

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

JOYCE L. PAULIN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 04-1121
Issued: September 8, 2004**

Appearances:
Peter J. Naake, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 19, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 22, 2003, which denied modification of a prior decision terminating appellant's compensation benefits. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden to terminate appellant's compensation benefits on the grounds that appellant no longer had residuals of the accepted bilateral carpal tunnel syndrome.

FACTUAL HISTORY

This is the third appeal before the Board. On April 1, 1993 appellant, a 40-year-old clerk window service technician, filed a Form CA-2 claim for benefits, alleging that she had developed a bilateral carpal tunnel condition causally related to factors of her employment. The Office accepted the claim for bilateral carpal tunnel syndrome. The Office commenced payment for

temporary total disability compensation. By decision dated August 15, 1994, the Office terminated appellant's compensation benefits on the grounds that she had refused to accept an offer of suitable work. By decision dated June 14, 1996, an Office hearing representative affirmed the Office's August 15, 1994 decision.

In a February 16, 1999 decision,¹ the Board reversed the Office's decisions. The Board found that the Office improperly determined that the offered position was suitable for appellant. The Board noted that the Office had relied on the December 23, 1993 report of Dr. Thomas M. Marshall, an Office referral physician and a Board-certified neurosurgeon, even though this report was provided to the Office five months before the employing establishment offered the limited-duty position to appellant and even though there was no indication that Dr. Marshall ever reviewed the physical requirements of the job description.² In addition, the Board found that the Office had improperly determined that appellant was able to perform the modified position offered by the employing establishment, which required appellant to work for six hours per day despite the fact that Dr. Daniel T. Maurer, appellant's treating physician and a Board-certified orthopedic surgeon, had repeatedly stated in several reports, including an August 17, 1994 functional capacities report submitted with the reconsideration request, that appellant could work no longer than three hours per day with restrictions. The complete facts of this case are set forth in the Board's February 16, 1999 decision and are herein incorporated by reference. Appellant's entitlement to disability compensation was restored. Appellant was paid appropriate compensation for temporary total disability and placed on the periodic rolls in July 1999.

The Office found that there was a conflict in the medical evidence regarding appellant's work restrictions and on May 26, 1999 referred appellant to Dr. Gary M. Krulik, a Board-certified orthopedic surgeon. In a report dated June 14, 1999, Dr. Krulik stated:

“[Appellant] appears to have an excellent result secondary to carpal tunnel release surgery. There are no objective findings today. The diagnosis is post carpal tunnel syndrome.... The patient has no signs at present that would indicate that there is objective residual disability. I do not believe that there are any particular job restrictions at this time.”

In a notice of proposed termination dated July 8, 1999, the Office stated that Dr. Krulik's opinion was that of an impartial medical examiner sufficient to resolve the conflict in the medical evidence and constituted the weight of the medical evidence.

By decision dated August 10, 1999, the Office terminated appellant's compensation benefits on the grounds that the residuals of appellant's accepted condition had ceased.

¹ Docket No. 97-106 (issued February 16, 1999).

² The Board noted that, although one of the job requirements was for appellant to write messages based upon incoming telephone calls, the job description contained no indication as to how frequently appellant, whose injury was bilateral carpal tunnel syndrome, might be required to write messages and no opinion from Dr. Marshall as to whether appellant could perform this particular task considering the nature of her employment injury. The Board further noted that in his August 17, 1994 functional capacities report, Dr. Maurer indicated that appellant was not able to perform the position because of her inability to write messages while receiving telephone calls continuously or frequently, only intermittently.

By letter dated August 3, 1999, appellant's attorney requested reconsideration. He stated that the Office erred in stating that Dr. Krulik was an impartial medical examiner who resolved a conflict in the medical evidence. Appellant's attorney stated that the Board had reversed the Office's 1994 termination decision on the grounds that the Office had erred by relying on the opinion of a physician, who had failed to consider the job description submitted by the employing establishment and therefore reversed the finding that appellant refused suitable work; there had been no mention of a conflict in the Board's decision. Appellant's attorney contended that Dr. Krulik's report did not constitute probative, rationalized medical evidence.

In a report dated September 20, 1999, Dr. Maurer, the attending physician, stated that appellant continued to have limitations with regard to her work duties and that she was a candidate for no more than a sedentary job. Dr. Maurer stated:

“Specifically, [appellant] was not able to lift safely greater than 14 pounds from floor to waist on an occasional basis and no more than 7 pounds from waist to an overhead position on an occasional basis. Sitting tolerance was limited to 45 degrees and static standing to 30 minutes. Overhead capabilities were limited to [five] minutes at a time. Clearly, these values are radically different than those which Dr. Krulik found on the basis of his office only examination without any other functional capability testing carried out and I would strongly request that her case be reevaluated. Clearly, she is not able to carry out the previous type of work duties which she performed and she does have ongoing evidence of disability causally related to her employment. I would therefore respectively ask that her lost compensation for wages and disability be reevaluated.”

By decision dated October 3, 2000, the Office denied reconsideration. Appellant again appealed to the Board. In the second appeal, by order dated October 29, 1991, the Board remanded the case to the Office for reconstruction of the case record, to be followed by an appropriate decision to preserve appellant's appeal rights.³

In a report dated October 3, 2003, Dr. Maurer reported that he had examined appellant on that day for bilateral residual carpal tunnel syndrome and median neuropathy. Dr. Maurer noted that appellant had no improvement over the last several years regarding her sensory examination and continued to demonstrate sensory deficits along the median nerve distribution involving the thumb, index, long and half the right finger on both hands. He stated that appellant had persistent numbness and paresthesias. He concluded that appellant had a bilateral upper extremity impairment of 26 percent due to sensory deficit and weakness.

By decision dated December 22, 2003, the Office conducted a merit review and denied modification of its prior decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has a disabling condition

³ Docket No. 00-737 (issued October 29, 2001).

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

causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.⁵ The Federal Employees' Compensation Act at section 8123(a) provides that, 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. It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

ANALYSIS

The Office did not meet its burden in the present case. The Board finds that the Office improperly terminated appellant's compensation based on the opinion of Dr. Krulik. The Office granted Dr. Krulik's report special weight as that of the impartial medical examiner and found that appellant no longer had any residuals of her accepted bilateral carpal tunnel syndrome. At the time that the Office referred appellant to Dr. Krulik, May 6, 1999, it did so on a premise that a conflict existed in the medical evidence regarding appellant's work restrictions. The report of Dr. Marshall, the Office's second opinion physician, dated December 23, 1993 which delineated appellant's work restrictions was over five years old. Medical evidence which is over two years old, however, is not considered probative medical evidence regarding appellant's work restrictions.⁷ At the time appellant was referred to Dr. Krulik there was no current medical evidence of record because the Office's decision terminating appellant's benefits for refusal of suitable work was only overturned by the Board on February 16, 1999. Therefore, at the time the Office referred appellant to Dr. Krulik and terminated appellant's compensation benefits based upon a finding of no work-related residuals no conflict existed in the medical evidence. Dr. Krulik's report is therefore not entitled to weight as that of the impartial medical specialist.

Subsequent to the termination of benefits appellant did submit several reports from his treating physician, Dr. Maurer, which supported a finding of continued residuals of the accepted bilateral carpal tunnel syndrome. Therefore, at the time of the Office's last merit decision on December 22, 2003 an unresolved conflict existed in the medical evidence as to whether appellant had residuals of the accepted condition. The Office therefore did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that her residuals had ceased.

⁵ *Id.*

⁶ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁷ *See Keith Hanselman*, 42 ECAB 680 (1991).

CONCLUSION

The August 10, 1999 and December 22, 2003 decisions are hereby reversed.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 1999 decision of the Office of Workers' Compensation Programs terminating appellant's compensation benefits and the December 22, 2003 decision denying modification are reversed.

Issued: September 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member