

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

FRANCIS P. BREWER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Reading, MA, Employer**

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**Docket No. 05-1312
Issued: December 1, 2005**

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 31, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 22, 2005 merit decision, concerning the termination of his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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 effective January 26, 2004 on the grounds that he no longer had residuals of his December 10, 2002 employment injury after that date.

FACTUAL HISTORY

On December 10, 2002 appellant, then a 52-year-old mail carrier, filed a traumatic injury claim alleging that he sustained an injury when he was holding a heavy mail tub which fell off a stool. The Office accepted that he sustained a biceps rupture of his left elbow and paid

appropriate compensation for periods of disability.¹ On December 23, 2002 appellant underwent a surgical repair of his left biceps rupture which was performed by Dr. John W. Zimmer, an attending Board-certified orthopedic surgeon. The results of electromyogram (EMG) and nerve conduction testing performed on April 22, 2003 revealed no evidence of neurological deficit or peripheral nerve injury of the left upper extremity.

The Office referred appellant and the case record to Dr. Mordechai Kamel, a Board-certified orthopedic surgeon, for an examination and evaluation of whether he had disabling residuals of his December 10, 2002 employment injury.

In a report dated June 24, 2003, Dr. Kamel stated that examination of appellant exhibited full range of motion of both elbows with complaints of tingling in the radial fingertips upon extension. He had a positive Tinel's sign over the left posterior interosseous nerve. Dr. Kamel diagnosed ruptured left distal biceps tendon, status postrepair and left posterior interosseous nerve entrapment or neuropraxia secondary to the first diagnosis. He stated that appellant was able to return to limited-duty work, at least on a part-time basis and possibly on a full-time basis, with marked limitation of lifting with the left arm.² Dr. Kamel indicated that he required further neurological consultation and noted, "[Appellant] continues to have marked weakness and muscle wasting secondary to the surgery and secondary to the pain in the forearm."³

In several notes produced between July and September 2003, Dr. Steven Barrett, an attending Board-certified family practitioner, indicated that appellant remained totally disabled due to his December 10, 2002 employment injury, stating, "He has chronic disabling left arm pain due to work-related injury and is further disabled by the side-effects of the necessary medication for treatment." In a report dated July 14, 2003, Dr. Barrett noted that appellant continued to complain of pain and a burning sensation in his left arm from the antecubital fossa to the hand. He stated that appellant possibly had left median neuritis or slight median nerve irritation under the area of the Lacerates fibrosis, a location which was close to the area of the biceps tendon surgery.

The Office found a conflict of medical opinion between Dr. Barrett and Dr. Kamel and referred appellant to Dr. Robert R. Pennell, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding whether he had disabling residuals of his December 10, 2002 employment injury.

In a report dated September 24, 2003, Dr. Pennell diagnosed traumatic rupture of the left distal biceps tendon, status post surgical repair of the left biceps tendon with excellent result and multiple somatic complaints without organic cause. He indicated that the first two diagnoses were employment related, but the last diagnosis was not. Dr. Pennell noted that several

¹ Appellant stopped work on December 10, 2002.

² In an accompanying form report, Dr. Kamel indicated that appellant could not lift, push or pull more than five pounds.

³ In a report dated June 9, 2003, Dr. Manoucher S. Shirazi, a Board-certified orthopedic surgeon, who performed an evaluation for the employing establishment, indicated that appellant could perform limited-duty work with no lifting more than 15 pounds with his left arm.

physicians had demonstrated that appellant had “made a 100 percent full recovery from the injury and surgery to his left elbow.” He stated that his examination showed no objective evidence of any ongoing disability or impairment and noted that testing, including grip strength testing, showed several inconsistencies in the findings and indicated that a review of the medical evidence showed that he repeatedly changed the location of his pain complaints. Dr. Pennell indicated that appellant could return to his regular full-time work and stated that “it is not necessary to impose any work limitations as a result of any injury he might have suffered at work on December 10, 2002.” He noted:

“In my opinion, [appellant] would reasonably have been totally disabled from December 10, 2002 until February 12, 2003. He then would have had a diminishing partial disability from February 12 until May 27, 2003. All of that disability would have been the result of his work accident of December 10, 2002.

“In my opinion, all testing, evaluation and treatment between December 10, 2002 and May 27, 2003 was reasonable and necessary and related to the work accident of December 10, 2002. All subsequent testing, evaluation and treatment was neither reasonable, nor necessary, nor related to the work accident of December 10, 2002.”⁴

By letter dated November 26, 2003, the Office advised appellant that it proposed termination of his compensation based on the opinion of the impartial medical specialist, Dr. Pennell. The Office provided him with an opportunity to present evidence and argument if he disagreed with the proposed action.

Appellant argued that he continued to have residuals of the December 10, 2002 employment injury and submitted a December 12, 2003 letter in which Dr. Barrett disagreed with Dr. Pennell’s opinion and noted that appellant’s continuing left elbow and forearm pain was employment related despite the lack of a specific diagnosis.

By decision dated January 26, 2005, the Office terminated appellant’s compensation on the grounds that he had no residuals of his December 10, 2002 employment injury after that date. The Office based its termination on the opinion of the impartial medical specialist, Dr. Pennell.

Appellant submitted a December 11, 2003 note in which Dr. Walter Panis, an attending physician Board-certified in physical medicine and rehabilitation, disagreed with Dr. Pennell’s opinion and stated that appellant had a complex regional pain syndrome “as the result of a work injury.” He submitted numerous medical reports detailing the treatment of his left arm problems as well as documents which had previously been considered by the Office.

Appellant also submitted an April 20, 2004 report in which Dr. Barrett discussed the history of the treatment of his left arm condition. He indicated that appellant’s pain quality was consistent with that caused by a nerve injury and stated that it could be difficult to find objective evidence for such injuries. Dr. Barrett noted that his symptoms had been consistent over time and stated, “It is also clear to me that [appellant’s] problems are all related to his work-related

⁴ The record contains a September 4, 2003 report of EMG testing which showed a mild left ulnar neuropathy.

injury because he was fully functional before that, then sustained an injury at work whose repair clearly placed him at risk for nerve injury and ongoing pain.”⁵

Appellant requested a hearing before an Office hearing representative which was held on November 30, 2004. He argued that several physicians had provided opinions that his left arm condition continued to be due to his December 10, 2002 employment injury.

By decision dated and finalized February 22, 2005, the Office hearing representative affirmed the Office’s January 26, 2004 decision, finding that the Office properly terminated appellant’s compensation effective January 26, 2004.⁶

LEGAL PRECEDENT

Under the Federal Employees’ Compensation Act,⁷ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁸ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹ The Office’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

Section 8123(a) of the Act provides in pertinent 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.”¹¹ In situations where 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.¹²

⁵ Appellant also submitted a page from a March 17, 2004 report, but the report was incomplete and unsigned.

⁶ The Office hearing representative indicated that appellant submitted additional evidence after the proper termination of compensation, which created a new conflict in the medical evidence and required further development concerning whether he continued to have employment-related residuals. The Office hearing representative stated that appellant should be referred to a new impartial medical specialist. As this matter is in an interlocutory posture, it is not before the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁹ *Id.*

¹⁰ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹¹ 5 U.S.C. § 8123(a).

¹² *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

The Office properly determined that there was a conflict in the medical opinion between Dr. Barrett, appellant's attending Board-certified family practitioner, and Dr. Kamel, a Board-certified orthopedic surgeon, acting as an Office referral physician, regarding the extent of the residuals due to the December 10, 2002 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Pennell, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.¹³

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Pennell, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹⁴ The September 24, 2003 report of his establishes that appellant had no disability due to his December 10, 2002 employment injury after January 26, 2004.

In a September 24, 2003 report, Dr. Pennell diagnosed traumatic rupture of the left distal biceps tendon, status post surgical repair of the left biceps tendon with excellent result and multiple somatic complaints without organic cause. He indicated that the first two diagnoses were employment related, but the last diagnosis was not. Dr. Pennell noted that appellant could return to his regular full-time work and stated that, "it is not necessary to impose any work limitations as a result of any injury he might have suffered at work on December 10, 2002." He further indicated that all the need for treatment after May 2003 was not related to the December 10, 2002 employment injury."¹⁵

The Board has carefully reviewed the opinion of Dr. Pennell and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹⁶ Dr. Pennell provided medical rationale for his opinion by explaining that his examination showed no objective evidence of any ongoing disability or impairment related to the December 10, 2002 employment injury.¹⁷ He accounted for the extent of appellant's complaints by indicating that testing, including grip strength testing, showed several inconsistencies in the

¹³ See *supra* note 7 and accompanying text.

¹⁴ See *supra* note 8 and accompanying text.

¹⁵ The record contains a September 4, 2003 report of EMG testing which showed a mild left ulnar neuropathy.

¹⁶ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁷ The record contains a September 4, 2003 report of EMG testing which showed a mild left ulnar neuropathy, but there is no indication that this finding was due to an employment-related condition. The record also contains the results of April 22, 2003 EMG testing which revealed no evidence of neurological deficit or peripheral nerve injury of the left upper extremity.

findings and by noting that a review of the medical evidence showed that appellant repeatedly changed the location of his pain complaints.¹⁸

For these reasons, the Office properly terminated appellant's compensation, effective January 26, 2004, based on the opinion of Dr. Pennell.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation, effective January 26, 2004, on the grounds that he no longer had residuals of his December 10, 2002 employment injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 22, 2005 decision is affirmed.

Issued: December 1, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ Appellant submitted a December 12, 2003 letter in which Dr. Barrett indicated that he disagreed with Dr. Pennell's opinion and that he felt that appellant's continuing left elbow and forearm pain was employment related despite the lack of a specific diagnosis. However, this report reiterates Dr. Barrett's previously stated opinion on his continuing employment-related residuals and is insufficient to overcome the opinion of the impartial medical specialist or create a new conflict as he was on the side of the conflict that the impartial medical specialist resolved. *See William Morris*, 52 ECAB 400, 404 (2002).