength on the right side when compared to the left. Although he indicates that appellant could return to some type of occupation that does not require repetitive-type work using his hands, he does not support that he has no disability or residuals from the employment injury. The Board finds that his report does support that appellant is unable to return to his position as a sandblaster.

CONCLUSION

As the Office did not establish that appellant's right carpal tunnel syndrome had ceased or was no longer related to his federal employment, the Office improperly terminated compensation and medical benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 12, 2004 is reversed.

Issued: December 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).