



## **FACTUAL HISTORY**

On April 10, 2003 appellant, then a 45-year-old claims clerk, filed an occupational disease claim alleging injuries to his right shoulder and wrist as a result of his federal employment. The Office accepted his claim for right shoulder tendinitis and right carpal tunnel syndrome. Appellant stopped working on May 26, 2003. On July 26, 2003 appellant accepted a full-time regular-duty position as a contact representative with the Social Security Administration. On December 20, 2003 appellant requested a schedule award.

Appellant submitted a December 2, 2003 attending physician's report from Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, who opined that appellant had a permanent partial disability caused by his employment. He stated that appellant could not perform the duties of a job requiring repetitive motion or heavy lifting. In an unsigned report dated February 16, 2004, Dr. Chmell stated that appellant had a recurrence of numbness and tingling in his hands and experienced pain in his hands and wrists with repetitive usage. The results of his physical examination revealed positive median nerve compression test in both hands; diminished sweating and sensation in median nerve distribution bilaterally; mild atrophy in the thenar area; and cervical spasm and tenderness with impingement at the shoulders with some crepitus. Dr. Chmell diagnosed bilateral carpal tunnel syndrome and multiple tendinitis of the upper extremities.

The Office referred appellant, together with a statement of accepted facts and the entire medical file, to Dr. John Joseph Dwyer, a Board-certified orthopedic surgeon, for a second opinion examination to ascertain the extent of any permanent impairment. On April 23, 2004 appellant submitted a second request for a schedule award.

In a report dated May 20, 2004, Dr. Dwyer stated that appellant had reached maximum medical improvement and provided a diagnosis of resolved soft tissue condition affecting both the right wrist and right shoulder, and a sprain/strain which responded favorably to treatment. He found no objective evidence of disability or impairment related to appellant's right shoulder, wrist or upper extremity and opined that appellant was fit to resume normal occupational duties without restriction. Dr. Dwyer's examination revealed that range of motion of the right and left arms at the shoulder was 175 degrees in abduction, external rotation was 80 degrees, and internal rotation was 80 degrees bilaterally. He found prominent acromioclavicular joints bilaterally, no atrophy of right or left shoulder girdle muscles, and good deltoid and trapezius strength about both upper extremities. Dr. Dwyer determined that grip strength was 3/5 bilaterally, equal and adequate, and that there was full flexion and extension at both shoulders. Median, radial and ulnar nerves were intact and functioning. Impingement and crossover signs were negative. Range of motion of the right hand at the wrist was 75 degrees during dorsiflexion; and 85 degrees during palmer flexion. Rotary movements were complete and the same at both wrists, namely 90 degrees during pronation and 85 degrees during supination. He found no atrophy of the intrinsic muscles of either hand and no distal, ulnar or radial crepitus at either wrist. Dr. Dwyer detected hypersensitivity of the right upper extremity to light touch and deep pressure. Abductor digiti quinti was equal in strength at both fifth fingers and at both index fingers.

By decision dated June 29, 2004, the Office denied appellant's request for a schedule award, based on Dr. Dwyer's May 20, 2004 report.

On July 8, 2004 appellant filed a claim for recurrence of disability commencing June 7, 2004, causally related to his accepted work injury. He stated that the recurrence was caused by "the repetitive motion of fingers and wrists." Appellant experienced pain in his right upper extremity, radiating up and down, that he frequently dropped things and was unable to feel the keys of his computer keyboard.

In an unsigned report dated June 29, 2004, Dr. Chmell opined that appellant had experienced a recurrence of dorsal right wrist pain and swelling. He stated that appellant's pain had progressively become more severe to the point that it was excruciating and occurred whenever he performed keyboarding activity. Dr. Chmell's examination revealed exquisite tenderness to palpation of appellant's right tendon and diminution of the range of motion of the right wrist. Sensation and strength were intact. He provided a diagnosis of tendinitis of the right wrist.

On July 17, 2004 appellant requested an oral hearing on the Office's June 29, 2004 denial of his request for a schedule award.

Appellant submitted an attending physician's report dated July 27, 2004 from Dr. Chmell, who stated that appellant "had prior tendinitis/carpal tunnel which resolved." He provided a diagnosis of tendinitis of the right wrist. In response to the question as to whether there were any permanent effects expected as a result of the current injury, Dr. Chmell answered, "I don't know."

The record contains a position description for a contact representative and a July 22, 2004 notice of termination from employment at the Social Security Administration due to appellant's unsatisfactory job performance.

In a July 30, 2004 letter, the Office advised appellant of the definition of a recurrence of disability and informed him that more information, including a physician's rationalized medical report with a diagnosis, was necessary to establish whether his current disability or medical treatment was related to the accepted injury.

In a September 23, 2004 decision, the Office denied appellant's recurrence claim, finding that the factual and medical evidence provided did not establish that the claimed recurrence resulted from the accepted work injury.

On September 23, 2004 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Dwyer's May 20, 2004 report, which demonstrated no residuals from the accepted employment injury. Appellant was advised that he had 30 days to submit additional evidence or argument.

On October 12, 2004 appellant submitted a request for review of the written record. In support of his request, appellant submitted a September 7, 2004 "Final Report" from Dr. James

Baker, a treating physician, who provided a diagnosis of tendinitis. In a report dated November 12, 2004, Dr. Chmell stated that appellant demonstrated marked swelling, tenderness, crepitus and diminished excursion of the tendons of the right wrist. Dr. Chmell further indicated that “with his work activities of repetitive usage of the right wrist, his condition of carpal tunnel syndrome and tendinitis deteriorated,” and that as of his most recent examination on September 7, 2004, appellant was unable to perform the activities of his regular job, which required repetitive and moderately strenuous usage of his right hand and wrist. Appellant submitted an unsigned July 27, 2004 report from Dr. Chmell, who again provided a diagnosis of tendinitis, right wrist. He also provided unsigned occupational therapy notes dictated by Nika Porter and previously submitted reports from Dr. Chmell.

By decision dated January 25, 2005, the Office finalized the termination of appellant’s compensation and medical benefits effective that date, finding there were no residuals from the accepted employment injury.

At a March 17, 2005 hearing, appellant testified that, in lieu of returning to a full-time limited-duty position available to him at the employing establishment, on or about July 23, 2003 he accepted a regular-duty position with the Social Security Administration, which involved extensive use of his right upper extremity.

By decision dated July 25, 2005, the Office hearing representative affirmed the Office’s June 29, 2004 denial of appellant’s request for a schedule award, finding that there was no evidence of record demonstrating that appellant had any permanent partial impairment of his right upper extremity related to accepted employment-related conditions.

By decision dated July 25, 2005, the Office hearing representative also affirmed the Office’s September 23, 2004 decision denying appellant’s claim for a recurrence of disability, finding that the evidence failed to establish a causal relationship between appellant’s current condition and his accepted employment injury.

### **LEGAL PRECEDENT -- ISSUE 1**

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability, and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>1</sup>

Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to

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<sup>1</sup> *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

The factual and medical evidence does not establish a recurrence of disability beginning June 6, 2004 related to the accepted April 10, 2003 work injury. Appellant testified that in lieu of returning to a full-time limited-duty position available to him at the employing establishment, on or about July 23, 2003, he accepted a regular-duty position with the Social Security Administration, which involved extensive use of his right upper extremity. He alleged that the repetitive duties of his regular-duty position caused a recurrence of his accepted condition. Appellant did not contend that his inability to work was caused by a spontaneous change in his medical condition. Rather, he claims that the repetitive nature of his new employment duties caused the worsening of his condition. By definition, appellant has not sustained a recurrence of disability.

In the Office's July 30, 2004 letter, the Office advised appellant of the definition of a recurrence of disability and informed him that more information, including a physician's rationalized medical report with a diagnosis, was necessary to establish whether his current disability or medical treatment was related to the accepted injury. In a June 19, 2004 report, Dr. Chmell opined that appellant had experienced a recurrence of dorsal right wrist pain and swelling, and stated that his pain occurred whenever he performed keyboarding activity. In a November 12, 2004 report, he indicated that "with his work activities of repetitive usage of the right wrist, [appellant's] condition of carpal tunnel syndrome and tendinitis deteriorated" and that he was unable to perform the activities of his regular job, which required repetitive and moderately strenuous usage of his right hand and wrist. Dr. Chmell did not opine that appellant had experienced a spontaneous change in his medical condition. Rather, he attributed the deterioration of appellant's condition to new exposure to the repetitive duties of his position with the Social Security Administration.

The Board finds that appellant failed to establish that he sustained a recurrence of disability effective June 6, 2004, causally related to his accepted employment injury.

### **LEGAL PRECEDENT -- ISSUE 2**

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>3</sup>

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<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> See *Kathryn E. Demarsh*, 56 ECAB \_\_\_\_ (Docket No. 05-269, issued August 18, 2005). See also *Beverly Grimes*, 54 ECAB 543 (2003).

The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>7</sup>

Section 8123(a) of the Federal Employees' Compensation Act<sup>8</sup> 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.<sup>9</sup> In situations where 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.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical opinion. Dr. Dwyer, the Office referral physician, offered an opinion that appellant's employment-related right shoulder and wrist conditions had resolved without any residuals or impairment. Dr. Chmell, appellant's treating physician, opined that his accepted conditions had deteriorated and rendered him totally disabled. The Office terminated appellant's compensation benefits on the grounds that his employment-related injury had ceased. The Board finds that, in light of the reports of Drs. Chmell and Dwyer, who are both Board-certified physicians, a conflict has been created on the issue of whether appellant continued to be disabled due to the 2003 employment injury. Consequently, the Office did not meet its burden of proof in terminating appellant's compensation.<sup>11</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>6</sup> *See Kathryn Demarsh*, *supra* note 3. *See also Franklin D. Haislah*, 52 ECAB 457 (2001).

<sup>7</sup> *See Kathryn Demarsh*, *supra* note 3.

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *See Willie M. Miller*, 53 ECAB 697 (2002); *James M. Frasher*, 53 ECAB 794 (2002).

<sup>11</sup> *See Gail D. Painton*, 41 ECAB 492 (1990).

### LEGAL PRECEDENT -- ISSUE 3

Section 8107 of the Act<sup>12</sup> provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>13</sup> The schedule award provisions of the Act and its implementing federal regulation<sup>14</sup> sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>15</sup> as the uniform standard applicable to all claimants.

### ANALYSIS -- ISSUE 3

The Office determined that appellant was not entitled to a schedule award based upon the May 20, 2004 report of Dr. Dwyer, an Office referral physician. He conducted a physical examination and determined that appellant had reached maximum medical improvement and provided a diagnosis of resolved soft tissue condition affecting both right wrist and right shoulder, and a sprain/strain which responded favorably to treatment. Dr. Dwyer found no objective evidence of disability or impairment related to appellant's right shoulder, wrist or other upper extremity and opined that appellant was fit to resume normal occupational duties without restriction. His examination revealed that range of motion of the right and left arms at the shoulder was 175 degrees in abduction, external rotation was 80 degrees, and internal rotation was 80 degrees bilaterally. Dr. Dwyer found prominent acromioclavicular joints bilaterally, no atrophy of right or left shoulder girdle muscles, and good deltoid and trapezius strength about both upper extremities. He determined that grip strength was 3/5 bilaterally, equal and adequate, and that there was full flexion and extension at both shoulders. Median, radial and ulnar nerves were intact and functioning. Impingement and crossover signs were negative. Range of motion of the right hand at the wrist was 75 degrees during dorsiflexion; and 85 degrees during palmer flexion. Rotary movements were complete and the same at both wrists, namely 90 degrees during pronation and 85 degrees during supination. He found no atrophy of the intrinsic muscles of either hand and no distal, ulnar or radial crepitus at either wrist. Dr. Dwyer detected hypersensitivity of the right upper extremity to light touch and deep pressure. Abductor digiti quinti was equal in strength at both fifth fingers and at both index fingers.

The record contains several reports from Dr. Chmell, including his December 2, 2003 report in which he opined that appellant had a permanent partial disability caused by his employment. However, the physician did not provide any impairment rating or otherwise

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<sup>12</sup> 5 U.S.C. § 8107(a).

<sup>13</sup> *Id.*

<sup>14</sup> 20 C.F.R. § 10.404.

<sup>15</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

provide adequate rationale addressing how appellant had sustained permanent impairment as a result of his work-related condition. The Board finds that there is no probative medical evidence of record, based upon a correct application of the A.M.A., *Guides*, to establish that appellant has any permanent impairment of his right upper extremity due to his accepted condition. Accordingly, the Board finds that appellant is not entitled to a schedule award.

### **CONCLUSION**

The Board finds that appellant failed to establish that he sustained a recurrence of disability on or about June 6, 2004 related to his accepted employment injury. The Board also finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award. Accordingly, the July 25, 2005 decisions of the Office are affirmed. The Board further finds that the Office did not meet its burden of proof in terminating appellant's compensation, and the case must be remanded to the Office for referral to an impartial medical examiner in order to resolve the conflict between the opinions of Drs. Dwyer and Chmell.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated July 25, 2005 denying appellant's claim for recurrence of disability and his request for schedule award are affirmed. The Board further finds that the Office's decision dated January 25, 2005 terminating appellant's compensation and medical benefits is reversed.

Issued: May 18, 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