

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

B.L., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Philadelphia, PA, Employer**

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**Docket No. 09-2225
Issued: June 16, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 31, 2009 appellant timely appealed the July 7, 2009 merit decision of the Office of Workers' Compensation Programs, which denied modification of a prior decision terminating his wage-loss compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective July 9, 2008.

FACTUAL HISTORY

Appellant, a 53-year-old maintenance mechanic,¹ has an accepted claim for bilateral carpal tunnel syndrome (CTS),² which arose on or about January 1, 1998. He also claimed to have sustained injuries to his shoulders, elbows, lumbar spine, right hip, knees and feet. However, the Office's January 8, 2008 acceptance was limited to bilateral CTS. As to the other claimed conditions, the Office declared a conflict in medical opinion and referred appellant to an impartial medical examiner.³

In a report dated March 11, 2008, Dr. Stuart L. Gordon, a Board-certified orthopedic surgeon and impartial medical examiner (IME), found, *inter alia*, that appellant's complaints were not causally related to his workplace. He stated that appellant did not need carpal tunnel surgery. Dr. Gordon also stated that appellant's complaints and symptoms were not referable to compression of the median nerve at the wrist.⁴ He diagnosed bilateral knee degenerative arthritis and fibromyalgia syndrome, both of which were nonwork related.⁵ Appellant's fibromyalgia reportedly accounted for the complaints regarding his shoulders, arms, hips and legs. Dr. Gordon indicated that there were no residuals of any prior injury and there was no need for further medical care, treatment or diagnostic studies as to any work-related condition.

On March 24, 2008 the Office received treatment notes from Dr. Brian T. Brislin, an orthopedic surgeon, who examined appellant on February 26, 2008. Dr. Brislin diagnosed bilateral CTS, status-post right carpal tunnel release. He indicated that, while appellant's surgery

¹ In September 2006, when appellant filed the current claim, he had been performing light-duty work due to a January 1, 2002 employment-related left hip and groin injury (xxxxxx088).

² He underwent a right carpal tunnel release on June 13, 2007.

³ In a report dated August 1, 2007, appellant's physician, Dr. David J. Zweiback, a Board-certified internist, diagnosed employment-related bilateral rotator cuff tear, bilateral CTS, degenerative joint disease and disc disease of the cervical spine and accelerated osteoarthritis of the lumbosacral spine. Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on December 19, 2007 and diagnosed bilateral CTS, surgically treated on the right, bilateral degenerative rotator cuff disease, degenerative osteoarthritis of the knees and peripheral neuropathy of the feet. He explained that appellant had the misfortune of having a significantly well established "degenerative diathesis," which was genetically based and unrelated to work exposure. According to Dr. Hanley, appellant's only employment-related condition was his bilateral CTS. He also noted that appellant had received treatment for CTS on the right side and that he should be offered treatment on the left side. The Office based its acceptance of the claim primarily on Dr. Hanley's findings. The January 8, 2008 decision advised that "[b]ecause of the conflict between Drs. Zweiback (sic) and Hanley on the work-related diagnoses," an independent medical examination would be scheduled "to determine if any other medical conditions were caused by [appellant's] job duties."

⁴ On physical examination Dr. Gordon noted that the left hand had a negative Tinel's test for carpal tunnel pathology. He further noted that the left hand Tinel's test revealed numbness on the ulnar side of the 4th and 5th fingers, but not in the median nerve distribution. Dr. Gordon's March 11, 2008 examination did not include any additional objective studies, such as magnetic resonance imaging (MRI) scans or electromyography and nerve conduction studies (EMG/NCS). The latest EMG he reviewed was from November 2006 and it was indicative of bilateral CTS.

⁵ Dr. Gordon also reported that appellant had undergone left knee surgery on January 9, 2008 for a twisting injury he sustained at work in December 2007 (xxxxxx591).

initially provided relief, he currently complained of pain in both the small and index fingers of the right hand. Dr. Brislin also noted positive Tinel's and Phalen's tests on the left side. Given that appellant's latest EMG was more than a year old, Dr. Brislin recommended obtaining a new study to reevaluate the severity of his left CTS and also to evaluate the pain appellant was having in his right wrist from the previous carpal tunnel surgery.

By decision dated July 9, 2008, the Office terminated appellant's compensation and medical benefits.⁶ Based on Dr. Gordon's March 11, 2008 report, it found that appellant's accepted condition of bilateral CTS had ceased. His opinion was accorded determinative weight because of his status as an IME.

Appellant requested reconsideration on four occasions. In all but one instance, the Office reviewed the merits of the claim and denied modification.⁷ The evidence appellant submitted on reconsideration included, *inter alia*, a September 5, 2008 EMG/NCS that was interpreted as "abnormal" and "indicative of bilateral median nerve compression in the hands [CTS]," right greater than left. The Office also received reports from Dr. Randall N. Smith, a Board-certified orthopedic surgeon, dated October 15, 2008, March 11 and May 27, 2009. In each of his reports, Dr. Smith diagnosed bilateral CTS, which he attributed to appellant's 1998 employment injury. He also noted that the diagnosis was confirmed based on appellant's September 5, 2008 EMG. In merit decisions dated October 23, 2008, January 23 and July 7, 2009, the Office continued to accord determinative weight to Dr. Gordon's March 11, 2008 report because of his purported status as an IME.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁸ Having determined that, an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has either ceased or that it is no longer related to the employment.⁹ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁰ 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.¹¹

⁶ The Office issued a notice of proposed termination on May 28, 2008.

⁷ In addition to the three merit decisions discussed *infra*, the Office also issued a May 7, 2009 nonmerit decision denying reconsideration. Appellant had requested reconsideration on April 14, 2009 and submitted a new medical report dated March 11, 2009 that included a diagnosis of employment-related bilateral CTS. In denying reconsideration, the Office overlooked the newly submitted report dated March 11, 2009. It eventually reviewed the previously overlooked March 11, 2009 report in a subsequent merit decision.

⁸ *Curtis Hall*, 45 ECAB 316 (1994).

⁹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

¹⁰ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

¹¹ *Calvin S. Mays*, 39 ECAB 993 (1988).

ANALYSIS

The Office terminated appellant's benefits based on Dr. Gordon's March 11, 2008 report. With respect to the accepted condition of bilateral CTS, Dr. Gordon stated that appellant did not need carpal tunnel surgery. He also indicated that appellant's complaints and symptoms were not referable to compression of the median nerve at the wrist. Dr. Gordon opined that appellant's nonwork-related fibromyalgia syndrome was responsible for a number of his complaints, including those referable to his shoulders and arms. The Office accorded Dr. Gordon's opinion determinative weight because he was selected to resolve a conflict in medical opinion.¹²

The Office selected Dr. Gordon to resolve a conflict in medical opinion between Dr. Hanley and Dr. Zweiback, however, the conflict he was selected to resolve did not involve whether appellant continued to suffer residuals of his accepted bilateral CTS.¹³ Dr. Hanley and Dr. Zweiback agreed that appellant had bilateral CTS. Dr. Hanley, the Office referral physician, had examined appellant just a few months prior to Dr. Gordon's March 2008 examination. The Office relied on Dr. Hanley's December 19, 2007 opinion in accepting the claim for bilateral CTS. Later it proposed terminating benefits based on the purported absence and/or cessation of the disease. Dr. Gordon essentially ruled out bilateral CTS without the benefit of one of the primary diagnostic tools -- a recent EMG/NCS. Dr. Brislin recommended that appellant undergo new studies when he examined him on February 26, 2008, prior to Dr. Gordon's examination. The record reveals that both the November 2006 and September 2008 electrodiagnostic studies confirmed the diagnosis of bilateral CTS.

Dr. Gordon did not resolve an existing conflict regarding appellant's accepted condition but in fact he created one. As the Office's January 8, 2008 medical conflict statement indicated, that there was a dispute over what, if any, additional conditions the Office should accept as employment related, but not whether appellant was properly diagnosed with bilateral CTS. Because Dr. Gordon was not an IME on the issue of ongoing employment-related residuals due to bilateral CTS, his March 11, 2008 report was not entitled to determinative weight. Furthermore, because there is currently an unresolved conflict in medical opinion between Drs. Zweiback, Brislin and Smith on the one hand and Dr. Gordon on the other, the Office failed to carry its burden to justify the termination of appellant's benefits.

¹² The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a) (2006); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹³ The "medical conflict statement" prepared by the Office on January 8, 2008 reads as follows:

The conflict is between Drs. Zwieback (sic) and Hanley on which conditions were caused, accelerated or aggravated by the claimant's job duties. Dr. Zwieback (sic) has stated that the following conditions are work related: bilateral rotator cuff tear; acceleration of osteoarthritis of the lumbar spine; degenerative joint and disc disease of the cervical spine; and bilateral CTS. Dr. Hanley has stated that only bilateral CTS is work related.

CONCLUSION

The Office improperly terminated appellant's benefits effective July 9, 2008.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 16, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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