

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

S.H., Appellant)

and)

DEPARTMENT OF THE ARMY, FORT)
GEORGE G. MEADE, MD, Employer)

Docket No. 11-1134
Issued: December 9, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 6, 2011 appellant, filed a timely appeal of a March 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits effective March 25, 2011.

On appeal, appellant alleged that she continued to experience residuals and disability as a result of her accepted employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. On January 23, 1991 appellant, then a 39-year-old secretary, filed an occupational disease claim alleging that she developed hand and arm pain typing in the performance of duty. OWCP accepted her claim for left hand sprain. On July 26, 1993 it accepted right carpal tunnel syndrome and on April 14, 1994 left elbow extensor tendinitis. Appellant underwent right carpal tunnel release on June 25, 1999. OWCP terminated appellant's compensation and medical benefits in a decision dated April 27, 2000. In an order dated January 31, 2001,² the Board granted a motion filed by the Director of OWCP to set aside OWCP's decision and to remand the case to consider all the medical evidence submitted to OWCP prior to the April 27, 2000 decision and to cancel the scheduled oral argument.

Appellant underwent additional bilateral carpal tunnel surgeries in 2001. Beginning in 2002, appellant's attending physician, Dr. James E. Lowe, Jr., a Board-certified surgeon, diagnosed work-related trigger fingers and requested authorization from OWCP for surgery. OWCP's district medical adviser found trigger finger not related to the accepted conditions and OWCP referred appellant to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for a second opinion on whether appellant's accepted conditions caused the trigger finger. Dr. Moore found no evidence of trigger finger.

OWCP determined there was a conflict of medical opinion between Drs. Lowe and Moore based on the diagnosis of trigger fingers and referred appellant to Dr. Robert Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Elkins was asked to determine not only whether the trigger finger developed as a result of the accepted work-related conditions, but also whether the work-related condition had resolved.

Appellant's physician continued to submit progress reports through November 2007 regarding her carpal tunnel condition and trigger finger.

Dr. Elkins, in his reports received by OWCP on August 23 and September 15, 2005, found the work-related conditions had resolved and that the trigger finger condition was not related to the accepted conditions.

No further activity took place with this claim until 2008, when OWCP sent appellant to another impartial medical examiner, Dr. James E. Rice, a Board-certified orthopedic surgeon, who ultimately refused to participate in the process due to the size of the medical record.

On June 10, 2008 OWCP referred appellant to Dr. William Anderson, a Board-certified orthopedic surgeon, to conduct an impartial medical examination. The office of Dr. Anderson advised OWCP that the examination would be done by another physician in the office, Dr. Brian Szura, also a Board-certified orthopedic surgeon.

² Docket No. 00-2309 (issued January 31, 2001).

By decision dated January 29, 2009, OWCP terminated appellant's compensation and medical benefits effective February 15, 2009 finding that the weight of the medical evidence rested with the June 24, 2008 report of Dr. Szura.

Appellant appealed this decision to the Board and in a decision and order dated December 30, 2009³ the Board found the physician utilized as the impartial medical examiner, Dr. Szura, had not been selected through the appropriate process. The Board reversed OWCP's January 29, 2009 decision. The facts and circumstances in the Board's prior decisions are adopted herein by reference.

OWCP reentered appellant on the periodic rolls on March 2, 2010.

On November 29, 2010 OWCP referred appellant for a second opinion evaluation with Dr. Edward Mulcahy, a Board-certified orthopedic surgeon, to determine the extent of appellant's injury-related disability and whether appellant continued to suffer any other residuals of her accepted work injury. In his report dated January 13, 2011, Dr. Mulcahy noted appellant's accepted conditions of sprain left hand, extensor tendinitis of the left elbow and right carpal tunnel syndrome. He listed appellant's symptoms as moderately severe pain in the left elbow along with some locking of the first second and third fingers of the left hand. On physical examination, Dr. Mulcahy found full range of motion of the left elbow with inconsistent complaints of pain on palpation. He found full range of motion of the left wrist with no evidence of triggering in the palm of her left hand or catching of the flexor tendons in the left palm. Dr. Mulcahy found pain with deep palpation of the flexor tendons of the thumb, index and middle fingers. He reported negative Tinel's and Phalen's tests with full range of motion without atrophy or decreased sensation in the hand and digits. Dr. Mulcahy diagnosed chronic pain syndrome in both upper extremities "of questionable etiology" and multiple surgeries of both wrists and hands. He stated that appellant had no objective findings on examination of both upper extremities. Dr. Mulcahy opined that appellant's left wrist strain had resolved, that her left elbow tendinitis had resolved and that her right carpal tunnel syndrome had resolved. He found that appellant had no objective findings to indicate that there were residuals of her accepted work injuries and that she had reached maximum medical improvement. Dr. Mulcahy stated that appellant could perform work with restrictions. He stated, "The work restrictions ... are not due to the residuals of the January 14, 1991 injury. These restrictions are considered permanent because of the likelihood of upper extremity complaints. This is based on her history of complaints and multiple surgeries over the last 20 years."

In a letter dated February 17, 2011, OWCP proposed to terminate appellant's medical and compensation benefits based on Dr. Mulcahy's report. It based its finding on Dr. Mulcahy's January 13, 2011 report finding that he submitted medical reasoning explaining that appellant's accepted conditions had resolved and that no further treatment was necessary. OWCP determined that Dr. Mulcahy was the weight of the medical evidence because there had been no contrary medical opinion in the record since November 15, 2007.

³ Docket No. 09-892 (issued December 30, 2009).

Appellant responded in a letter dated March 14, 2011 and stated that she continued to experience residuals of her accepted conditions. She stated that she had been unable to find a hand doctor to examine her since Dr. Lowe is no longer practicing medicine.

By decision dated March 25, 2011, OWCP finalized the proposed termination of appellant's compensation and medical benefits finding that the weight of the current medical evidence as represented by Dr. Mulcahy's report established that she had no disability and no medical residuals as a result of her accepted employment injuries.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁷

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁸ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

ANALYSIS

OWCP accepted appellant's claim for left hand sprain, right carpal tunnel syndrome and left elbow extensor tendinitis as well as right carpal tunnel release. In the latest decision and order dated December 30, 2009,¹⁰ the Board found that there remained an outstanding conflict of medical opinion evidence between appellant's physician, Dr. Lowe, and OWCP's physician, Dr. Elkins, on the issue of whether appellant had any continuing disability or medical residuals

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *Id.*

⁸ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁹ *R.C.*, 58 ECAB 238 (2006).

¹⁰ Docket No. 09-892 (issued December 30, 2009).

as a result of her accepted employment injuries. OWCP referred appellant to Dr. Mulcahy for a second opinion evaluation and on January 13, 2011 he reviewed appellant's history of injury and accepted conditions. He performed a physical examination and found full range of motion of the left elbow and wrist with no evidence of triggering in the palm of her left hand or catching of the flexor tendons in the left palm. Dr. Mulcahy reported negative Tinel's and Phalen's tests with full range of motion without atrophy or decreased sensation in the hand and digits. He diagnosed chronic pain syndrome in both upper extremities "of questionable etiology" and stated that appellant had no objective findings on examination of either upper extremity. Dr. Mulcahy opined that all of appellant's accepted conditions had resolved as she had no objective findings in support of residuals. Dr. Mulcahy stated that appellant would perform work with restrictions. He stated, "The work restrictions ... are not due to the residuals of the January 14, 1991 injury."

The Board finds that the record continues to contain an unresolved conflict of medical opinion evidence between appellant's physician, Dr. Lowe and physicians for OWCP Drs. Mulcahy and Elkins. OWCP has not followed the appropriate steps for resolving the conflict by selecting an impartial medical examiner through the Physicians Directory Service and referring appellant, a statement of accepted facts and a list of specific questions to the impartial medical examiner. The only current medical evidence in the record is Dr. Mulcahy's January 13, 2011 report. As Dr. Mulcahy was not properly designated or selected as a impartial medical examiner, his report cannot resolve the existing conflict and meet OWCP's burden of proof to terminate appellant's compensation benefits. In assessing medical evidence, the number of physicians supporting one position or another is not controlling.¹¹ The Board previously found an unresolved conflict of medical evidence and the concurring opinion of a second opinion physician is not sufficient to resolve this conflict, which must be addressed in order to determine appellant's continuing disability and medical residuals.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation and medical benefits effective March 25, 2011 as there is an unresolved conflict of medical opinion evidence. The Board further finds the issue of whether appellant's accepted work-related conditions caused a trigger finger condition has not been finally adjudicated as there remains an unresolved conflict of medical evidence.

¹¹ K.W., 59 ECAB 714 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board