

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

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**L.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kearny, NJ, Employer**

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**Docket No. 11-1146  
Issued: December 2, 2011**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant*

*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 13, 2011 appellant, through her attorney, filed a timely appeal from a December 20, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant was disabled from March 15 through September 28, 2007 causally related to her accepted employment injury.

**FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated April 15, 2010, the Board set aside September 5, 2008 and January 21, 2009 decisions denying appellant's claim for

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

disability compensation from March 15 to September 28, 2007 due to her accepted condition of bilateral carpal tunnel syndrome.<sup>2</sup> It found that, although Dr. Mark A. Filippone, an attending Board-certified physiatrist, opined that appellant was disabled due to bilateral carpal tunnel syndrome during the relevant period it was insufficiently rationalized to establish that she was disabled due to her accepted work injury. The Board remanded the case for further development of the evidence. The facts and the circumstances of the case as set forth in the prior decision are hereby incorporated by reference.

By letter dated May 7, 2010, OWCP requested that Dr. Filippone provide a rationalized opinion regarding whether appellant was totally disabled from March 15 through September 28, 2007 due to her carpal tunnel syndrome. It further asked that he clarify whether she was currently partially disabled as a result of her work injury.

On June 15, 2010 Dr. Filippone advised that electromyograms (EMG) and nerve conduction studies (NCS) obtained March 23, 2009 and May 3, 2010 showed bilateral carpal tunnel syndrome. On examination he found a bilateral positive Tinel's sign and Phalen's test. Regarding the question of whether appellant was disabled from March 15 through September 28, 2007 due to carpal tunnel syndrome, Dr. Filippone stated:

“Given the history, [appellant's] subjective complaints and objective findings as well as the repetitive nature of [her] job for the [employing establishment], it is well within reasonable medical probability that the carpal tunnel syndrome is a direct result of [her] work for the [employing establishment] and was the cause of the period of disability in question.”

Dr. Filippone asserted that appellant required work restrictions and bilateral carpal tunnel releases.

By decision dated July 13, 2010, OWCP denied appellant's claim for disability compensation from March 15 to September 28, 2007. It found that Dr. Filippone's opinion was not rationalized and thus did not meet her burden of proof.

On July 21, 2010 appellant, through her attorney, requested an oral hearing.<sup>3</sup> At the hearing, held on November 5, 2010, counsel argued that the medical evidence from Dr. Filippone established that she was disabled from March 15 to September 28, 2007.

By decision dated December 20, 2010, OWCP's hearing representative affirmed the July 13, 2010 decision. She determined that Dr. Filippone's reports remained insufficient to

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<sup>2</sup> Docket No. 09-1503 (issued April 15, 2010). On December 19, 2007 appellant, then a 53-year-old distribution clerk, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment. OWCP accepted her claim for bilateral carpal tunnel syndrome.

<sup>3</sup> On September 2, 2010 appellant underwent a right carpal tunnel release. On November 23, 2010 OWCP accepted that she sustained a recurrence of disability beginning that date.

show total disability due to carpal tunnel syndrome in light of his contemporaneous reports that she was disabled during this period due to stress.<sup>4</sup>

On appeal appellant's attorney argues that Dr. Filippone's report establishes that appellant was disabled from March 17 through September 28, 2007. He maintains that OWCP should at the least have referred her for a second opinion examination.

### **LEGAL PRECEDENT**

The term disability as used in FECA<sup>5</sup> means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.<sup>6</sup> Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>7</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>8</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>9</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>10</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>11</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>12</sup>

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<sup>4</sup> In reports dated March and April 2007, Dr. Filippone diagnosed an anxiety disorder, post-traumatic stress disorder and a repetitive stress injury to the upper extremities and found that appellant was disabled from employment.

<sup>5</sup> 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

<sup>6</sup> *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>10</sup> *Vanessa Young*, 55 ECAB 575 (2004).

<sup>11</sup> *Richard E. Simpson*, 55 ECAB 490 (2004).

<sup>12</sup> *Melvin James*, 55 ECAB 406 (2004); *Henry G. Flores, Jr.*, 43 ECAB 901 (1992).

## ANALYSIS

On prior appeal the Board found that the medical reports from Dr. Filippone supported appellant's contention that she was disabled from March 15 to September 28, 2007 due to her accepted bilateral carpal tunnel syndrome but lacked sufficient rationale as to why the diagnosed condition caused disability from employment. The Board instructed OWCP to obtain a report that would resolve the issue.

On remand, in his June 15, 2010 report, Dr. Filippone diagnosed bilateral carpal tunnel syndrome as supported by diagnostic studies and physical findings of positive Tinel's signs and Phalen's tests bilaterally. He found that based on clinical examination, the objective studies and the repetitive nature of appellant's work duties, it was "well within reasonable medical probability" that her carpal tunnel syndrome was related to her employment and caused disability for the period March 15 to September 28, 2007.

Dr. Filippone's opinion is again supportive of appellant's claim and based on a firm diagnosis and supportive by diagnostic studies and objective findings. He did not, however, explain why her bilateral carpal tunnel syndrome prevented her from performing the duties of her employment. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>13</sup> Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>14</sup> As OWCP undertook development of the medical evidence, it had an obligation to secure a report that adequately addressed the relevant issue.<sup>15</sup> Moreover, the Board on prior appeal instructed OWCP to determine whether appellant was disabled from March 15 to September 28, 2007 due to her accepted carpal tunnel syndrome. As Dr. Filippone did not provide adequate explanation for his finding that appellant was disabled from employment during that period due to the accepted condition, OWCP has not adequately developed the evidence pursuant to the Board's instructions.

On remand, OWCP should obtain a rationalized opinion regarding whether appellant was disabled from employment during the relevant period due to her employment injury. Following this and such further development as deemed necessary, it should issue a *de novo* decision.

## CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>13</sup> Jimmy A. Hammons, 51 ECAB 219 (1999).

<sup>14</sup> See *supra* note 12.

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 2, 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