

compensation for periods of disability. In May and July 2001, appellant underwent surgical procedures, which included shortening of both ulna bones, debridement of his right wrist joint and debridement of partial scapholunate tears and triangular fibrocartilagenous cartilage complex tears in both wrists. In April 2002, he had surgical hardware removed from both wrists. By decision dated July 25, 2003, the Office granted appellant a schedule award for a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm.

By decision dated December 15, 2003, the Board issued a decision setting aside the Office's schedule award determination and remanding the case for further development.¹

On remand the Office referred appellant to Dr. Anthony Fenison, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding the extent of the permanent impairment of his upper extremities.² In a report dated March 24, 2004, Dr. Fenison concluded that appellant had no more than a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm based on "slight loss of the wrist range of motion."³ On April 14, 2004 an Office medical adviser reviewed the findings of Dr. Fenison and determined that appellant had a four percent impairment of his right arm due to limited radial and lunar deviation of his right wrist.

By decision dated May 6, 2004, the Office determined that appellant did not establish that he had more than a four percent impairment of his right arm and a three percent impairment of his left arm, for which he received a schedule award. By decision dated and finalized March 4, 2005, an Office hearing representative affirmed the Office's May 6, 2004 decision.⁴

¹ Docket No. 03-1994 (issued December 15, 2003). The Board found that the Office properly determined that there was a conflict in the medical evidence regarding appellant's upper extremity impairment between Dr. Vermon S. Esplin, an attending Board-certified orthopedic surgeon, and Dr. Hugh Macaulay, a Board-certified orthopedic surgeon, who served as an Office medical adviser. The Board noted, however, that there were deficiencies in the evaluation of Dr. Robert P. Hanson, Jr., a Board-certified orthopedic surgeon, who served as an impartial medical specialist and remanded the case for referral to another impartial medical specialist.

² Section 8123(a) of the Federal Employees' Compensation 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. 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

³ Dr. Fenison reported findings for range of motion testing of appellant's elbows, wrist and fingers. He stated that appellant had grip strength findings of 110, 115 and 115 pounds on the right and findings of 125, 120 and 120 pounds on the left. Dr. Fenison concluded that he lost 25 percent of his preinjury grip strength capacity.

⁴ By decision and order dated September 7, 2005, the Board determined that there were deficiencies in the Office's evaluation of the permanent impairment of appellant's upper extremities and set aside the Office's May 6, 2004 and March 4, 2005 decisions. The Board remanded the case to the Office for further development and the issuance of an appropriate decision. At the time appellant filed the present appeal on September 13, 2005, the issue of his entitlement to schedule award compensation was interlocutory and, therefore, this matter is not currently before the Board. See 20 C.F.R. § 501.2(c) (providing that the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

In May 2004, the Office requested that Dr. Fenison provide an opinion regarding whether appellant could perform the sandblaster position he held when he filed his occupational disease claim. The Office attached a description of the position which indicated that the position involved the sandblasting of metal parts and components in order to prepare them for electro-brush painting and other processes. The physical requirements included active lifting, holding and carrying of up to 65 pounds (and greater weight with assistance) and holding a blasting nozzle with 40 pounds pressure. The position also required manually scrubbing and scraping surfaces clean with a fiber or wire brush, cleaning and stenciling wingfolds, operating a forklift and uncrating products and loading them onto carts and trailers.

In a report dated October 16, 2004, Dr. Fenison noted that he had reviewed his March 24, 2004 report and stated:

“After reviewing the position of a sandblaster, I do believe that this patient could return to his usual and customary duties. It appears that the heaviest item this patient is asked to lift or carry is 65 pounds and he must be able to withstand approximately 40 pounds of pressure while performing the painting/blasting activities. When I examined the patient, his overall grip strength was approximately 110 pounds for the right side and 120 pounds for the left side; therefore, there is no reason that he could not lift or manipulate the device that is used for his painting/sandblasting activities. It is my overall orthopedic opinion that he could return to his previous occupation.”

In a report dated October 11, 2004, Dr. Rita B. Bermudez, an attending Board-certified physical medicine and rehabilitation physician, indicated that examination revealed tenderness to palpation over the ulnar forearms and elbows and decreased sensation over the right little and ring fingers. She diagnosed chronic bilateral wrist pain with tenosynovitis and ulnar neuropathy.

In a report dated June 8, 2005, Dr. Bermudez noted that examination revealed tenderness to palpation over the mid palms and the ulnar nerve at the cubital grooves and decreased sensation to pinwheel pricks over the little fingers bilaterally. She again diagnosed chronic bilateral wrist pain with tenosynovitis and ulnar neuropathy. In a form report dated June 8, 2005, Dr. Bermudez indicated that appellant could only occasionally lift 20 pounds and frequently lift 10 pounds, that he could not perform forceful pushing or pulling, that he could only engage in repetitive wrist or elbow motion for 4 hours per day and that he could only operate a motor vehicle for 4 hours per day.

By notice dated July 6, 2005, the Office advised appellant of its proposed termination of his compensation for wage loss and medical benefits. It asserted that the opinion of Dr. Fenison showed that he no longer had residuals of his accepted employment injuries. The Office provided appellant 30 days to respond to the proposed termination of his compensation.

Appellant argued that the opinion of Dr. Bermudez established that he continued to have residuals of his accepted employment injuries and could not perform the sandblaster job. He submitted a July 19, 2005 report in which Dr. Bermudez indicated that he could not return to his regular work.

By decision dated August 8, 2005, the Office terminated appellant's compensation, effective September 3, 2005, on the grounds that he no longer had residuals of his employment injuries after that date.

LEGAL PRECEDENT

Under the Act,⁵ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁶ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS

The Office accepted that appellant sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand and wrist and authorized several surgical procedures including shortening of both ulna bones, debridement of the right wrist joint and debridement of partial scapholunate tears and triangular fibrocartilagenous cartilage complex tears in both wrists.⁹ By decision dated August 8, 2005, the Office terminated appellant's compensation based on the opinion of Dr. Fenison, a Board-certified orthopedic surgeon, who served as an Office referral physician with respect to the issue of whether appellant continued to have residuals of his employment injuries because there was no conflict in the medical evidence regarding this matter at the time the case was referred to him in October 2004.¹⁰

The Board finds that there is a conflict in the medical evidence between Dr. Fenison, the government physician, and Dr. Bermudez, an attending Board-certified physical medicine and rehabilitation physician, regarding whether appellant continued to have residuals of his employment injury which prevented him from performing the sandblaster position he held when he filed his claim.¹¹

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁷ *Id.*

⁸ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ At the time he filed his claim, appellant was working as a sandblaster, a position which required active lifting, holding and carrying of up to 65 pounds (and greater weight with assistance) and holding a blasting nozzle with 40 pounds pressure. In addition to operating a sandblaster, the position required manually scrubbing and scraping surfaces clean with a fiber or wire brush, cleaning and stenciling wingfolds, operating a forklift and uncrating products and loading them onto carts and trailers.

¹⁰ *See supra* note 2 regarding the circumstances in which a conflict in the medical evidence may be found. Dr. Fenison also served as an impartial medical specialist for the determination of appellant's entitlement to schedule award compensation. For the reasons delineated above, the matter of appellant's entitlement to schedule award compensation is not currently before the Board. *See supra* note 4.

¹¹ *See supra* note 2 regarding the circumstances in which a conflict in the medical evidence may be found.

In a report dated October 16, 2004, Dr. Fenison noted that he had reviewed his March 24, 2004 report and the description of the sandblaster position and stated: "I do believe that this patient could return to his usual and customary duties." He indicated that the heaviest item the position required him to lift or carry was 65 pounds and noted that he was required to withstand approximately 40 pounds of pressure while performing his blasting activities. Dr. Fenison stated that when he examined appellant on March 24, 2004, his overall grip strength was approximately 110 pounds for the right side and 120 pounds for the left side and concluded that there was "no reason that he could not lift or manipulate the device that is used for his painting/sandblasting activities."

In contrast, the record contains reports of Dr. Bermudez which indicate that appellant could not perform the sandblaster position. In a report dated June 8, 2005, she listed work restrictions that would be inconsistent with the duties of the sandblaster position, including a restriction prohibiting appellant from lifting more than 20 pounds on an occasional basis and more than 10 pounds on a frequent basis.¹² In a report dated July 19, 2005, Dr. Bermudez indicated that appellant could not return to his regular work.

The Board finds that, since the Office relied on the opinion of Dr. Fenison to terminate appellant's compensation benefits effective September 3, 2005 without having resolved the existing conflict in the medical evidence, the Office has failed to meet its burden of proof in terminating appellant's benefits.¹³

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective September 3, 2005 on the grounds that he no longer had residuals of his employment injury after that date.

¹² In reports dated October 11, 2004 and June 8, 2005, Dr. Bermudez noted that examination revealed such findings as tenderness to palpation over the ulnar forearms and elbows and decreased sensation over several fingers. She diagnosed chronic bilateral wrist pain with tenosynovitis and ulnar neuropathy.

¹³ See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 8, 2005 decision is reversed.

Issued: May 9, 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