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

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| **D.M., Appellant** | ) | |
| **and** | ) | **Docket No. 11-2052** |
| | ) | **Issued: March 14, 2012** |
| **U.S. POSTAL SERVICE, MAIN POST OFFICE, Milwaukee, WI, 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
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On September 6, 2011 appellant timely appealed the March 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

### ***ISSUE***

The issue is whether OWCP properly rescinded acceptance of appellant's claim for recurrence beginning July 21, 2010.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal includes evidence received after OWCP issued its March 7, 2011 decision. The Board's appellate review is limited to evidence that was in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1) (2011). Accordingly, any new evidence received after the March 7, 2011 decision will not be considered on appeal.

## ***FACTUAL HISTORY***

On March 2, 2000 appellant, then a 31-year-old mail handler, filed an occupational disease claim Form CA-2 for bilateral wrist tendinitis, carpal tunnel syndrome and cubital tunnel syndrome. She attributed her injury to repetitive pushing, pulling and lifting of mail and equipment.

Dr. John T. Kroner, a Board-certified orthopedic surgeon, initially examined appellant on February 16, 2000. He noted that she complained of numbness, tingling, aching and soreness in the upper extremities, hands and wrists dating back at least six or seven years. Dr. Kroner also noted that appellant had worked for the employing establishment in different capacities, but always involving repetitive gripping and sustained grip-type activities. He further noted that she had previously been told she had tendinitis and was treated with anti-inflammatory medications, but this treatment had not resulted in any significant improvement. On physical examination there was diffuse tenderness in the forearms and the flexor tendons of the fingers and thumb. Also, appellant had pain with median nerve compression test, but no real complaints of numbness. Dr. Kroner recommended an electromyogram and nerve conduction study (EMG/NCV) to determine if she had carpal tunnel syndrome (CTS).

In a follow-up examination on February 25, 2000, Dr. Kroner noted that appellant's recent EMG/NCV results "interestingly" did not show any CTS, but revealed some moderate delay of conduction of the ulnar nerve across the elbow. He diagnosed bilateral wrist tendinitis, CTS and cubital tunnel syndrome. Dr. Kroner recommended steroid injections in the carpal tunnel area, however, appellant deferred treatment at that time. When appellant returned on March 17, 2000, he administered the previously recommended steroid injections. Dr. Kroner diagnosed bilateral CTS and tendinitis and placed appellant on work restrictions.

On March 18, 2000 OWCP accepted appellant's claim for bilateral wrist tendinitis, with a February 25, 2000 date of injury.

Following acceptance of the claim, appellant received conservative treatment and she continued to work with restrictions. Effective October 3, 2000, the employing establishment dismissed her for cause. Appellant's subsequent employment history was sporadic. From June 2003 until December 2005, she worked as a slot attendant at Potawatomi Bingo Casino. Beginning in January 2006, appellant worked six weeks as a part-time crossing guard for the City of Milwaukee. She also reported receiving a disability annuity from the Social Security Administration beginning in April 2007. Appellant's most recent employment was as an enumerator with the U.S. Census Bureau. She worked intermittently during the period May 18 through August 7, 2010, at which time the Census Bureau terminated her employment for lack of work.[3]

On September 17, 2010 appellant filed a claim for recurrence of disability Form CA-2a beginning July 21, 2010. Dr. Kroner saw her for a follow-up examination on July 21, 2010. He noted that he previously saw appellant 10 years prior for bilateral early mild CTS and tendinitis. Dr. Kroner also noted that the previous EMG/NCV showed delay at the ulnar nerve of the elbow,

[3] Appellant worked 26 days during the period May 18 to August 7, 2010, for a total of 153 hours.

but no evidence of CTS even though clinically it was thought to be consistent with CTS. His latest examination revealed tenderness at the flexor tendon area of both wrists and a positive median nerve compression test. Dr. Kroner treated appellant with steroids and ordered a repeat EMG/NCV so he could reevaluate the severity of CTS.

A July 29, 2010 EMG/NCV revealed right carpal tunnel syndrome and bilateral cubital tunnel syndrome. Dr. Kroner subsequently recommended surgery for both upper extremities. He proposed a two-stage procedure that began with right carpal tunnel and right cubital tunnel releases followed by a left ulnar nerve transposition four weeks later. Appellant agreed with the proposed treatment and Dr. Kroner requested authorization from OWCP.

In an August 17, 2010 attending physician's report Form CA-20, Dr. Kroner diagnosed ulnar nerve compression syndrome, dysesthesia and joint pain in the wrist (ICD-9 Codes 354.2, 782.0 and 719.4). He indicated that the condition was employment related and noted that appellant's employment "always involved repetitive gripping, sustained grip activities."

On November 17, 2010 Dr. Kroner performed a right elbow ulnar nerve transposition and right carpal tunnel release. On December 15, 2010 he performed a left elbow ulnar nerve transposition.

On December 15, 2010 OWCP advised appellant that her recurrence of July 21, 2010 had been accepted. Several weeks later, it retroactively authorized the November 17, 2010 right upper extremity surgery. While it did not specifically authorize appellant's December 15, 2010 surgery, OWCP authorized postsurgical therapeutic exercises and physical therapy with respect to the left upper extremity.

On January 10, 2011 appellant filed claims for compensation Form CA-7 for the periods of July 21 through November 16, 2010 and November 17, 2010 through January 7, 2011.

On January 12, 2011 the employing establishment wrote to OWCP requesting "reconsideration of the acceptance of [appellant's] recurrence...." Appellant's employer noted that she had been separated from service effective October 3, 2000, and had since held several positions elsewhere, including her latest job with the U.S. Census Bureau that ended on August 7, 2010. The employing establishment challenged whether there was a causal relationship between her current bilateral upper extremity condition and her February 25, 2000 accepted employment injury.

On January 21, 2011 OWCP acknowledged receipt of appellant's claim for compensation for the period July 21, 2010 to January 7, 2011. It advised her that her claim and any future claims for compensation could not be processed because the evidence of record did not address how her current condition was related to the original injury of February 25, 2000. The record also reportedly did not address whether appellant was entitled to compensation as a result of her February 25, 2000 employment injury. OWCP acknowledged it had already issued a decision accepting her recurrence of July 21, 2010. However, it explained that it issued the December 15, 2010 decision "without a thorough review of [appellant's] case." Consequently, OWCP requested further information from appellant. It specifically asked Dr. Kroner to explain how appellant's current condition and recent surgeries were related to the original February 25, 2000

injury, while also taking into account the fact that appellant had not worked as a mail handler since October 3, 2000. OWCP afforded appellant 30 days to submit the requested information. It also advised her that any medical treatment she received would be at her own expense, and if the claim were later accepted, she could then submit her expenses for reimbursement.

In response, Dr. Kroner wrote a letter to the claims examiner dated February 4, 2011. He discussed his previous treatment of appellant in 2000 to 2001 and her original EMG/NCV.[4] Dr. Kroner noted that the initial electrodiagnostic study showed bilateral delay of the ulnar nerve conduction across the elbow. He also indicated that both he and the administering physician believed the study revealed components of CTS as well as the documented cubital tunnel syndrome and tendinitis of the wrists and hands. Dr. Kroner explained that appellant continued to have problems with all of these conditions, and various modalities of nonoperative treatment had been attempted over the course of the subsequent 10 years, which included splints, cortisone shots, anti-inflammatory medications and activity modification. He further explained that her ongoing problems gradually worsened over time, which was typical of cubital tunnel syndrome and CTS. Dr. Kroner indicated that he believed all three diagnoses -- tendinitis, CTS and cubital tunnel syndrome -- dated back to appellant's initial visit, with the symptoms from those dating back several years prior according to the history she provided during the initial evaluation on February 16, 2000. He explained that the same mechanism that caused the tendinitis, which OWCP accepted as work related, was also known to cause CTS. Because the symptoms of all three conditions were there at the beginning, Dr. Kroner was perplexed as to how OWCP could accept tendinitis, but not cubital tunnel syndrome and CTS.

By decision dated March 7, 2011, OWCP denied appellant's claim for recurrence beginning July 21, 2010. The latest decision did not mention that the recurrence had previously been accepted on December 15, 2010.[5] OWCP denied the claimed recurrence because "Dr. Kroner failed to explain how [appellant's] current condition" was related to her accepted February 25, 2000 employment injury.

## ***LEGAL PRECEDENT***

OWCP has the authority to review an award for or against payment of compensation at any time on its own motion or upon application.[6] When supported by the evidence, OWCP may set aside or modify a prior decision and issue a new decision.[7] However, the power to annul an award is not an arbitrary one.[8] OWCP can only set aside an award for compensation in the

[4] Dr. Kroner properly identified the date of injury as February 25, 2000, but mistakenly referenced "October 2010" and "2010" as the month and year of his initial evaluation. Although he examined appellant on October 1, 2010 in advance of her two surgeries in November and December 2010, he initially examined appellant on February 16, 2000, as documented in his February 17, 2000 narrative report.

[5] The January 21, 2011 recurrence development letter and the subsequent March 7, 2011 decision were issued by a different claims examiner than the one who previously accepted appellant's recurrence claim on December 15, 2010.

[6] 5 U.S.C. § 8128.

[7] *V.C.*, 59 ECAB 137, 139 (2007); *John W. Graves*, 52 ECAB 160, 161-62 (2000).

[8] *V.C.*, *supra* note 7.

manner provided by FECA.[9] Once OWCP accepts a claim, it bears the burden to justify modification or termination of benefits.[10] If OWCP later decides that it erroneously accepted a claim, it must provide a clear explanation for rescinding acceptance.[11]

## ***ANALYSIS***

Appellant claimed a recurrence of disability beginning July 21, 2010. By decision dated December 15, 2010, OWCP accepted the claim and authorized appellant's November 17, 2010 right carpal tunnel release and right elbow ulnar nerve transposition. While it did not specifically authorize appellant's December 15, 2010 left elbow ulnar nerve transposition, OWCP authorized postsurgical treatment for the left upper extremity on January 7, 2011.

At the employing establishment's request, OWCP revisited its December 15, 2010 acceptance of appellant's recurrence claim. On January 21, 2011 it explained that it issued the December 15, 2010 acceptance without a thorough review of her case. OWCP informed appellant that it would not process her claim for wage-loss compensation or pay for further medical care unless and until she submitted additional evidence in support of her claimed recurrence beginning July 21, 2010. By doing so, OWCP effectively rescinded acceptance of her claimed recurrence as of January 21, 2011.

In a February 4, 2011 report, Dr. Kroner explained that notwithstanding the initial EMG/NCV results, he believed appellant had clinical evidence of bilateral CTS, as well as tendinitis and cubital tunnel syndrome dating back to his initial evaluation in February 2000. He explained that the same mechanism of injury that gave rise to the accepted condition of bilateral wrist tendinitis was also known to cause CTS.

Despite the fact that appellant's electrodiagnostic studies revealed cubital tunnel syndrome in February 2000, and Dr. Kroner's stated belief that all three of her current upper extremity conditions were employment related, OWCP found that appellant failed to establish a causal relationship between her current condition and her February 25, 2000 employment injury. It denied her recurrence claim without even referencing the fact that it had previously accepted the claim on December 15, 2010.

Once OWCP accepts a claim, it bears the burden to justify modification or termination of benefits.[12] The claim remains in accepted status until OWCP presents sufficient evidence and/or argument to rescind its acceptance of the July 21, 2010 recurrence. The only explanation OWCP offered for rescinding the claim was that it had not conducted a thorough review of the case prior

[9] If OWCP determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), OWCP (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded or award compensation previously denied. 20 C.F.R. § 10.610 (2011).

[10] *V.C.*, *supra* note 7.

[11] *Id.*

[12] *Id.*

to issuing the December 15, 2010 decision. While OWCP may have reasonably believed it initially acted in haste, this explanation is not sufficient justification to support rescinding acceptance of the recurrence claim. Moreover, the March 7, 2011 decision did not even purport to rescind the prior acceptance, but shifted the burden of proof to appellant to establish that her claimed disability of July 21, 2010 was causally related to her February 25, 2000 employment injury. The decision did not acknowledge that the claim was accepted and authorized at least one of appellant's two recent surgeries.

Neither the claims examiner's January 21, 2011 letter nor the March 7, 2011 decision provided sufficient evidence or argument to support recision of appellant's July 21, 2010 recurrence. OWCP impermissibly shifted the burden of proof to appellant to establish that her claimed recurrence of July 21, 2010 was causally related to her February 25, 2000 employment injury. As OWCP failed to carry its burden, the March 7, 2011 decision shall be reversed. Accordingly, appellant's July 21, 2010 recurrence remains accepted and she is eligible to receive appropriate wage-loss compensation and medical benefits related to her February 25, 2000 employment injury.

## ***CONCLUSION***

OWCP did not meet its burden of proof to rescind acceptance of appellant's July 21, 2010 recurrence.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 7, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 14, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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