United States Department of Labor
Employees' Compensation Appeals Board

CHARLOTTE A. GOURLEY, Appellant	)	
and	)	**Docket No. 04-752**
	)	**Issued: July 19, 2004**
DEPARTMENT OF THE ARMY, TOOELE ARMY DEPOT, Tooele, UT, Employer	)	

Appearances:
Charlotte A. Gourley, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 27, 2004 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated June 24, November 20 and December 17, 2003 which terminated her compensation benefits and denied further reconsideration of appellant's claim under 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective July 12, 2003, on the grounds that she had no further disability for work or residuals requiring further medical treatment; and (2) whether the Office properly refused to reopen appellant's case for further review on its merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 23, 1990 appellant, then a 43-year-old painting worker helper, filed a claim for compensation for a traumatic injury alleging that, on July 19, 1990, as she was getting out from

under a two and one-half ton truck, she struck her right elbow on the axle and sustained injury to her right upper extremity. The Office accepted that appellant sustained a right elbow strain/sprain, right forearm strain/sprain and right lateral epicondylitis. She underwent a right peripheral nerve/ganglion decompression. Appellant received appropriate compensation and medical benefits.

Appellant was treated by a series of physicians and followed by Dr. Robert H. Horne, a Board-certified orthopedic surgeon, beginning on November 21, 1990. He noted that appellant had a peripheral nerve entrapment in the muscles of her right forearm. Appellant underwent surgery on November 27, 1990 but remained symptomatic postoperatively.

On December 11, 1995 Dr. Horne noted that appellant had a positive Finklestein's test, which suggested that the entrapment was recurring that she was losing the grip in her hands and had a 2-pound grip on the right side and a 52-pound grip on the left Dr. Horne noted that her nondominant left arm circumference was 9 and 7/8 inches and her dominant right arm circumference was 9 and 3/8 inches, which suggested that the radial nerve compression was still present. He requested authorization for a reexploration of the nerve in her forearm for posterior interosseous nerve syndrome.

On June 3, 1996 Dr. Horne noted changes in and differences between the left side and the right side upper extremities in ranges of motion of the wrist and the elbow, finding that the right side had increasing losses. He compared circumferences at the biceps and mid-forearm between the left and right sides and found that the right side was less in both measurements.

By report dated August 17, 1998, Dr. Horne noted that examination revealed that appellant's right forearm circumference was 25.5 centimeters while the left was measured at 24.7 centimeters, a Finkelstein's test was negative, her surgical incision was well healed, but that her right hand grip strength was 0 pounds and her left hand grip strength was 67 pounds. Appellant had a resting tremor in her right arm and that the results of an electromyogram (EMG) performed January 17, 1996 demonstrated mild chronic partial denervation of the right distal radius posterior interosseous muscles, suggestive of mild posterior interosseous neuropathy. Dr. Horne opined that appellant had a chronic nerve entrapment syndrome with the forearm muscles innervated by the posterior interosseous nerve, which would be surgically treatable. Dr. Horne's request for a repeat EMG was denied by the Office at the recommendation of an Office medical adviser.

On January 29, 2003 the Office determined that a second opinion examination was necessary. On February 4, 2003 the Office referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Dewey C. MacKay, a Board-certified orthopedic surgeon.

By report dated March 12, 2003, Dr. MacKay reviewed appellant's factual and medical history and noted her symptomatology, which consisted of chronic headaches, right forearm numbness, right forearm pain and weakness. She could to lift only 5 pounds on the right and 25 pounds on the left. He noted that appellant's surgical incision was well healed, that the circumference of her right arm was 23 centimeters, with the left arm circumference equaling

22 centimeters, but that her right grip strength was 2 kilograms of force, where the left grip strength was 28 kilograms of force. Dr. MacKay noted that appellant had diffuse tenderness to palpation over the medial and lateral epicondyles of the elbow and tenderness to palpation over the forearm, but was otherwise neurologically intact. He diagnosed a right elbow sprain/strain and contusion, lateral epicondylitis of the right elbow, surgical intervention in the right elbow with lateral release of the right elbow and release of the radial nerve and status post ulnar nerve transposition of the right elbow. Dr. MacKay opined that appellant had reached maximum medical improvement from her surgeries and had multiple subjective complaints but no significant objective findings on examination. He opined that appellant's chronic headaches were not part of the problem, that her subjective complaints were multiple, but that there were no significant preexisting disabilities. Dr. MacKay noted that appellant's current EMG was normal and he found that appellant's total disability ended no later than 1992. He recommended that appellant return to sedentary work in an office environment and noted that she exhibited pain magnification for secondary gain.

By notice dated May 22, 2003, the Office advised appellant that it proposed to terminate her compensation and medical benefits on the grounds that she had no continuing disability or residuals causally related to her employment-related conditions or injury. The Office gave appellant 30 days within which to submit further evidence supporting continued disability. It noted that Dr. MacKay's is report carried the weight of the medical evidence.

In a June 3, 2003 report, Dr. Philip V. Savia, Jr., a Board-certified neurologist, noted a normal physical examination of appellant. He diagnosed limb pain, stable, chronic headache, chronic mixed migraine headache, chronic neck strain, chronic low back pain, chronic unspecified anxiety state and sleep apnea.

In response to the proposed termination, appellant provided a June 4, 2003 statement in which she claimed that her right arm remained the same as it was before treatment with almost constant pain. She noted that her third and fourth digits curled into a contracture. She claimed that if any stress was placed on her right arm, her hand and arm would begin to shake, which would continue for several minutes. Appellant contended that Dr. MacKay did not adequately test her arm. She submitted a June 5, 2003 report from Dr. Horne, who noted that he disagreed with Dr. MacKay's findings and conclusions, particularly with his estimate of the work activities she perform. Dr. Horne recommended an evaluation by a physiatrist prior to releasing her to return to any work.

By decision dated June 24, 2003, the Office finalized the termination of appellant's compensation and medical benefits effective July 12, 2003. The Office found that Dr. MacKay's report constituted the weight of the medical evidence.

In a letter dated June 30, 2003, appellant disagreed with the termination of her compensation benefits. On July 3, 2003 she requested a review of the written record by an Office hearing representative.

By decision dated November 20, 2003, the Office hearing representative affirmed the June 24, 2003 termination decision finding that Dr. MacKay's report constituted the weight of

the medical evidence. She indicated that Dr. MacKay noted no objective findings of the original work injuries and no residuals and noted that the EMG results were normal. The hearing representative found that Dr. Horne did not provide new or additional evidence not previously considered by the Office in support of his disagreement with Dr. MacKay's report.

In an undated letter received by the Office on December 12, 2003, appellant requested reconsideration of the November 20, 2003 decision. Appellant argued that she continued to experience right forearm numbness and weakness and could not lift more than five pounds.

By decision dated December 17, 2003 the, Office denied reconsideration finding that she had not submitted relevant new evidence or argument not previously considered.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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 disability has ceased or that it is no longer related to the employment.[2] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[4]

ANALYSIS

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. There is a conflict in the medical opinion evidence on the issue of whether appellant has continuing disability and residuals related to her accepted conditions.

Dr. Horne appellant's treating physician, stated on his August 17, 1998 report, that her right hand grip strength was 0 pounds and her left hand grip strength was 67 pounds. This supports that appellant had continued extreme weakness on the right when compared with the left side. He further noted that appellant had a resting tremor in her right arm and that the results of an EMG performed on January 17, 1996 demonstrated mild chronic partial denervation of the right distal radius posterior interosseous muscles, which he found was suggestive of mild posterior interosseous neuropathy. These findings were objective measurements and

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

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

[3] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[4] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

observations and indicated that appellant had persistent right-sided effects, which likely would require further medical intervention or physical therapy.

By report dated March 12, 2003, Dr. MacKay noted appellant's subjective complaints of right forearm numbness, complaints of diffuse tenderness to palpation over the medial and lateral epicondyles of the elbow and complaints of tenderness to palpation over the forearm. He noted that appellant had demonstrated right-sided weakness and inability to lift more than 5 pounds with the right arm, when she lifted 25 pounds with the left arm. Dr. MacKay also noted that appellant's right hand grip strength was 2 kilograms of force, but that the left hand grip strength was 28 kilograms of force. He diagnosed right elbow sprain/strain and contusion and lateral epicondylitis of the elbow, postsurgery, but opined that appellant had reached maximum medical improvement with multiple subjective complaints but with no significant objective findings on examination and no significant preexisting disabilities. Dr. MacKay noted that appellant's current EMG was normal and he opined that her total disability ended no later than 1992. He recommended that appellant return to sedentary work in an office environment.

In a June 5, 2003 response, Dr. Horne strongly disagreed with Dr. MacKay's findings and conclusions, particularly those dealing with what activities appellant could perform for what period of time.

As the opinions of Dr. Horne disagree with the opinion of Dr. MacKay, there exists a conflict in the medical opinion evidence which requires resolution before compensation and medical benefits may be terminated on the grounds stated.

CONCLUSION

In this case, the Office did not meet its burden of proof to terminate compensation and medical benefits because there exists a conflict in medical opinion evidence which requires resolution.[5]

[5] Due to the disposition reached the second issue is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 20 and June 24, 2003 are reversed; the decision dated December 17, 2003 is rendered moot.

Issued: July 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member