

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation effective November 21, 2009 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries; and (2) whether appellant met her burden of proof to establish continuing employment-related disability.

On appeal, appellant's attorney contends that OWCP: (1) was required to provide a third-party independent medical examination under 5 U.S.C. § 8123(a) as the report of Dr. Edwin Mohler, an orthopedic surgeon, was the only evidence contradicting appellant's claim; (2) failed to meet its burden of proof as Dr. Mohler's report had little probative value and not well rationalized or based on proper factual or medical background; and (3) failed to consider all properly submitted evidence that was sufficient to overcome termination and created a new conflict regarding continuing disability.

FACTUAL HISTORY

On August 25, 2008 appellant, then a 49-year-old claims representative, filed an occupational disease claim (Form CA-2) alleging bilateral carpal tunnel syndrome, which she became aware of and attributed to her federal employment on July 28, 2008. On November 5, 2008 OWCP accepted the claim for bilateral carpal tunnel syndrome and lesion of left ulnar nerve. On November 24, 2008 appellant underwent a left carpal tunnel release and left ulnar nerve compression at elbow. On March 31, 2009 she underwent right carpal tunnel release and release of right ulnar nerve at elbow. Appellant participated in a nurse rehabilitation program and was placed on the periodic rolls. In a statement of accepted facts dated August 6, 2009, OWCP indicated that she sustained a prior employment injury on April 25, 2008 that was accepted for cervical and lumbosacral sprain.

In a June 23, 2009 medical report, Dr. Walter Short, a Board-certified orthopedic surgeon, who performed appellant's hand surgeries, opined that she was temporarily totally disabled and that her complaints were consistent with the history of her injury.

To determine whether appellant continued to have residuals of her July 28, 2008 carpal tunnel work injury and whether she was capable of working, OWCP referred her to Dr. Mohler for a second opinion evaluation. In a September 15, 2009 report, Dr. Mohler reviewed her medical records and a statement of accepted facts. His physical examination revealed full range of motion of appellant's elbows, wrists and digits. There was no evidence of tendinitis and equal Tinel's signs at cubital tunnel and carpal tunnel. The median nerve compression test, Phalen's test, reverse Phalen's test and Allen's test were all negative. Dr. Mohler reported reduced sensation over the ulnar distribution compared to the median, left reduced compared to the right. He also reported reduced response to sensory stimulus on the ulnar borders of the forearm, right more than left. Dr. Mohler diagnosed postoperative surgical scars and opined that, while the diagnosed conditions were caused by the July 28, 2008 employment injury, the conditions had resolved and appellant did not require additional treatment. He opined that she was not capable of performing her date-of-injury position as a claims representative due to multiple other conditions and that her disability was not related to her employment-related condition of July 28, 2008.

In a September 15, 2009 medical report, Dr. Short indicated that a physical examination of appellant's right elbow revealed a range of motion between 20 and 130 degrees, positive Tinel's sign over the medial aspect of the elbow, slightly diminished sensation in the median and ulnar nerve distributions and a positive Phalen's sign. Due to progressive symptoms, he ordered electromyogram (EMG) and nerve conductions studies.

On October 2, 2009 OWCP issued a notice of proposed termination to terminate appellant's compensation benefits on the grounds that the weight of medical evidence from Dr. Mohler established that she was no longer disabled due to the accepted condition. Appellant was given 30 days to submit additional evidence or argument.

In response to the notice of proposed termination of benefits, appellant submitted a May 21, 2009 medical report by Dr. Stephen Robinson, a Board-certified orthopedic surgeon, who diagnosed herniated cervical disc and physical therapy notes.³

By decision dated November 5, 2009, OWCP finalized termination of appellant's compensation benefits effective November 21, 2009 finding that her accepted conditions had resolved.

On March 23, 2010 appellant requested reconsideration and submitted additional evidence. In a January 6, 2010 medical report, Dr. Short indicated that she had a mildly positive Tinel's sign at the ulnar nerve. He reported that appellant's ulnar nerve compression at the elbow bilaterally and left carpal tunnel syndrome was resolved. Dr. Short indicated that she had mild right carpal tunnel syndrome and opined that she would not be able to do repetitive activities with her hands.

By decision dated May 12, 2010, OWCP denied modification of the November 5, 2009 decision to terminate appellant's compensation.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying 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 Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ The right to medical benefits for an accepted

³ In a letter dated November 12, 2008, received by OWCP on November 13, 2009, appellant objected to the October 2, 2009 proposed termination and submitted additional evidence. The Board notes that the November 12, 2008 correspondence contains an apparent typographical error and should bear the date of November 12, 2009 as it references the notice of proposed termination.

⁴ See *Jorge E. Sotomayor*, 52 ECAB 105, 106 (2000); *Curtis Hall*, 45 ECAB 316 (1994).

⁵ See *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁶ See *Del K. Rykert*, 40 ECAB 284 (1988).

condition is not limited to the period of entitlement to compensation for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden to justify termination of benefits.

Appellant's counsel argues that there is an unresolved conflict in medical opinion between Dr. Mohler and Dr. Short.⁹ For a conflict to arise the opposing physicians viewpoints must be of virtually equal weight and rationale.¹⁰ It is OWCP that bears the burden to justify modification or termination of benefits.¹¹

OWCP based its decision to terminate appellant's benefits on a September 15, 2009 report by Dr. Mohler, the second-opinion physician, who reported full range of motion and no evidence of tendinitis. Dr. Mohler found equal Tinel's signs at the cubital and carpal tunnel. He reported a negative nerve compression test, negative Phalen's test and negative reverse Phalen's test. Dr. Mohler indicated reduced sensation over the ulnar distribution compared to the median, left reduced compared to the right. He also reported reduced response to sensory stimulus on the ulnar borders of appellant's forearm, right more than left. Dr. Mohler concluded that appellant's employment-related condition had resolved. Noting the lack of objective findings that, the condition was still present, he found no disabling residuals and no need for further medical care or additional diagnostic testing. Dr. Mohler noted that, although appellant was unable to return to her date-of-injury position, this was due to her nonemployment-related conditions.

On September 15, 2009 Dr. Short, appellant's attending physician, diagnosed carpal tunnel syndrome and ulnar nerve compression. He related increasing numbness and paresthesias in the right arm/hand, found a positive Tinel's sign over the medial aspect of the right elbow, slightly diminished sensation in the median and ulnar nerve distributions and a positive Phalen's sign. Dr. Short ordered EMG and nerve conductions studies based on his medical opinion that appellant continued to show progressive symptoms.

The medical reports of Drs. Mohler and Short were both dated September 15, 2009 and they conducted similar tests to evaluate appellant's condition. However, the test results obtained by Dr. Mohler and Dr. Short were significantly different. While Dr. Mohler reported equal Tinel's signs and a negative Phalen's test, Dr. Short reported positive Tinel's and positive Phalen's signs. He concluded that appellant's employment-related condition had resolved,

⁷ See *T.P.*, 58 ECAB 524 (2007).

⁸ See *I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination. See 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁰ See *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹¹ See *Curtis Hall*, 45 ECAB 316 (1994).

whereas Dr. Short diagnosed carpal tunnel syndrome and ulnar nerve compression and ordered EMG and nerve conduction studies due to progressive symptoms. Dr. Mohler's report did not explain his own findings of "equal" Tinel's signs as to whether they were positive or negative. Furthermore, he failed to reconcile his opinion with the findings and opinion of Dr. Short.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and medical benefits effective November 21, 2009. As of that date a conflict in medical opinion existed between Dr. Short and Dr. Mohler, both orthopedic surgeons. Each physician had the opportunity to examine appellant and review the diagnostic studies of record. With respect to the existence and extent of any ongoing employment-related residuals, the Board finds that the relevant and probative medical evidence is in equipoise. It is well established that where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹² The Board notes that the reports and treatment records of Dr. Short were of record prior to the November 5, 2009 termination decision of OWCP. As OWCP failed to resolve the conflicting medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate appellant's benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective November 21, 2009 due to an unresolved conflict in medical opinion.¹³

¹² See *Darlene R. Kennedy*, 57 ECAB 414 (2006); *H.S.*, Docket No. 10-1220 (issued May 24, 2011).

¹³ In view of the Board's disposition of OWCP's termination of compensation, the issue of whether appellant has established that she had any further disability after November 21, 2009 due to her accepted employment injury is moot.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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