

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

C.C., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Allentown, PA,
Employer**)

**Docket No. 08-244
Issued: June 16, 2008**

Appearances:
Thomas R. Uliase, 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 November 1, 2007 appellant, through counsel, filed a timely appeal from a decision of the Office of Workers' Compensation Programs' hearing representative dated December 11, 2006 affirming the termination of appellant's compensation benefits. She also appeals an April 30, 2007 decision denying her request for a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 14, 2006 for the accepted conditions of right upper extremity epicondylitis and tendinitis; (2) whether appellant met her burden of proof to establish that she had any continuing disability or condition after May 14, 2006, causally related to her accepted employment injuries; (3) whether the Office properly denied further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 26, 2002 appellant, then a 37-year-old mail processor, filed a traumatic injury claim alleging that she sustained right carpal tunnel syndrome due to putting mail into trays on October 24, 2002. The Office accepted the claim for right upper extremity epicondylitis and tendinitis. Appellant stopped work on October 25, 2002 and was placed on the periodic rolls for temporary total disability.

In chart notes dated April 26, 2004 to September 15, 2005, Dr. Scott Fried, a treating Board-certified orthopedic surgeon, diagnosed lateral epicondylitis with radial tunnel greater on the right side than the left, bilateral upper extremities repetitive strain injury, brachial plexus greater on the right side than on the left and moderate inflammatory process due to repetitive strain injury and possible arthralgia. Dr. Fried concluded that appellant continued to be totally disabled due to her employment injuries.

On April 25, 2005 the Office referred appellant to Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, to determine appellant's work capability and whether her bilateral diffuse sensory brachial plexopathies were due to the October 24, 2002 employment injury. On May 24, 2005 Dr. Salem opined that appellant had no disability or residuals as a result of her October 24, 2002 employment injury. He noted that she had multiple complaints that predated the injury. In an attached work capacity evaluation form (OWCP-5c), Dr. Salem indicated that appellant had no restrictions and was capable of performing her usual job.

On August 26, 2005 the Office referred appellant to Dr. Thomas DiBenedetto, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Fried and Dr. Salem.

On September 23, 2005 Dr. DiBenedetto reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He concluded that appellant's right lateral epicondylitis had resolved. Dr. DiBenedetto noted that she had vague complaints of right elbow pain, but no tenderness over the lateral epicondyle. A physical examination revealed "decreased sensation in the ulnar three digits," negative Phalen's and Tinel's tests at both the elbow and wrist, "tenderness over extensor musculature," bilateral trapezius and posterior neck pain, no paraspinal spasm, "pain over her extensor musculature with resisted extension," and full range of motion in the neck and bilateral upper extremity joints. Dr. DiBenedetto also found no hard objective findings to support the diagnosis of bilateral brachial plexopathies. He noted that no mention of any bilateral brachial plexus lesion had been made until Dr. Fried began treating appellant and that she had normal EMG and nerve conduction study testing. Dr. DiBenedetto stated that he found no evidence of any continuing lateral epicondylitis or any physical evidence of bilateral brachial plexopathies. He concluded that appellant had no residuals of her accepted employment injury and was not disabled from working.

In a November 10, 2005 report, Dr. Fried and Dana Steiner, PAC, reported that appellant experienced an increase in her pain symptoms with tingling and numbness bilaterally in the third to fifth digits.

By decision dated March 17, 2006, the Office denied appellant's claim of bilateral brachial plexopathies.

On March 29, 2006 the Office issued a notice of proposed termination of benefits. By decision dated May 11, 2006, the Office finalized the termination of appellant's compensation effective May 14, 2006. The Office found the weight of the evidence rested with the opinion of Dr. DiBenedetto, the impartial medical examiner, who concluded that appellant no longer had any residuals due to her accepted October 24, 2002 employment injury.

In a letter dated May 16, 2006, appellant's counsel requested an oral hearing before an Office hearing representative, which was held on October 16, 2006. The Office received an April 26, 2006 report by Dr. Fried who opined that appellant continued to have residuals of her accepted employment injury.

In a May 1, 2006 report, Dr. Fried detailed appellant's treatment and her medical and employment history. He reviewed the reports of Drs. DiBenedetto and Salem, and reiterated the diagnoses of lateral epicondylitis with radial tunnel greater on the right side than the left, bilateral upper extremities repetitive strain injury, brachial plexus greater on the right side than on the left and moderate inflammatory process due to repetitive strain injury and possible arthralgia. He noted his disagreement with the reports of Drs. DiBenedetto and Salem. A May 25, 2006 electromyographic evaluation performed by Richard L. Read, physical therapist reported bilateral of mild upper brachial plexus, bilateral ulnar nerve and radial compromise, more severe on the right medial and dorsal elbow levels and moderate on the left with the remainder of the tests reported as normal.

In a decision dated December 11, 2006, the Office hearing representative affirmed the May 11, 2006 decision terminating appellant's compensation. He found the report of the impartial medical examiner, Dr. DiBenedetto, constituted the special weight of the medical evidence in establishing that appellant's accepted employment injury had resolved.

On April 12, 2007 appellant's counsel requested reconsideration and submitted a January 27, 2006 report from Dr. Fried, who reported appellant was "tender across the bilateral trap[ezi]s with spasm" and "Roos testing reproduces pain at the right greater than the left plexus with unchanged dyesthesia into all digits." Dr. Fried also reported positive right radial forearm with compression testing and positive ulnar Tinel's sign. He noted that a recent electromyography revealed "progression at both the ulnar and radial nerves, as well as ongoing bilateral brachial plexopathy."

By nonmerit decision dated April 30, 2007, Office denied appellant's request for reconsideration of the December 11, 2006 decision on the grounds that the evidence submitted was repetitious.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ Having determined that an employee has a disability causally related to his federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.² The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.³ 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.⁴

Section 8123(a) 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.⁵ It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for upper extremity epicondylitis and tendinitis and placed her on the periodic rolls. The Office has the burden of justifying the termination of appellant's compensation for these medical conditions.

In order to resolve the conflict in the medical evidence between appellant's treating physician, Dr. Fried, and Dr. Salem, the second opinion physician, the Office referred the case to an impartial medical specialist, Dr. DiBenedetto, who concluded, in his September 23, 2005 report that the accepted conditions of right upper extremity epicondylitis and tendinitis stemming from her October 24, 2002 work injury had resolved. In support of this conclusion, Dr. DiBenedetto noted that he found no evidence of any continuing lateral epicondylitis. A physical examination revealed negative Phalen's and Tinel's signs at both the wrist and elbow and "no tenderness over the lateral epicondylitis." The Office relied on Dr. DiBenedetto's opinion in its May 11, 2006 decision which found that appellant had no residuals or continuing disability stemming from her October 24, 2002 work injury and was therefore not entitled to compensation or medical benefits.

¹ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006); *George A. Rodriguez*, 57 ECAB 224 (2005).

² *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Elaine Sneed*, 56 ECAB 373 (2005).

³ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

⁴ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁵ *F.R.*, 58 ECAB ____ (Docket No. 05-15, issued July 10, 2007); *Regina T. Pellecchia*, 53 ECAB 155 (2001).

⁶ *J.M.*, *supra* note 2.

The Board finds that Dr. DiBenedetto's impartial medical opinion establishes that appellant's accepted conditions resolved without continuing disability or any residuals from her accepted October 24, 2002 employment injury. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. DiBenedetto's opinion as the special weight of an impartial medical examiner.⁷

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective May 14, 2006.

On appeal appellant's attorney contends that the Office should have expanded the acceptance of appellant's claim to include brachial plexopathy. He also contends that Dr. DiBenedetto's report is equivocal on this matter or there is an unresolved conflict between Dr. DiBenedetto and Dr. Fried on this issue. For conditions not accepted by the Office as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove any such relationship.⁸ Dr. Fried diagnosed bilateral brachial plexus in his various reports. However, he provided no rationale explaining how this condition was caused or aggravated by appellant's employment injury. The Board has held that medical reports unsupported by medical rationale are of limited probative value.⁹ Similarly, Dr. DiBenedetto's opinion is also insufficient to support appellant's claim. He concluded that there was no hard objective findings to support the diagnosis of bilateral plexopathies and noted that the condition was not diagnosed until appellant was treated by Dr. Fried. Dr. DiBenedetto also noted that such condition had not been accepted by the Office. The report of the impartial specialist does not support appellant's assertion that her bilateral brachial plexus condition is employment related.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.¹⁰ In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. 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 appellant's diagnosed condition and the implicated employment factors.¹¹ The opinion of the

⁷ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁸ *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁹ *T.F.*, *supra* note 1.

¹⁰ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

¹¹ *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

physician must be based on a complete factual and medical background of appellant, 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 appellant.¹²

ANALYSIS – ISSUE 2

After the Office properly terminated appellant's compensation in its May 11, 2006 decision, the burden of proof shifted to appellant to establish continuing employment-related disability.¹³ Appellant submitted a May 1, 2006 report by Dr. Fried and a May 25, 2006 electromyographic evaluation performed by Mr. Read, physical therapist. Dr. Fried noted his disagreement with the reports of Drs. Salem and DiBenedetto and opined that appellant continued to have residuals from her accepted lateral epicondylitis. However, Dr. Fried was on one side of the conflict which was resolved by Dr. DiBenedetto. His May 1, 2006 report is essentially duplicative of his prior reports on whether appellant continues to have residuals from the accepted conditions which helped to create the conflict and would be insufficient to give rise to a new conflict or otherwise show that the termination was improper.¹⁴ The May 25, 2006 electromyographic report by Mr. Read, physical therapist is insufficient to create a conflict as Mr. Read is not a physician under the Act.¹⁵ Accordingly, the Board finds that Dr. DiBenedetto's opinion constituted the special weight of medical opinion, supports the Office's May 11, 2006 decision to terminate appellant's compensation and deny any entitlement to continuing disability based on the accepted conditions of upper extremity epicondylitis and tendinitis.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹⁶ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁸ When a claimant fails to

¹² *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹³ *Joseph A. Brown, Jr.*, *supra* note 10.

¹⁴ *M.S.*, 58 ECAB ____ (Docket No. 06-797, issued January 31, 2007).

¹⁵ *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act).

¹⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁸ *Id.* at § 10.607(a).

meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. With regard to the evidence submitted with her request, she submitted a new report dated January 27, 2006 by Dr. Fried. This report generally reiterates Dr. Fried's prior opinion that appellant's bilateral brachial plexus is employment related. The Board has held that evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.²⁰

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. Thus, she has not met the criteria to have the Office reopen her case for review on the merits.²¹

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective May 14, 2006 on the grounds that she no longer had any residuals or disability causally related to her accepted right upper extremity epicondylitis and tendinitis. The Board also finds that appellant has failed to establish that she had any employment-related residuals or disability after May 14, 2006 due to her accepted right upper extremity epicondylitis and tendinitis. The Board further finds the Office properly denied her request for a merit review.

¹⁹ 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

²⁰ See *L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

²¹ *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 30, 2007 and December 11, 2006 be affirmed.

Issued: June 16, 2008
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