

**United States Department of Labor
Employees' Compensation Appeals Board**

LYNN D. HARRINGTON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gasport, NY, Employer**

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**Docket No. 04-349
Issued: May 13, 2004**

Appearances:

*David W. Covino, Esq., for the appellant
Office of the Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 24, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated March 21, 2003. Pursuant to 20 C.F.R. §§ 501(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits.

FACTUAL HISTORY

On December 29, 1993 appellant, a 44-year-old mail handler, ruptured blood vessels and tendons in her right hand while reaching to shut a mailbox. She filed a claim for benefits, which the Office accepted for ganglion cyst, contusion of the right wrist and surgery to remove a ganglion cyst. Appellant has not worked for the employing establishment since May 1994.¹ The

¹ Appellant was terminated by the employing establishment on July 11, 1994, for reasons unrelated to her accepted right wrist condition.

Office commenced payment for temporary total disability compensation and placed appellant on the periodic rolls.

In a November 17, 1998 investigative memorandum, the employing establishment advised the Office that appellant had been observed and videotaped in the process of operating a fishing and hunting store with her husband by its inspectors on June 28 and August 28, 1996. The investigators also took numerous photographs in the course of this surveillance, which took place from June 1996 through March 1998. The memorandum stated that, on August 28, 1996, four inspectors posing as customers went on a fishing charter trip with appellant and her husband. Just prior to boarding the charter boat, appellant was videotaped cleaning the boat and its windows, making extensive use of her right hand and wrist. The memorandum further stated that as the boat was leaving the dock, appellant was videotaped jumping onto the boat and holding on with just her right wrist.²

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted right wrist condition, the Office referred appellant to Dr. Eugene J. Hanavan, a Board-certified orthopedic surgeon. In a report dated May 12, 1999, he stated that appellant had some weakness at the extreme range of motion in dorsi and palmar flexion of the wrists. Dr. Hanavan advised that appellant had a tenosynovitis condition in her right wrist but opined that this was unrelated to her December 1993 employment injury. He stated that appellant had reached maximum medical improvement with regard to her right wrist injury and that she was fit to return to her job as a letter carrier. In a May 13, 1999 report, entitled "Confidential Memo[random]," Dr. Hanavan stated that he had reviewed the surveillance videos and photographs and had observed appellant using her right hand to engage in a variety of activities with no apparent difficulties. These included: receiving money from a customer with her right hand; carrying a very large purse with her right hand; climbing onto a charter boat; gripping the dock post with her right hand; cleaning the boat windows with her right hand; adjusting a dock rope; wringing out a wash cloth; operating the charter boat with her right hand; holding onto the bulkhead with her right hand; operating the throttle level with her right hand; and working a "game of chance" with her right hand, which also involved gripping and exchanging money and paying winners with her right hand. Dr. Hanavan stated that, based on his review of these photos and videos of appellant's activities from June 1996 through March 1998, it was his opinion that appellant could perform work for the employing establishment.

In a supplemental form report received by the Office on November 1, 1999, Dr. Hanavan indicated that appellant exhibited no positive objective signs that she still had the accepted conditions stemming from her 1993 work injury. He stated that there was no evidence of the ganglion cyst condition at the time of his examination, though he did note restricted dorsi and palmar flexion of the right wrist due to pain. Dr. Hanavan advised that appellant had no causally-related disability restricting her from returning to work. Though Dr. Hanavan and an associate physician did note the presence of de Quervain's syndrome in appellant's right wrist, Dr. Hanavan did not believe this condition was in any way related to the December 1993 employment injury. He noted that de Quervain's condition had been initially diagnosed by

² The videotape and photographs from the investigative memorandum were attached to the statement of accepted facts.

examination in March 1998, five years after the work injury, and that therefore there was no basis to conclude that it was causally related to the 1993 work injury. Accordingly, Dr. Hanavan opined that de Quervain's release surgery should not be authorized since the condition was not work related.

By decision dated March 17, 2000, the Office terminated appellant's compensation, finding that Dr. Hanavan's referral opinion represented the weight of the medical evidence. By letter dated March 20, 2000, the Office denied appellant authorization for additional right wrist surgery in light of the March 17, 2000 decision finding that she had no residuals from her accepted right wrist condition.

By letter dated March 24, 2000, appellant's attorney requested an oral hearing, which was held on July 20, 2000.

By decision dated October 17, 2000, an Office hearing representative affirmed the March 17, 2000 Office decision.

By letter dated October 10, 2001, appellant's attorney requested reconsideration. Appellant submitted an August 28, 2001 report from Dr. Joseph E. Buran, a Board-certified orthopedic surgeon and appellant's treating physician, who stated that he had reviewed the various activities depicted in the surveillance photographs and videotapes and believed that these were mild-low repetitive, low demand tasks. He opined that these activities were minor, incidental and part of normal activities of daily living which should not be misconstrued as being an aggravating condition for carpal tunnel syndrome.

By decision dated December 31, 2001, the Office denied appellant's request for reconsideration. On January 23, 2002 appellant filed an appeal with the Board.

In response to appellant's appeal to the Board, the Director of the Office filed a motion to remand the December 31, 2001 Office decision. The Director contended that appellant had submitted a report from Dr. Buran which created a conflict in the medical evidence.

By Order dated December 26, 2002, the Board granted the Director's motion. The Board therefore set aside the December 31, 2001 Office decision and remanded to the Office for referral to an impartial medical specialist to resolve the outstanding conflict in the medical evidence.

In order to determine appellant's current condition, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David Nichols, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated March 5, 2003, he stated that appellant has some mild scarring of the right wrist secondary to her three surgeries. Dr. Nichols advised that the only residual impairment appellant had from the December 29, 1993 injury was her dorsal scarring and mild limitation of dorsiflexion. He stated that this was a mild impairment which did not interfere with appellant's use of her right hand, as indicated by the surveillance videotapes showing her using her hand with no detectable disability. Dr. Nichols concluded that appellant had no residual disability resulting from her December 29, 1993 employment injury.

In addition, Dr. Nichols noted that, although Dr. Buran had diagnosed carpal tunnel syndrome in his August 28, 2001 report, appellant did not have carpal tunnel syndrome. Dr. Nichols noted that appellant had bilateral carpal tunnel releases performed in 1982 but that these procedures had completely resolved the bilateral carpal tunnel condition which she had experienced at that time. He noted that there had no mention of any recurrence of carpal tunnel syndrome in any of the subsequent medical reports.

By decision dated March 21, 2003, the Office terminated appellant's compensation. The Office stated that Dr. Nichols' referee opinion indicating that there were no residuals from the December 1993 work injury represented the weight of the medical evidence.³

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.⁴ 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.⁵

ANALYSIS

The Office based its decision to terminate appellant's compensation on the March 5, 2003 report of Dr. Nichols, the independent medical examiner, who advised that the only residual impairment appellant had from the December 29, 1993 right wrist injury was mild dorsal scarring and mild limitation of dorsiflexion, a mild impairment which did not interfere with the use of her right hand. He indicated that appellant had no objective disability which would interfere with any activities involving the use of her right hand, as demonstrated by his examination, the medical records and the activities in which he observed appellant engaging in the surveillance photographs and videotapes. Dr. Nichols concluded that appellant had no residual disability resulting from her December 29, 1993 employment injury. He also ruled out a diagnosis of bilateral carpal tunnel syndrome, as mentioned by Dr. Buran in his August 28, 2001 report.⁶

³ On October 11, 2003 appellant filed a Form CA-7 claim for a schedule award based on her accepted right wrist condition. Appellant submitted a September 19, 2003 report and impairment evaluation from Dr. Buran. By letter dated October 27, 2003, the Office stated that it had erroneously developed her request for a schedule award. The Office advised appellant that she was not entitled to a schedule award in light of the fact that it had determined she had no residuals from her work-related disability. The Board notes, however, that such a determination does not necessarily preclude appellant from future entitlement to a schedule award (*e.g.*, in the event she sustains a recurrence of her work-related disability) and that, in any event, the Office must first issue a formal determination and decision regarding appellant's entitlement to a schedule award.

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ The Board notes that the record contains no evidence indicating that the Office accepted a claim based on bilateral carpal tunnel syndrome causally related to the December 1993 work injury.

The Board finds that the Office properly found that Dr. Nichols' referee opinion negated a causal relationship between appellant's claimed current condition and disability and her accepted December 1993 right wrist injury and that she no longer had any residuals from her employment injuries. This report was sufficiently probative, rationalized and based upon a proper factual background properly relied on. Accordingly, the Board finds that Dr. Nichols' opinion constituted sufficient medical rationale to support the Office's March 21, 2003 decision terminating appellant's compensation. The Board therefore affirms the March 21, 2003 Office decision terminating compensation.

CONCLUSION

Under the circumstances described above, the Board finds that the Office met its burden to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member