

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

V.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New York, NY, Employer)

**Docket No. 09-1180
Issued: February 16, 2010**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2009 appellant filed a timely appeal of a December 18, 2008 decision of the Office of Workers' Compensation Programs affirming the termination of her wage-loss compensation benefits

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's wage-loss compensation effective December 20, 2008.

FACTUAL HISTORY

On January 26, 2006 appellant, then a 44-year-old city carrier, filed a traumatic injury claim alleging that on that date she injured her left forearm after falling down several steps while delivering mail. She stopped work on January 27, 2006 and underwent an open reduction with internal fixation on her left forearm. On March 3, 2006 the Office accepted appellant's claim for

closed left fracture of the radius and ulna. On September 5, 2006 appellant returned to light duty working four hours per day.¹

Reports dated between February 6 and June 14, 2006 from appellant's treating physician, Dr. David Tuckman, a Board-certified orthopedic surgeon, diagnosed left radial and ulna fractures. Dr. Tuckman also recommended physical therapy and noted that appellant was not yet able to return to work.

On June 20, 2006 the Office referred appellant, with a statement of accepted facts, to Dr. P. Leo Varriale, a Board-certified orthopedic surgeon, for a second opinion evaluation. It inquired whether appellant had any continued disability as a result of the accepted work injury. In a July 10, 2006 report, Dr. Varriale diagnosed status post open reduction and internal fixation of the radius and ulna of the left forearm with radial sensory nerve deficit. He opined that appellant had not fully recovered from the effects of her injury and required continued physical therapy. Dr. Varriale noted that appellant had a nerve injury to her forearm related to the surgery and work injury. He advised that appellant could return to light duty without repetitive use of her left arm and no lifting over one pound. In a July 12, 2006 work capacity evaluation form, Dr. Varriale indicated that appellant could not perform her usual job because her arm fractures were healing, however, she could work four hours per day with restrictions.

From August 10, 2006 and March 18, 2008 Dr. Tuckman advised that appellant continued working limited duty at four hours per day. Beginning December 28, 2006, appellant was also treated by Dr. Gary Kaplan, a Board-certified psychiatrist and neurologist, who noted the history of injury and advised that appellant required continued light duty due to persistent functional and motor deficits that were residuals of the accepted fracture and its repair. Dr. Kaplan restricted appellant to light duty for four hours a day.

On February 21, 2008 the Office referred appellant to Dr. Frank Hudak, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 19, 2008 report, Dr. Hudak reviewed appellant's history of injury and medical records and conducted a physical examination. He opined that appellant had not totally recovered from the effects of her work injury as she had residual loss of sensation of the superficial radial nerve of the left forearm. Dr. Hudak found, however, that appellant could increase her schedule to eight hours a day as the loss of sensation condition was not functionally significant in terms of work activity. He advised that appellant could return to full duty as a city carrier and that she did not require further treatment as she had reached maximum medical improvement.

On April 24, 2008 Dr. Kaplan noted a small area over the radial aspect of appellant's left forearm distally of decreased sensation. He opined that appellant had continued functional disability of the left upper extremity as she was unable to lift or carry. Dr. Kaplan advised that she continue with light duty at four hours a day.

¹ Upon appellant's return to work part time, she received wage-loss compensation for the other four hours per day for her partial disability.

On May 15, 2008 the Office proposed to terminate appellant's wage-loss compensation, finding that the weight of medical evidence, represented by Dr. Hudak's report, established that appellant no longer remained disabled from performing the duties of her preinjury job.

In a statement dated May 12, 2008, appellant's representative contended that appellant sustained additional work-related injuries and conditions from the January 26, 2006 event that should be accepted based on the medical evidence from Dr. Kaplan.

In a July 24, 2008 letter, the Office notified appellant that there was a conflict in medical evidence between Dr. Hudak, who opined that appellant could return to full duty as her left forearm condition was not functionally significant to her work activity, and Dr. Kaplan, who opined that she had continued functional disability requiring continued part-time light duty. On July 24, 2008 it referred appellant with a statement of accepted facts to Dr. Norman Sveilich, an osteopath Board-certified in orthopedic surgery, to resolve the conflict in medical opinion.

In an August 21, 2008 report, Dr. Sveilich summarized appellant's work injury and medical treatment. X-rays of the left radius and ulna performed at the examination revealed two bone fractures, plated and healed in acceptable alignment. Dr. Sveilich diagnosed residual hypoesthesia sensory nerve, two to three centimeters proximally to the left anterior wrist laterally, and mild disuse muscle atrophy. He also noted permanent partial physical disability. Dr. Sveilich opined that appellant's work injury caused her left forearm fractures and that surgery was necessary because the fractures were not in satisfactory alignment. He further opined that the surgery led to sensory nerve ulnar injury with nerve entrapment causing residual hypoesthesia. Dr. Sveilich advised that appellant was able to perform her regular full work duties. In an attached examination report dated August 4, 2008, he noted appellant's history and complaints of left wrist joint pain. Dr. Sveilich's examination revealed no left hand muscle atrophy, no left wrist instability and normal motion. He also found no atrophy of the extensor, flexor and pronator muscles of the left forearm. Dr. Sveilich noted slight decrease of extension and flexion strength of the left wrist. He further found no swelling or deformity of the left elbow and normal motion. Dr. Sveilich assessed permanent partial physical disability, mild disuse muscle atrophy and residual hypoesthesia sensory nerve. He advised that appellant was fully fit for work.

In a September 10, 2008 letter, the Office requested clarification from Dr. Sveilich regarding his opinion that appellant had permanent partial disability but was also fit for full duty. In a September 18, 2008 addendum report, Dr. Sveilich indicated that residual hypoesthesia of the nerve fibers were the basis of appellant's permanent partial disability rating. He advised that this finding had no effect on her ability to function.

On September 15, 2008 an Office medical adviser concurred with Dr. Sveilich's opinion on causal relationship.

In an October 10, 2008 decision, the Office expanded appellant's accepted conditions to include hypoesthesia of the sensory nerve, two to three centimeters proximally to the left anterior wrist laterally. Also on that date, it issued a notice of proposed termination of wage-loss compensation, finding that the weight of medical evidence rested with Dr. Sveilich's report and

established that the accepted medical condition no longer caused disability from work. The Office noted that appellant would remain entitled to medical benefits.²

Appellant submitted a November 4, 2008 report from Dr. Tuckman, who reported that appellant's left arm wound had healed and there was full range of motion. Dr. Tuckman recommended that appellant continue light duty with four-hour workdays and follow up with treatment as needed. A November 19, 2008 report from Dr. Kaplan noted that appellant still had difficulty carrying with her left arm and that there was tenderness with pressure over the dorsal aspect of the proximal left forearm. Dr. Kaplan also noted occasional left shoulder pain and no focal motor deficits. He opined that appellant remain disabled from full duty and continue with light duty.

In a December 2, 2008 statement, appellant's representative noted that he had previously submitted a request for expanded accepted condition due to appellant's work injury. He asserted that the evidence of record established that appellant was only capable of performing light duty.

In a December 18, 2008 decision, the Office terminated appellant's wage-loss benefits effective December 20, 2008 finding that Dr. Sveilich, who represented the weight of medical evidence, found that appellant had no continued disability and that other evidence submitted was insufficient to alter this recommendation.

LEGAL PRECEDENT

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 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 Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

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.⁶

² On November 5, 2008 the Office reissued the proposed notice and sent a copy to appellant's representative as the original notice was only sent to appellant.

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁶ 5 U.S.C. § 8123(a).

ANALYSIS

The Office accepted that appellant's January 26, 2006 work injury caused closed left fracture of the radius and ulna and hypoesthesia sensory nerve, two to three centimeters proximally to the left anterior wrist laterally. It paid appellant appropriate compensation before terminating her wage-loss compensation effective December 20, 2008. The Board finds that the Office met its burden to establish that appellant was no longer disabled from her job effective December 20, 2008.

The Office properly determined that a conflict existed in the medical evidence as to whether appellant had any disability due to her accepted left forearm condition. Appellant's treating physician, Dr. Kaplan, indicated that appellant had continued functional disability of the left upper extremity due to her work injury as she was unable to lift or carry, and therefore, advised continued light duty at four hours per day. On the other hand, the second opinion physician, Dr. Hudak, opined that appellant could return to full duty as her residual loss of sensation of the superficial radial nerve of the left forearm was not disabling.

The Office properly referred appellant to Dr. Sveilich for an independent medical examination to resolve the conflict in medical opinion between Drs. Kaplan and Hudak as to whether appellant had any disability due to the accepted left forearm condition. In reports dated August 4 and 21, 2008, Dr. Sveilich provided a detailed history of appellant's condition in which he reviewed the medical record. He conducted a comprehensive examination noting that appellant had no left hand muscle atrophy, no left wrist instability, no atrophy of the extensor, flexor and pronator muscles in the left forearm, no swelling or deformity and normal motion. Moreover, x-rays performed at the examination revealed that appellant's fractures were healed and in acceptable alignment. Dr. Sveilich diagnosed residual hypoesthesia sensory nerve near the left wrist and mild disuse muscle atrophy and opined that this was due to the work injury. He also noted some permanent partial disability. Based on his findings, Dr. Sveilich concluded that appellant was fit to perform her regular full-duty position.

On September 10, 2008 the Office asked Dr. Sveilich to clarify if appellant was fit for full duty if she had permanent partial disability.⁷ In a September 18, 2008 addendum report, Dr. Sveilich indicated that residual hypoesthesia of the nerve fibers was the basis of appellant's permanent partial disability rating. However, he explained that this finding had no effect on appellant's ability to function.

The Board finds that Dr. Sveilich's opinion is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight⁸ and establishes that appellant is no longer disabled from her regular job. Dr. Sveilich had a statement of accepted

⁷ When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. *T.C.*, 60 ECAB __ (Docket No. 08-2112, issued June 12, 2009).

⁸ *See Y.A.*, 59 ECAB __ (Docket No. 08-254, issued September 9, 2008) (when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight).

facts, appellant's position description and his report accurately summarized the relevant medical evidence. Furthermore, he analyzed the case record and his own findings on examination to support his conclusion regarding appellant's left forearm condition.⁹ Dr. Sveilich's comprehensive report noted detailed examination findings and he found no basis for any work restrictions due to residuals of appellant's work injury.

Following receipt of Dr. Sveilich's reports, appellant submitted additional medical evidence. However, this evidence is insufficient to overcome the weight of Dr. Sveilich's opinion or to create a new medical conflict. A November 19, 2008 report from Dr. Kaplan, who was on one side of the conflict resolved by Dr. Sveilich,¹⁰ provided no new rationale in support of continuing causal relationship for appellant's left forearm condition and is insufficient to create a new conflict or overcome Dr. Sveilich's report. Likewise, Dr. Tuckman's November 4, 2008 report did not offer any medical rationale to support that appellant had an ongoing work-related disability.¹¹

For these reasons, the weight of the medical evidence rests with Dr. Sveilich and establishes that appellant had no continued disability due to her accepted left forearm conditions, and therefore, the Office met its burden of proof to terminate appellant's wage-loss compensation benefits.

On appeal, appellant asserts that nothing in the Office's December 18, 2008 decision negates the evidence or arguments outlined in the statements submitted by her representative requesting expanded accepted medical conditions. She also asserts that the Office did not refer to her representative's December 2, 2008 response in its December 18, 2008 decision. However, the Board notes that the Office was responsive to appellant's request to update accepted conditions when it accepted sensory nerve hypoesthesia based on Dr. Sveilich's reports. However, Dr. Sveilich provided no support for any other conditions being work related and appellant did not submit any reasoned medical evidence explaining how any particular nonaccepted conditions were caused or aggravated by appellant's work injury.¹² Appellant further asserts that the medical evidence of record makes the termination of wage-loss compensation improper. As noted, the weight of the medical evidence rests with Dr. Sveilich's

⁹ See *Naomi Lilly*, 10 ECAB 560 (1959) (the opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into the weight of an evaluation).

¹⁰ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); see also *Dorothy Sidwell*, 41 ECAB 857 (1990) (reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict).

¹¹ 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).

¹² See *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (where a claimant claims that a condition not accepted or approved by the Office was due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

opinion as the independent medical evaluator, who found that appellant's left forearm conditions no longer resulted in any disability from her job.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation effective December 20, 2008.¹³

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated December 18, 2008 is affirmed.

Issued: February 16, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹³ Following issuance of the Office's December 18, 2008 decision, additional evidence was received into the record. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. *See* 20 C.F.R. § 501.2(c).