

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

_____)	
B.C., Appellant)	
)	
and)	Docket No. 11-1945
)	Issued: April 19, 2012
U.S. POSTAL SERVICE, INJURY)	
COMPENSATION OFFICE, Newark, NJ,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 23, 2011 appellant filed an appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated April 28 and August 4, 2011. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 met her burden of proof to establish that she sustained a recurrence of disability on December 8, 2010 caused by the accepted right carpal tunnel syndrome.

On appeal, appellant asserts that the medical evidence establishes that her condition worsened, as shown by an electromyographic (EMG) study.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On June 10, 2008 appellant, then a 40-year-old health and resource management specialist, filed an occupational disease claim alleging that her employment duties required a significant amount of repetitive motion and caused carpal tunnel syndrome. An employing establishment manager noted that appellant had been out of work since April 23, 2008 due to a nonemployment-related foot infection. On September 10, 2008 OWCP accepted right carpal tunnel syndrome.

A July 16, 2009 nerve conduction (NCS) and EMG study was unremarkable on the left. The study demonstrated mild right sensory carpal tunnel syndrome. In reports dated January 15 and April 21, 2010, Dr. Michael D. Merkin, a Board-certified neurologist, advised that appellant had pain in her right wrist and had performed typing at work.

On December 20, 2010 appellant filed a recurrence of disability claim, stating that she sustained disability on December 15, 2010 when she awakened to pain in her arm, wrist and hand. It continued at work when typing and using a computer mouse. An employing establishment manager advised that appellant continued to perform all her job duties. She referenced a second injury, adjudicated under file number xxxxxx289. In a December 17, 2010 report, Dr. Merkin noted that appellant reported increasing issues with her arm, hand and wrist and was off work due to pain. She could remain off work until further testing, including an EMG study, was complete. Appellant filed a claim for wage-loss compensation beginning December 15, 2010.

In a December 31, 2010 statement, appellant explained that in April 2008 she was hospitalized for over three weeks with a foot infection that left her unable to walk and was out of work until May 2009. She required additional foot surgery in September 2009. After her return to work following the September 2009 surgery, she suffered several setbacks and claimed an aggravation to her toe and foot, that OWCP accepted. With regard to the instant claim, appellant stated that her right arm, wrist and hand pain became more intense while typing and using a computer mouse. On a January 3, 2011 attending physician's report, Dr. Merkin diagnosed right median nerve entrapment and recommended a wrist splint. He advised that appellant became totally disabled on December 15, 2010 and could not return to work, stating that he was awaiting a follow-up EMG study.

On January 4, 2011 appellant informed OWCP that the physician treating her foot had taken her off work. OWCP informed her that she could file a separate recurrence claim for her foot condition.

A January 11, 2011 NCS and EMG examination demonstrated a trend towards a mild bilateral sensory carpal tunnel syndrome. On February 4, 2011 Dr. Merkin noted the EMG findings. He reported that typing at work bothered appellant's hands and, since she had stopped work, her hands felt better. Dr. Merkin reported that she was working a splint and opined that appellant's symptoms were work related. She had some degree of disability and he recommended evaluation by a hand specialist.

In March 14, 2011 reports, Dr. Alexander M. Marcus, Board-certified in general orthopedics and surgery of the hand, reviewed appellant's history of right carpal tunnel syndrome and a foot injury. He reported that she had been out of work for approximately three months and described her chief complaint of worsening right arm pain with some numbness. At work, her duties included typing and computer use. Dr. Marcus provided findings on physical examination, noting that carpal tunnel compression test was equivocal and reviewed the EMG studies. He advised that appellant's symptoms were primarily due to tendinitis and recommended therapy, ergonomic changes and a magnetic resonance imaging (MRI) study of the right wrist. Dr. Marcus diagnosed right carpal tunnel syndrome and right wrist tendinitis and found that she could return to work without restriction.²

In an April 13, 2011 report, Dr. Marcus noted appellant's continued complaint of wrist pain and numbness. He provided physical examination findings and reviewed an MRI scan study, stating there was nothing that would be causing her symptoms. Dr. Marcus advised that her right wrist pain was most consistent with dorsal tendinitis. He recommended that she continue to wear a brace, physical therapy and ergonomic changes and again diagnosed mild right carpal tunnel syndrome. Dr. Marcus opined that he did not feel that appellant would further injure her right hand or wrist if she returned to work, but that it was up to her and her supervisors to determine if it was safe for her to perform her work duties.

In an April 25, 2011 letter, Dr. Merkin advised that appellant was last seen in his office on February 4, 2011 when she told him that any typing she did at work caused her discomfort, and that he recommended that she see a hand specialist. He opined that appellant's carpal tunnel syndrome was related to her work as a typist, and had been totally disabled as a typist as her diagnosis is commonly related to that occupation.

By decision dated April 28, 2011, OWCP denied appellant's recurrence claim on the grounds that the medical evidence did not establish that her current condition was due to the accepted right carpal tunnel syndrome.

On May 3, 2011 appellant requested reconsideration. She stated that she was not claiming disability compensation past March 15, 2011 for this injury and further requested that tendinitis be accepted as employment related. In a May 11, 2011 report, Dr. Marcus noted appellant's complaint of throbbing wrist pain at night. He advised that it was a difficult situation of multiple symptoms and likely multiple etiologies. Dr. Marcus indicated that appellant's symptoms were most consistent with dorsal wrist tendinitis, based on her description of increasing symptoms with repetitive activities such as typing at work, noting that this diagnosis was based primarily on history and an overall description of symptoms. He stated that the reported paresthesias represented carpal tunnel syndrome, noting that EMG findings were consistent with that diagnosis, and was associated with appellant's repetitive work activities. Dr. Marcus advised that he discussed treatment options with appellant, including a carpal tunnel release, but that she did not want one at that point because she was having foot surgery that week.

² Dr. Marcus became appellant's physician of record on February 16, 2011.

In a merit decision dated August 4, 2011, OWCP denied appellant's recurrence claim. It noted its review of the medical evidence including Dr. Merkin's April 25, 2011 report and the reports of May 11, 2011 from Dr. Marcus, and denied modification of the April 28, 2011 decision.

LEGAL PRECEDENT

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."³ A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁴ Where no such rationale is present, medical evidence is of diminished probative value.⁵

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁶ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷

ANALYSIS

The Board finds this case is not in posture for decision. The accepted condition is right carpal tunnel syndrome, and appellant is claiming that she sustained a recurrence of disability for the period December 20, 2010 through March 15, 2011. She also requested that right wrist tendinitis be accepted as employment related.

The medical evidence relevant to the period of claimed compensation includes a December 12, 2010 report in which Dr. Merkin, an attending neurologist, noted that appellant reported increasing issues with her arm, hand and wrist and was out of work due to pain. He

³ 20 C.F.R. § 10.5(x); *R.S.*, 58 ECAB 362 (2007).

⁴ *I.J.*, 59 ECAB 408 (2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁵ See *Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁶ 20 C.F.R. § 10.5(f); *Cheryl Decavitch*, 50 ECAB 397 (1999).

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

advised that she could remain off work until all testing, including an EMG study, was complete. On January 3, 2011 Dr. Merkin diagnosed right median nerve entrapment, recommended a wrist splint and advised that appellant became totally disabled on December 15, 2010. He indicated that she had not been advised that she could return to work, stating that he was awaiting a follow-up EMG study. On February 4, 2011 Dr. Merkin noted that a January 11, 2011 EMG study demonstrated a trend towards mild bilateral sensory carpal tunnel syndrome. He reported that typing at work bothered appellant's hands, and that since she had stopped working her hands felt better. Dr. Merkin opined that appellant's symptoms were work related and that she had some degree of disability. He recommended evaluation by a hand specialist. On April 25, 2011 Dr. Merkin reported that, when appellant was last seen on February 4, 2011, she told him that typing at work caused discomfort. He opined that her carpal tunnel syndrome was related to appellant's work as a typist, and that she had been totally disabled as a typist because her diagnosis is commonly related to that occupation.

On March 14, 2011 Dr. Marcus, an attending hand surgeon, diagnosed right carpal tunnel syndrome and right wrist tendinitis and recommended that appellant could return to work without restrictions but also recommended ergonomic changes. He again recommended ergonomic changes on April 13, 2011 and on May 11, 2011 advised that a diagnosis of wrist tendinitis as most consistent with appellant's description of increasing symptoms with repetitive activities such as typing at work.

The Board finds that, while these reports lack detailed medical rationale sufficient to discharge appellant's burden of proof that she sustained a recurrence of disability beginning on December 20, 2010, this does not mean that they may be completely disregarded by OWCP. It merely means that their probative value is diminished.⁸

It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁹ The case shall therefore be remanded to OWCP. On remand, OWCP shall refer appellant, an updated statement of accepted facts and the medical evidence of record to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether appellant sustained a recurrence of disability on December 20, 2010 due to the accepted right carpal tunnel syndrome and whether the diagnosed right wrist tendinitis is employment related. After this and such further development as deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant established that she was totally disabled for the period December 20, 2010 through March 15, 2011 due to the accepted right carpal tunnel syndrome.

⁸ *Shirley A. Temple*, 48 ECAB 404 (1997).

⁹ *See Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4 and April 28, 2011 are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: April 19, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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