

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

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J.T., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,  
CLAIMS DIVISION, Roanoke Rapids, NC,  
Employer**

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**Docket No. 07-844  
Issued: September 5, 2007**

*Appearances:*

*Martin Kaplan, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 24 and November 14, 2006 merit decision concerning the termination of her 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 wage-loss compensation effective April 16, 2006 on the grounds that she had no disability due to her accepted employment injuries after that date.

**FACTUAL HISTORY**

On January 15, 2002 appellant, then a 46-year-old claims clerk, filed an occupational disease claim alleging that she sustained injury to her arms due to the repetitive duties of her job, including typing and handling case files. She first became aware of her condition in

January 1990 and first realized that it was caused or aggravated by her employment in June 1990. Appellant did not stop work at the time she filed her claim, but she began performing limited-duty work for the employing establishment. The Office accepted that she sustained bilateral carpal tunnel syndrome and arthritic changes of the first carpometacarpal joints of the thumbs.

The record contains a description of the claims clerk position from early 1991 which indicates that the position involved such duties as reviewing claim files, scheduling appointments, entering data into the computer, processing incoming mail, and using the computer to create and edit documents. The position required use of the computer to perform such tasks as preparing periodic and special workload inventories and reports, extracting data from documents to complete required items on forms, coding evidence per agency requirements, completing forms to ensure that future benefits are protected, and making routine data entries to change records regarding entitlement to benefits. Appellant first began to complain of right hand problems in 1990. Electromyogram (EMG) and nerve conduction studies conducted on August 20, 1990 showed normal results in the right arm. The record contains medical records from 1992 which showed that appellant was diagnosed with de Quervain's tendinitis of the right wrist and on December 28, 1992 she underwent a surgical release of the first extensor compartment of the right wrist. The findings of January 15, 2002 EMG and nerve conduction studies showed bilateral carpal tunnel syndrome.

On April 29, 2002 appellant underwent right carpal tunnel release surgery and, on June 24, 2002, she underwent left carpal tunnel release surgery. Both procedures were authorized by the Office. After stopping work for her surgeries, appellant returned to limited-duty work for the employing establishment on a full-time basis in August 2002. She returned to regular duty in February 2003 and stopped work in July 2003.

In February 2004, the Office referred appellant to Dr. Ganesh Bissram, a Board-certified orthopedic surgeon, for further evaluation of her condition. In a February 27, 2004 report, Dr. Bissram diagnosed status post bilateral carpal tunnel release with median nerve neuritis, more on the left, and degenerative arthritic changes of the first carpometacarpal joint of both wrists. He noted that these conditions were related to appellant's employment and indicated that, due to her weak grip strength and wrist pain, appellant could not engage in heavy lifting, repetitive hand motion or heavy gripping. In a February 27, 2004 work restriction form, Dr. Bissram indicated that appellant could move her wrists, push, pull, reach, or lift up to eight pounds for two hours per day. On April 13, 2004 Dr. Bissram indicated that he had reviewed the description of the claims clerk position and determined that appellant could perform the position.

On May 12, 2004 Dr. Gilbert G. Whitmer, an attending Board-certified orthopedic surgeon, indicated that he agreed with the employment-related diagnoses detailed by Dr. Bissram but noted that he did not agree with Dr. Bissram's opinion on appellant's ability to work as described in his recommended work restrictions. In various prior reports, including a December 18, 2003 report, Dr. Whitmer had indicated that appellant had severe weakness and pain in her hands and wrist and was unable to return to work.

The Office determined that there was a conflict in the medical opinion between Dr. Bissram and Dr. Whitmer regarding the effect of appellant's employment-related conditions

on her ability to work. It indicated that it would refer appellant to Dr. Eduardo Oscar Marsigli, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. The Office actually referred appellant to Dr. Adolfo Hector Marsigli, a Board-certified orthopedic surgeon. On October 5, 2004 Dr. Adolfo Hector Marsigli determined that appellant could return to the claims clerk position if she took a 15-minute break every 2 hours.

Appellant claimed that she sustained depression and hypertension due to the pain from her accepted employment injuries. In support of her claim, she submitted brief reports of Dr. Gerardo Maradiaga, an attending Board-certified internist, and Dr. Scott Cunningham, an attending Board-certified psychiatrist. In an April 4, 2005 decision, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish her claim.

In an April 19, 2005 decision, the Office terminated appellant's disability compensation effective April 18, 2005 based on the opinion of Dr. Adolfo Hector Marsigli. In a decision dated and finalized October 4, 2005, an Office hearing representative reversed the Office's termination of compensation because appellant was improperly referred to Dr. Adolfo Hector Marsigli rather than Dr. Eduardo Oscar Marsigli. The hearing representative directed the Office to refer appellant to another impartial medical specialist for an opinion on her ability to work.<sup>1</sup>

On October 17, 2005 the Office referred appellant to Dr. Paul H. Wright, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the effect of her employment-related conditions on her ability to work. On December 1, 2005 Dr. Wright detailed appellant's factual and medical history and indicated that he had received a description of the claims clerk position. He noted that appellant exhibited tenderness to palpation over the radial aspect of the right wrist and a pulling sensation in each palm which extended into the thumbs upon Allen's testing. Dr. Wright indicated that appellant continued to have employment-related bilateral thumb arthritis as well as bilateral wrist tendinitis which was part of her accepted condition of bilateral carpal tunnel syndrome. He stated that, due to the effects of her accepted conditions, appellant needed to avoid activities that would aggravate her wrists and thumbs. Dr. Wright indicated that appellant should not lift more than 10 pounds with each hand or squeeze more than 10 pounds of grip pressure and should avoid repetitive use of her hands to include finger and wrist flexion. In a December 1, 2005 work restriction form, Dr. Wright stated that appellant should not engage in any repetitive wrist or elbow motions.

In January 2006 the employing establishment provided an additional description of the claims clerk position that appellant held when injured. Appellant was required to spend 60 percent of her time engaged in intermittent typing usually consisting of fewer than 100 strokes per interview. She had to perform about 134 interviews per week. Appellant spent less than five percent of her time pulling files and less than five percent of her time lifting file folders which on average weighed less than three pounds. The employing establishment later indicated that the name of the position changed from claims clerk to claims assistant but that the duties and physical demands remained the same.

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<sup>1</sup> The hearing representative also affirmed the Office's April 4, 2005 decision denying appellant's emotional condition. In an April 13, 2006 decision, the Office affirmed this finding of the October 4, 2005 decision.

On January 23, 2006 Dr. Wright stated that he had reviewed the additional description of the claims clerk position provided by the employing establishment. He indicated that, taking the accepted conditions into consideration, appellant was capable of performing the claims clerk position. Dr. Wright stated that it appeared that appellant's failure to return to work was mainly due to her depression, hypertension and chronic pain syndrome.

In a February 21, 2006 notice, the Office advised appellant of its proposed termination of her disability compensation on the grounds that she no longer had disability due to her accepted employment injuries. The Office informed appellant of its determination that the weight of the medical evidence regarding this matter rested with the opinion of the impartial medical examiner, Dr. Wright.

In a March 7, 2006 letter, appellant's attorney argued that the description of the claims clerk position contained in the record was not sufficiently detailed to accurately identify all the physical activity appellant was required to perform. Appellant's attorney asserted that Dr. Wright's prescription against engaging in repetitive wrist and finger motion prevented appellant from performing the position. Appellant submitted May 18, 2005 and March 1, 2006 reports in which Dr. Raviner Mamedi, an attending Board-certified psychiatrist, discussed her emotional condition.

In a March 28, 2006 decision, the Office finalized its proposed termination of appellant's wage-loss compensation effective April 16, 2006. Appellant remained entitled to compensation for medical treatment related to the accepted conditions. She submitted an August 21, 2006 report of Dr. Mamedi. Appellant requested a hearing before an Office hearing representative and, at the August 28, 2006 hearing, she argued that the position she performed at the time of her injury was more demanding than the position detailed in the job description found in the record. In a November 14, 2006 decision, the Office hearing representative affirmed the Office's March 24, 2006 decision.

#### **LEGAL PRECEDENT**

Under the Federal Employees' Compensation Act,<sup>2</sup> once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was 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>

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,

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

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

<sup>5</sup> See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

the Secretary shall appoint a third physician who shall make an examination.”<sup>6</sup> In situations where there exists 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.<sup>7</sup>

### ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and arthritic changes of the first carpometacarpal joints of the thumbs. In a March 28, 2006 decision, the Office terminated appellant’s disability compensation effective April 16, 2006 on the grounds that she had no disability due to her accepted employment injuries after that date. The Office based its termination on the opinion of Dr. Wright, a Board-certified orthopedic surgeon who served as an Office referral physician. Dr. Wright determined that appellant could perform the claims clerk position she held when injured.

The Office properly determined that there was a conflict in the medical opinion between Dr. Bissram, a Board-certified orthopedic surgeon acting as an Office referral physician, and Dr. Whitmer, an attending Board-certified orthopedic surgeon, regarding the effect of appellant’s employment-related conditions on her ability to work.<sup>8</sup>

On February 27, 2004 Dr. Bissram indicated that appellant had weak grip strength and wrist pain due to her employment-related conditions and stated that she could move her wrists, push, pull, reach, or lift up to eight pounds for two hours per day. On April 13, 2004 Dr. Bissram indicated that he had reviewed the description of the claims clerk position and determined that appellant could perform the position. In contrast Dr. Whitmer noted on May 12, 2004 that he agreed with the employment-related diagnoses detailed by Dr. Bissram but indicated that he did not agree with Dr. Bissram’s opinion on appellant’s ability to work as described in his recommended work restrictions. In various prior reports, including a December 18, 2003 report, Dr. Whitmer had indicated that appellant had severe weakness and pain in her hands and wrist and was unable to return to work.

In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Wright, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>9</sup> The Board finds that the opinion of Dr. Wright is not sufficiently well rationalized to resolve the conflict in the medical opinion regarding the effect of appellant’s employment-related conditions on her ability to work. Dr. Wright ultimately

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<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>8</sup> See *supra* note 6 and accompanying text.

<sup>9</sup> See *id.* The Office had previously referred appellant to Dr. Eduardo Oscar Marsigli for an impartial medical examination. An Office hearing representative properly found that the referral was improper because appellant was referred to Dr. Adolfo Hector Marsigli rather than Dr. Eduardo Oscar Marsigli. The hearing representative then correctly directed the Office to refer appellant to another impartial medical specialist.

determined that appellant could perform the claims clerk position she held when injured, but he did not provide adequate rationale for this determination.

On December 1, 2005 Dr. Wright noted that appellant continued to have employment-related bilateral thumb arthritis as well as bilateral wrist tendinitis which was part of her accepted condition of bilateral carpal tunnel syndrome.<sup>10</sup> He stated that due to the effects of her accepted conditions, appellant needed to avoid activities that would aggravate her wrists and thumbs. Dr. Wright indicated that appellant should not lift more than 10 pounds with each hand or squeeze more than 10 pounds of grip pressure and should avoid repetitive use of her hands to include finger and wrist flexion. In a December 1, 2005 work restrictions form, Dr. Wright provided an even more restrictive assessment of appellant's ability to work in that he stated that appellant should not engage in any repetitive wrist or elbow motions.

In January 2006 the employing establishment provided additional description of the claims clerk position that appellant held when injured. Appellant was required to spend 60 percent of her time each day engaged in intermittent typing of interviews. She was required to conduct about 134 interviews per week with each interview usually requiring the performance of fewer than 100 strokes per interview. Appellant spent less than five percent of her time pulling files and less than five percent of her time lifting file folders which on average weighed less than three pounds. On January 23, 2006 Dr. Wright stated that he had reviewed the additional description of the claims clerk position provided by the employing establishment. He indicated that, taking the accepted conditions into consideration, appellant was capable of performing the claims clerk position.

Dr. Wright did not adequately explain his opinion that appellant could perform the claims clerk position. On December 1, 2005 Dr. Wright provided an extremely restrictive assessment of appellant's ability to use her wrists, hands and fingers. Moreover, his December 1, 2005 opinion is equivocal in that he indicated in the text of his narrative report that appellant should avoid repetitive use of her hands, but stated in his work restrictions form that appellant should not engage in any repetitive wrist or elbow motions. Dr. Wright did not explain this discrepancy in his January 23, 2006 supplemental report. The claims clerk position involves duties that require a significant amount of wrist, hand and finger motion and Dr. Wright has not explained how appellant's medical condition would allow her to perform these duties given his opinion that she could only use her hands to a limited degree. Appellant's recording of interviews would usually require her to perform thousands of keystrokes per day. Her handling of case files for about 10 percent of the day would require her to engage in such activities as thumbing through case records to locate documents.

Moreover, there are a number of other duties of the claims clerk position which would require appellant to move her wrist, hands and fingers. For example, appellant was required to use the computer to perform such tasks as preparing periodic and special workload inventories and reports, extracting data from documents to complete required items on forms, coding evidence per agency requirements, completing forms to ensure that future benefits are protected, and making routine data entries to change records regarding entitlement to benefits. These duties

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<sup>10</sup> Dr. Wright noted that appellant exhibited tenderness to palpation over the radial aspect of the right wrist and a pulling sensation in each palm which extended into the thumbs upon Allen's testing.

would also appear to be in contravention of Dr. Wright's restrictive assessment of appellant's ability to use her hands and Dr. Wright has not adequately explained how appellant would be able to perform these and similar duties.

For these reasons, Dr. Wright's reports do not provide a well-rationalized opinion that appellant could perform the claims clerk position she held when injured. Therefore, Dr. Wright's opinion does not show that appellant no longer had disability due to her accepted employment injuries and his opinion is not entitled to special weight on this matter. The Board finds that since the Office relied on the opinion of Dr. Wright to terminate appellant's disability compensation effective April 16, 2006 without having resolved the existing conflict in the medical evidence, the Office has failed to meet its burden of proof in terminating appellant's disability compensation.<sup>11</sup>

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's disability compensation effective April 16, 2006 on the grounds that she had no disability due to her accepted employment injuries after that date.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' November 14 and March 24, 2006 decisions are reversed.

Issued: September 5, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).