

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

BARBARA J. MURATORE, Appellant

and

**DEPARTMENT OF AGRICULTURE,
INSPECTIONS OPERATIONS PROGRAM,
Athens, GA, Employer**

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**Docket No. 06-416
Issued: June 5, 2006**

Appearances:
Barbara J. Muratore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 12, 2005 appellant filed a timely appeal from September 18 and November 8, 2005 merit decisions of the Office of Workers' Compensation Programs denying modification of a decision terminating her compensation benefits. Appellant also appealed a November 22, 2005 decision which denied further merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 21, 2004; (2) whether appellant established that she had any continuing disability after July 21, 2004; and (3) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On April 13, 2001 appellant, then a 52-year-old biological science laboratory technician, filed an occupational disease claim alleging that she developed right ulnar nerve entrapment while performing repetitive work in the performance of duty. The Office accepted the claim for right ulnar nerve entrapment and authorized an ulnar nerve transposition which was performed on June 26, 2001. Appellant stopped work on April 9, 2001 and returned to part time four hours a day light duty in November 2001. She stopped work again in January 2002.

Appellant came under the care of Dr. Daniel D. Moyer, a Board-certified orthopedic surgeon, who treated her from March 8, 2001 to January 7, 2002 for pain in her right arm secondary to an ulnar nerve entrapment of the elbow. This condition was caused by repetitious use of her hands at work, noting that appellant capped 1,000 test tubes daily. In a report dated July 31, 2001, Dr. Moyer noted that nerve conduction tests were normal; however, appellant continued to complain of aching in her right hand. He opined that appellant had numerous psychiatric problems. Dr. Moyer advised that appellant failed to respond to conservative treatment and on September 26, 2001 he performed a right ulnar nerve transposition. On November 20, 2001 he returned appellant to light-duty work four hours a day for two weeks gradually increasing to eight hours per day. On January 7, 2002 Dr. Moyer advised that appellant returned to work; however, she was unable to perform her job. He recommended vocational rehabilitation. A functional capacity evaluation of February 26, 2002 indicated that appellant would not be able to complete greater than 13 minutes of continuous repetitive work activities without multiple rest breaks. In reports dated August 26 and September 16, 2002, Dr. Moyer opined that appellant's right ulnar nerve entrapment had resolved.¹

On November 22, 2002 the Office issued a notice of proposed termination of compensation and medical benefits on the grounds that Dr. Moyer found that the accepted condition had resolved.

Appellant submitted reports from Dr. Mark A. Ellis, a Board-certified anesthesiologist, dated September 13 to November 29, 2002. He noted a history of appellant's work-related condition of ulnar nerve entrapment. Dr. Ellis diagnosed reflex sympathetic dystrophy. He opined that appellant could return to work subject to various lifting and reaching restrictions.

By decision dated December 30, 2002, the Office terminated appellant's compensation benefits effective that day. It found that the weight of the medical evidence established that she had no continuing disability or residuals from her accepted employment injury.

In a letter dated January 16, 2003, appellant requested an oral hearing before an Office hearing representative. The hearing was held on August 19, 2003. Appellant submitted reports

¹ On April 11, 2002 appellant was referred for vocational rehabilitation. A rehabilitation counselor developed a rehabilitation plan on August 6, 2002. The counselor proposed training for a research assistant or a biological aide and advised that appellant could begin classes at Athens Technical College in September 2002. The counselor noted that Dr. Moyer supported appellant participating in vocational rehabilitation prior to entering the job market. In a letter dated September 10, 2002, the Office approved the vocational rehabilitation-training plan for appellant.

from Dr. Ellis dated January 8 to March 7, 2003. He opined that appellant's symptoms were the result of the development of complex regional pain symptoms (also known as reflex sympathetic dystrophy) affecting the ulnar nerve and were due to the ulnar nerve transposition surgery appellant underwent for the accepted ulnar nerve entrapment. In an August 25, 2003 report, Dr. Frank McDonald, a Board-certified neurologist, opined that appellant developed complex regional pain syndrome in the right arm due to a work-related injury.

In a decision dated December 3, 2002, the hearing representative reversed the December 30, 2002 termination decision and remanded the case for further development. The hearing representative found that Dr. Ellis' reports raised an uncontroverted inference that the diagnosed condition of reflex sympathetic dystrophy was consequential to the accepted work-related injury and surgery. The hearing representative instructed the Office to refer appellant for a second opinion examination to determine the causal relationship of the reflex sympathetic dystrophy condition to her accepted injury.

On January 28, 2004 the Office referred appellant to Dr. Charles Nicol, a Board-certified neurologist, for a second opinion evaluation. In a report dated February 11, 2004, Dr. Nicol reviewed the medical records provided and examined appellant. He diagnosed status postsurgery for a right ulnar neuropathy. Dr. Nicol noted an essentially normal neurological examination and advised that there was no clinical evidence to support the diagnosis of reflex sympathetic dystrophy. He opined that there was a large psychological overlay to appellant's symptoms and that her anxiety and depressive neurosis should be evaluated and treated.

The Office found a conflict in the medical opinion between Dr. Ellis, the treating physician, who attributed the reflex sympathetic dystrophy condition as a consequence to the ulnar nerve surgery, and Dr. Nicol, the Office referral physician, who determined that appellant did not have reflex sympathetic dystrophy and opined that her symptoms were not work related but of an undetermined psychological origin.

Appellant submitted attending physicians' reports from Dr. Ellis dated January 9 and February 9, 2004 who repeated his diagnosis of the right upper extremity and noted with a checkmark "yes" that the condition was caused or aggravated by an employment activity. Also submitted was an attending physician's report from Dr. Moye dated January 12, 2004 who diagnosed entrapment of the right ulnar nerve and noted with a checkmark "yes" that this condition was caused or aggravated by repetitive activities.

To resolve the conflict, the Office referred appellant to Dr. Stella I. Tsai, a Board-certified neurologist selected as the impartial medical specialist. In a report dated May 3, 2004, she reviewed the records provided and examined appellant. She noted a history of appellant's work-related injury and listed her complaint of right elbow and forearm pain. She noted findings upon physical examination of no atrophy of the upper extremities, negative Tinel's sign, negative Phalen's test, normal cranial nerve examination, normal motor examination, no cog wheeling, rigidity or tremor, sensory examination was normal with intact to pin, position and light, negative Romberg's test, and cerebellar examination was normal. Dr. Tsai diagnosed complaints of right arm pain with normal neurological examination as well as some nonphysiological findings indicating lack of patient effort. She noted the diagnosis of regional pain syndrome was controversial without specific testing to diagnose the disorder. Dr. Tsai found no physical

evidence in terms of swelling or skin changes. The diagnosis of regional pain syndrome was based only on the component of pain superimposed on a patient with a number of pain syndromes in the past. Dr. Tsai advised that appellant's history was not consistent with reflex sympathetic dystrophy noting there was no significant physical trauma. Dr. Tsai opined that appellant's diagnosis of arm pain was of unknown etiology superimposed on other musculoskeletal problems without evidence clinically or by report of right ulnar neuropathy or other neurological deficits. Dr. Tsai opined that other possible etiologies for appellant's condition were not employment related and would include a right medial cord lesion of the brachial plexus, or a right C8-T1 radiculopathy. She advised that appellant did not need any further treatment given the lack of physical findings.

On June 18, 2004 the Office issued a notice of proposed termination of compensation on the ground that Dr. Tsai's report established no residuals of the work-related employment injury and determined that appellant did not have reflex sympathetic dystrophy.

Appellant submitted a statement dated July 12, 2004 asserting that she still had residuals of her work-related injury which was supported by Dr. Moye's report of January 12, 2004. Appellant submitted range of motion testing dated June 17 and 24, 2004 performed by a physical therapist. Also submitted was a pamphlet detailing reflex sympathetic dystrophy.

By decision dated July 21, 2004, the Office terminated appellant's compensation benefits effective that day, finding that the weight of the medical evidence established that she had no continuing disability or residuals resulting from her accepted employment injury.

By letters dated May 28 and June 4, 2005, appellant requested reconsideration and submitted additional medical evidence. In letters dated August 21 and September 17, 2005, she asserted that she had residuals of her accepted work-related condition of ulnar nerve entrapment. Appellant submitted reports from Dr. Jon S. Poling, a Board-certified neurologist, dated June 26 to August 9, 2004. He obtained an August 9, 2004 electromyogram (EMG) study which revealed a slight right ulnar nerve elbow entrapment. Reports from Dr. Ellis dated August 16, 2004 and June 29, 2005 advised that appellant sustained a four percent permanent impairment of the right arm.² Other reports from Dr. Ellis, dated August 16, 2004 to March 3, 2005, noted appellant's complaints of right arm pain with stiffness and diagnosed reflex sympathetic dystrophy of the right upper extremity, acute cervical strain and depression. On June 29, 2005 he opined that appellant's symptoms were the result of the development of complex regional pain symptoms affecting the ulnar nerve directly related to the ulnar nerve transposition surgery which was performed to correct the work-related ulnar nerve entrapment.

In a September 18, 2005 decision, the Office denied modification of the July 21, 2004 decision.

By letter dated October 13, 2005, appellant requested reconsideration and submitted a September 25, 2005 report from Dr. Ellis. He repeated the diagnosis of complex regional pain syndrome related to the ulnar nerve transposition surgery. Dr. Ellis opined that appellant's condition was permanent and would not improve.

² No issue pertaining to a schedule award is presently before the Board.

By decision dated November 8, 2005, the Office denied modification of the September 18, 2005 decision.

In a letter dated November 12, 2005, appellant requested reconsideration and asserted that Dr. Poling's report of August 9, 2004 supported her contention that she had residuals of her accepted of ulnar nerve entrapment. Appellant submitted duplicate reports from Dr. McDonald dated August 25, 2003, Dr. Ellis dated January 9, 2004, Dr. Moye dated January 12, 2004 and Dr. Poling dated August 9, 2004.

By decision dated November 22, 2005, the Office denied appellant's reconsideration request on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ 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.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁵

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right ulnar nerve entrapment for which she underwent surgery on June 26, 2001. The Office determined that a conflict in medical opinion arose between her attending physician, Dr. Ellis, a Board-certified anesthesiologist, and the Office referral physician, Dr. Nicol, a Board-certified neurologist. The hearing representative noted that Dr. Ellis diagnosed reflex sympathetic dystrophy as a consequence of the June 26, 2001 surgery. Dr. Nicol did not support the diagnosis and reported a normal neurological examination.⁶ Consequently, the Office properly referred appellant to Dr. Tsai to resolve the conflict.⁷

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁶ 5 U.S.C. § 8123(a), in pertinent part, provides: "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."

⁷ The Office initially referred appellant to a Dr. John Paul to resolve the medical conflict. However, Dr. Paul refused to conduct the requested examination. Thus, the Office properly referred appellant to Dr. Tsai.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁸

In a May 3, 2004 report, Dr. Tsai reviewed the case record, the statement of accepted facts, and the reports of Dr. Ellis and Dr. Nicol. She examined appellant thoroughly and related her clinical findings. Dr. Tsai noted findings upon physical examination, including no atrophy of the upper extremities, negative Tinel's sign, negative Phalen's test, normal cranial nerve examination, normal motor examination, normal sensory examination and a normal cerebellar examination. She diagnosed complaints of right arm pain with normal neurological examination as well as some nonphysiological findings indicating lack of patient effort. Dr. Tsai advised that appellant's history was not consistent with reflex sympathetic dystrophy noting there was no significant physical trauma and no physical evidence of the classical syndrome in terms of swelling and skin changes. She opined that appellant's diagnosis of arm pain was of unknown etiology superimposed on other musculoskeletal problems without clinical evidence of right ulnar neuropathy or other neurological deficits. Dr. Tsai opined that appellant did not require any further treatment for reflex sympathetic dystrophy given the lack of physical findings and that other possible causes of her symptoms were not employment related. The Board finds that the report of Dr. Tsai is well rationalized and represents the special weight of medical opinion.

After issuance of the pretermination notice, appellant submitted range of motion testing dated June 17 and 24, 2004 performed by a physical therapist. However, the Board has noted that a physical therapist is not a physician as defined under the Federal Employees' Compensation Act.⁹ Therefore, these reports are of no probative medical value. Appellant also submitted pamphlets on reflex sympathetic dystrophy. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.¹⁰ Appellant submitted a January 12, 2004 form report from Dr. Moye who listed the diagnosis for which he treated appellant. He indicated that her disability had lasted until November 20, 2001 when she was advised she could perform light-duty work. Dr. Moye noted that her care was transferred to Dr. Ellis. This report merely addressed Dr. Moye's prior treatment of appellant and does not address any disability beyond January 7, 2002.

The Board finds that the opinion of Dr. Tsai is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related condition ceased and that appellant did not have reflex sympathetic dystrophy. She reviewed the entire case record and statement of accepted facts and had

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

⁹ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

¹⁰ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

examined appellant. At the time benefits were terminated she clearly opined that appellant had no residuals or disability attributable to her accepted conditions. Her opinion as set forth in her report of May 3, 2004 is found to be probative evidence and reliable. The Board finds that Dr. Tsai's opinion represents the weight of the medical evidence and is sufficient to justify the Office's termination of all benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant.¹¹

To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹²

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that she has any continuing residuals of her ulnar nerve entrapment causally related to her accepted employment injuries on or after July 21, 2004.

Appellant submitted reports from Dr. Poling dated June 26 to August 9, 2004, including an EMG study which revealed a slight right ulnar nerve elbow entrapment. However, Dr. Poling did not specifically address how this finding was causally related to the accepted employment injury. Therefore, these documents are insufficient to meet appellant's burden of proof.

Other reports from Dr. Ellis dated August 16, 2004 and June 29, 2005 advised that appellant sustained a four percent permanent impairment of the right arm. However, Dr. Ellis did not specifically address how any continuing condition or permanent impairment was causally related to the accepted employment injury. Reports from Dr. Ellis, dated August 16, 2004 to March 3, 2005, noted appellant's complaints of worsening right arm pain and stiffness and diagnosed reflex sympathetic dystrophy of the right upper extremity, acute cervical strain and depression. On June 29, 2005 the physician opined that appellant's symptoms were the result of the development of complex regional pain syndrome affecting the ulnar nerve and was directly

¹¹ *Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004).

¹² *See Connie Johns*, 44 ECAB 560 (1993); *James Mack*, 43 ECAB 321 (1991).

related to the work-related ulnar nerve transposition surgery. However, the Office never accepted that appellant sustained complex regional pain syndrome as a result of her work injury and there is no medical rationalized evidence to support such a conclusion.¹³ Therefore, these documents are insufficient to meet appellant's burden of proof. Moreover, his reports did not include a rationalized opinion regarding the causal relationship between appellant's current condition and her accepted conditions.¹⁴ Dr. Ellis' reports are similar to his prior reports and, as he was on one side of the conflict that Dr. Tsai resolved, his reports are insufficient to overcome that of Dr. Tsai or to create a new medical conflict.¹⁵

None of the reports submitted by appellant after the termination of benefits included a rationalized opinion regarding the causal relationship between her current condition and her accepted work-related injury of March 5, 2001. Therefore, the Board finds that the reports from Drs. Poling and Ellis are insufficient to overcome that of Dr. Tsai or to create a new medical conflict.

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Federal Employees' Compensation Act,¹⁶ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹⁷ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the [Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹⁸

¹³ See *Alice J. Tysinger*, *supra* note 3.

¹⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁵ See *Howard Y. Miyashiro*, 43 ECAB 1101, 115 (1992).

¹⁶ 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b).

¹⁸ 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 3

Appellant's November 12, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

Appellant's request for reconsideration asserted that Dr. Poling's report of August 9, 2004 supported her contention that she had residuals of her work-related condition of ulnar nerve entrapment. However, appellant's letter did not show how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted reports from Dr. McDonald dated August 25, 2003, Dr. Ellis dated January 9, 2004, Dr. Moye dated January 12, 2004 and Dr. Poling dated August 9, 2004. However, these reports are duplicative of prior reports already contained in the record and were previously considered by the Office.¹⁹ Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her November 12, 2005 request for reconsideration.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate benefits effective July 21, 2004. The Board further finds that appellant failed to establish that she had any continuing disability after July 21, 2004.²⁰ Finally, the Board finds that the Office properly denied appellant's request for reconsideration.

¹⁹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

²⁰ With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and 8 and September 18, 2005 are affirmed.

Issued: June 5, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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