

On May 15, 2009 Dr. John Capo, an attending Board-certified orthopedic surgeon, performed right tunnel release surgery which was authorized by OWCP. Appellant returned to limited-duty work on August 18, 2009 but stopped work on September 1, 2009.

In a November 24, 2009 report, Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon serving as an OWCP referral physician, stated that on examination appellant had unremarkable Tinel's and Phalen's tests in her wrists and seven millimeter two-point discrimination in her fingers and thumbs. Appellant had equal reflexes and 5/5 strength in her arms. Dr. Lakin determined that appellant did not have any disability due to accepted work injuries and was capable of returning to her regular work.

In a December 30, 2009 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the opinion of Dr. Lakin. It provided appellant an opportunity to submit evidence or argument challenging the proposed termination.

Appellant submitted a December 31, 2009 report from Dr. Capo, who stated that he saw her on October 20, 2009 when she reported that she had some problems at work with increasing pain after she was forced to do excessive work beyond her work restrictions. Dr. Capo noted that appellant had been out of work since September 4, 2009 due to this circumstance and was found to have pain and increasing swelling in her hand during the October 20, 2009 examination. He returned appellant to physical therapy for strengthening and noted that her condition was improving over time. Dr. Capo recommended that she not perform her full work duties.

In a February 9, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day. It found that the weight of the medical evidence regarding residuals of the accepted work injuries rested with Dr. Lakin's opinion.

Appellant requested a hearing before an OWCP hearing representative and submitted additional evidence. In a December 1, 2009 report, Dr. Capo stated that on examination it was observed that the incisions on appellant's right wrist were well healed. There was a mild Tinel's sign and she had slight tenderness and mild paresthesias in her thumb. During a January 19, 2010 examination, Dr. Capo observed that on the right side appellant could flex her fingers into her palm, but that she had grip weakness and some paresthesias in the thumb, index and middle fingers. On February 16, 2010 he stated that on examination appellant could fully flex her right fingers and she had negative Tinel's sign and mild paresthesias in her right thumb. Dr. Capo indicated that appellant could return to light duty.

At the June 1, 2010 hearing before an OWCP hearing representative, appellant testified that in April 2010 she returned to her regular work on a full-time basis because no limited-duty work was available. She asserted that she struggled to perform the duties of this job.²

In a September 3, 2010 decision, an OWCP hearing representative affirmed OWCP's termination of appellant's wage-loss compensation and medical benefits effective February 9, 2010. She also reviewed medical evidence that appellant submitted after February 9, 2010 and found that it did not show that she was entitled to wage-loss compensation and medical benefits after that date.

² After the hearing, appellant submitted an October 2, 2009 note in which an attending physician stated that she should stay off work for eight weeks due to severe anxiety and stress.

On August 18, 2011 appellant requested reconsideration of her claim and submitted medical evidence which she claimed showed that she continued to have residuals of her accepted bilateral carpal tunnel syndrome.

In an April 20, 2010 report, Dr. Capo indicated that appellant reported that she had pain in the ulnar side of her right wrist with no significant paresthesias in her fingers. Examination of appellant's right arm revealed a negative Tinel's sign with some tenderness over the flexor carpi ulnaris tendon. Dr. Capo indicated that it was appropriate for appellant to return to work.

In an August 31, 2010 report, Dr. Capo stated that appellant indicated that she had returned to work and experienced pain, tingling, numbness and difficulty with motion in both arms. He indicated that on examination of both arms appellant exhibited positive Tinel's and Phalen's signs and median nerve compression bilaterally, worse on the left and paresthesias in the median nerve distribution bilaterally. Dr. Capo stated that appellant seemed "to have exacerbated her symptoms" and recommended that she limit her work to no heavy lifting. On October 5, 2010 he noted that on examination appellant had positive Tinel's sign over her right carpal tunnel, paresthesias in her right median nerve distribution and positive Tinel's and Phalen's signs over the cubital tunnel. Dr. Capo indicated that appellant had "significant pain and disability and could not perform her full work."

In a November 16, 2011 decision, OWCP denied appellant's request for merit review of her claim indicating that the submitted evidence was not relevant to the termination of her wage-loss compensation and medical benefits effective February 9, 2010.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁷ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ While a reopening of a case may be predicated solely on

³ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at C.F.R. § 10.608(b).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁹

Once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹⁰ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹¹ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability or need for medical care which continued after termination of compensation benefits.¹²

ANALYSIS

OWCP issued a decision on September 3, 2010 in which an OWCP hearing representative affirmed its February 9, 2010 termination of appellant's compensation for wage-loss compensation and medical benefits.¹³ Appellant requested reconsideration of this decision in August 2011.

The Board does not have jurisdiction over OWCP's September 3, 2010 termination decision.¹⁴ The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of her claim.

In her application for reconsideration, appellant submitted new and relevant medical evidence. She submitted an August 31, 2010 report from Dr. Capo, an attending Board-certified orthopedic surgeon, stated that on examination of both arms she exhibited positive Tinel's and Phalen's signs and median nerve compression bilaterally, worse on the left, and paresthesias in the median nerve distribution bilaterally. Dr. Capo recommended that appellant limit her work to no heavy lifting. On October 5, 2010 he noted that on examination appellant had positive Tinel's sign over her right carpal tunnel and paresthesias in her right median nerve distribution and posited that she could not perform her full work.

After the termination of appellant's wage-loss compensation and medical benefits effective February 9, 2010, which was affirmed in the September 3, 2010 OWCP hearing representative decision, the burden for reinstating compensation benefits shifted to her.¹⁵ The

⁹ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁰ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹¹ *Id.*

¹² *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹³ In the September 3, 2010 decision, OWCP's hearing representative also reviewed medical evidence appellant submitted after February 9, 2010 and found that it did not show that she was entitled to wage-loss compensation and medical benefits after that date.

¹⁴ It does not appear that appellant appealed this decision to the Board.

¹⁵ *See supra* note 12.

medical evidence submitted on reconsideration had not been previously considered by OWCP and suggests that appellant continued to have residuals of her accepted carpal tunnel syndrome condition after February 9, 2010. This evidence is relevant to the question of whether appellant met her burden of proof to show entitlement to wage-loss compensation or medical benefits after February 9, 2010. The case shall be remanded to OWCP to perform a merit review evaluating the evidence and argument appellant presented in conjunction with her reconsideration request. After such development as it deems necessary, OWCP shall issue an appropriate merit decision on this matter.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP in order to perform a merit review.

Issued: October 19, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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