

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

K.M., Appellant)

and)

U.S. POSTAL SERVICE, NEW JERSEY)
INTERNATIONAL & BULK MAIL CENTER,)
Jersey City, NJ, Employer)

Docket No. 09-1148
Issued: January 14, 2010

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 March 24, 2009 appellant filed a timely appeal from May 9, 2008 and January 27, 2009 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 10, 2008 on the grounds that she had no residuals of the accepted conditions.

On appeal appellant, through her attorney, contends that the opinion of the impartial examiner is insufficient to be entitled to special weight

FACTUAL HISTORY

On March 18, 2005 appellant, then a 46-year-old mail clerk, filed an occupational disease claim alleging that factors of her federal employment caused pain of the left arm, palm and

thumb condition. She came under the care of Dr. Mark A.P. Filippone, a Board-certified physiatrist, who advised that electromyographic/nerve conduction studies (EMG/NCS) demonstrated evidence of right carpal tunnel syndrome and left C5-6 cervical radiculopathy, which he opined, were employment related. The Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome, brachial neuritis or radiculitis and tenosynovitis of both hands and wrists. Appellant worked limited duty until July 12, 2006 when she sustained a recurrence of disability that was accepted by the Office. Dr. Filippone submitted reports advising that appellant was totally disabled.

In November 2006 appellant was seen by Dr. A.R. Sayed Bakhaty, a pain management specialist, who performed cervical epidural injections on January 10 and 24, February 7 and April 25, 2007. On January 16, 2007 her attorney asked that the claim also be accepted for cervical radiculopathy and reflex sympathetic dystrophy.¹ In reports dated April 10 and May 22, 2007, Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, diagnosed cervical disc herniation with persistent cervical radiculopathy and bilateral carpal tunnel syndrome. He recommended surgery.

The Office referred appellant to Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 25, 2007 report, Dr. Lakin advised that appellant's orthopedic examination was unremarkable, with no correlation between her subjective complaints and findings on examination. He found no evidence of carpal tunnel syndrome, tenosynovitis of the hands and wrist and no brachial neuritis or radiculitis. Dr. Lakin concluded that appellant could return to work with no restrictions and needed no further care. Thereafter, Dr. Filippone continued to advise that she was totally disabled due.

The Office determined that a conflict in medical opinion arose between Dr. Filippone and Dr. Lakin regarding whether appellant had any continuing employment-related disability. It referred her to Dr. Dean L. Carlson, Board-certified in orthopedic surgery, for an impartial evaluation. In a December 13, 2007 report, Dr. Carlson reviewed the history of injury, the medical record including diagnostic studies, and noted appellant's complaints of bilateral hand and forearm burning pain with a bilateral upper extremity "tired feeling" and constant cervical spine pain spreading to her trapezius muscles and both shoulders. Physical examination findings included decreased cervical spine and bilateral shoulder range of motion. Bilateral elbow and wrist range of motion was normal, and bilateral Phalen's and Finkelstein's tests were negative. Two-point discrimination and Semmes-Weinstein thresholds showed inconsistent nonanatomic values. Dr. Carlson diagnosed arthralgia of wrist and hands, not occupationally related. In answer to specific questions, he stated that he agreed with Dr. Lakin that appellant had no objective physical findings of carpal tunnel syndrome, C5-6 cervical radiculopathy or tenosynovitis of either hand, noting inconsistent testing results for motor weakness in her grip, and inappropriate testing results for cervical radiculopathy or carpal tunnel syndrome. Dr. Carlson advised that MRI scan studies of the wrist were not diagnostic of any employment-related pathology, that echography of the wrists was normal, and that the cervical spine MRI scan was not diagnostic of a job-related injury but of age-related findings. Dr. Carlson opined

¹ The record does not contain a final decision regarding this request. A December 4, 2006 magnetic resonance imaging (MRI) scan was submitted demonstrating bulging discs at C5-6 and C6-7.

that appellant had reached maximum medical improvement and concluded that she could perform her regular duties as a mail clerk. While she needed no further treatment, she would be an appropriate candidate for work hardening for an eight-week period, after which she could return to unrestricted duties. In a January 31, 2008 report, he advised that any previous diagnosis of cervical radiculopathy, brachial neuritis, brachial radiculitis, carpal tunnel syndrome and bilateral carpal/hand tenosynovitis had completely resolved with maximum medical improvement achieved on June 25, 2007, the date of Dr. Lakin's examination. Dr. Carlson recommended work hardening because appellant had not worked since July 11, 2006 and he found that she was physically deconditioned. However, there was no reason that she could not return to unrestricted duties without hardening physical therapy and use workplace duties for her hardening exercises.

On March 5, 2008 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as represented by Dr. Carlson, established that she no longer had disability or residuals caused by the accepted conditions.²

On January 9, 2008 appellant, through counsel, disagreed with the proposed termination. On March 20, 2008 Dr. Filippone advised that an EMG/NCS that day was abnormal, with evidence of partial denervation in the mid-cervical paraspinals bilaterally and in left upper extremity muscles enervated by the left C5-6 nerve roots and there was NCS evidence of bilateral carpal tunnel syndrome. He concluded that appellant continued to be totally disabled. The Office forwarded the March 20, 2008 EMG/NCS study to Dr. Carlson for review. Dr. Carlson advised that an independent EMG/NCS was appropriate. He subsequently submitted an April 21, 2008 EMG/NCS report in which Dr. Joseph Rempson, Board-certified in internal medicine and psychiatry, advised that the study was normal with no evidence of carpal tunnel syndrome or cervical radiculopathy. Dr. Carlson advised that the new diagnostic study did not establish arthralgia of the wrists and hands.

By decision dated May 9, 2008, the Office terminated appellant's compensation effective May 10, 2008.

In a report dated March 28 and received by the Office on May 12, 2008, Dr. Filippone noted his disagreement with Dr. Carlson's opinion. On May 15, 2008 appellant, through counsel, requested a hearing, that was held on October 29, 2008. She described her employment duties and complaints of pain. Appellant returned to full-time work around May 29, 2008, describing her job as looking up incomplete zip codes with no keying. She submitted additional reports from Dr. Filippone, who reiterated his findings and conclusion that she remained totally disabled due to her accepted conditions.

In a January 27, 2009 decision, an Office hearing representative affirmed the May 9, 2008 decision.

² The Board notes that the decision memorandum refers to Dr. Carlson as both Dr. Carlson and "Dr. Cohen," a typographical error.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

Section 8123(a) of the Federal Employees' Compensation Act⁵ 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 When 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 on a proper factual background, must be given special weight.⁷

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. The Office determined that a conflict in medical opinion arose between appellant's treating physician, Dr. Filippone, and Dr. Lakin, who provided a second opinion evaluation for the Office, regarding whether she had any continuing employment-related residual or disability. It properly referred appellant to Dr. Carlson, Board-certified in orthopedic surgery, for an impartial evaluation.

In a comprehensive report dated December 13, 2007, Dr. Carlson provided physical examination findings and diagnosed arthralgia of wrist and hands, not occupationally related, advising that appellant had no objective physical findings of carpal tunnel syndrome, C5-6 cervical radiculopathy or tenosynovitis of either hand, noting inconsistent testing results for motor weakness in her grip, and inappropriate testing results for cervical radiculopathy or carpal tunnel syndrome. He opined that appellant had reached maximum medical improvement and could perform her regular duties as a mail clerk. Dr. Carlson initially advised that she would be an appropriate candidate for work hardening for an eight-week period, after which she could return to unrestricted duties. In a January 31, 2008 report, he clarified that any previous diagnoses of cervical radiculopathy, brachial neuritis, brachial radiculitis, carpal tunnel syndrome and bilateral carpal/hand tenosynovitis had completely resolved. Dr. Carlson stated that he had recommended work hardening because appellant had not worked since July 11, 2006 and was physically deconditioned. He saw no reason that she could not return to unrestricted duties without hardening therapy.

³ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

⁷ *Manuel Gill*, 52 ECAB 282 (2001).

By report dated March 20, 2008, Dr. Filippone advised that an EMG/NCS that day was abnormal, with EMG evidence of partial denervation in the mid-cervical paraspinals bilaterally and in left upper extremity muscles enervated by the left C5-6 nerve roots and NCS evidence of bilateral carpal tunnel syndrome. He concluded that appellant continued to be totally disabled. Dr. Filippone reiterated his findings of disability and conclusions.

The Office forwarded Dr. Filippone's March 20, 2008 report to Dr. Carlson for review. On April 29, 2008 Dr. Carlson advised that an independent EMG/NCS was appropriate. Such testing was obtained and he attached an April 21, 2008 EMG/NCS study that was interpreted as normal with no evidence of carpal tunnel syndrome or cervical radiculopathy. Dr. Carlson reiterated his previous diagnosis of arthralgia of the wrists and hands, not occupationally related. He provided a comprehensive, well-rationalized opinion in which he clearly advised that any residuals of her accepted conditions had resolved. Dr. Carlson's report is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.⁸ The Board concludes that Dr. Filippone's medical opinion is insufficient to overcome the weight accorded Dr. Carlson as an impartial medical specialist regarding whether appellant had residuals of her accepted conditions. The Office therefore properly terminated appellant's compensation benefits.⁹

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she had no residuals or disability due to her accepted conditions.

⁸ See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

⁹ *Manuel Gill*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 14, 2010
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