

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

A.P., Appellant)	
)	
and)	Docket No. 11-1767
)	Issued: September 26, 2012
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 20, 2011 appellant filed a timely appeal from a January 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant was disabled from March 10, 2005 to June 3, 2010 causally related to her accepted employment injury; and (2) whether OWCP properly denied her request for a subpoena.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on January 21, 2011, the 180-day computation began January 22, 2011. One hundred and eighty days from January 21, 2011 is July 20, 2011. Since using July 26, 2011, the date the appeal was received by the Clerk of the Board would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 20, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 28, 2005 appellant, then a 60-year-old file clerk, filed a recurrence of disability claim beginning March 9, 2005 causally related to her August 18, 1994 employment injury. She attributed her recurrence of disability to “pushing and pulling on file cabinet drawers.” OWCP adjudicated the claim for recurrence of disability as a new occupational disease claim.³ On June 1, 2009 it accepted the claim for an aggravation of bilateral carpal tunnel syndrome and an aggravation of bilateral tendinitis of the wrist.

On August 31, 2009 appellant filed a claim for compensation from March 10, 2005 to the present.

In a report dated June 30, 2005, Dr. Amrutia J. Barot, a Board-certified neurologist, discussed appellant’s history of bilateral carpal tunnel syndrome and peripheral neuropathy of both the upper and lower extremities. He stated:

“It is my opinion that [appellant] has peripheral neuropathy with persistent distal median neuropathy, which tends to get symptomatic when she works using her hands in repetitive movements. At this particular time, her work seems to be aggravating her symptoms, and it would make sense to avoid making her do activities that would require repetitive movements.”

In an accompanying progress report dated June 30, 2005, Dr. Barot noted that appellant “tried to work but then was not able to function because of reoccurrence of symptoms.”

In a progress report dated May 19, 2006, Dr. Barot noted that appellant had minimal findings but extensive symptoms of carpal tunnel syndrome. He indicated that when she returned to work she performed repetitive duties which aggravated her symptoms. Dr. Barot found no “change in her symptoms warranting [appellant] to return to work” and advised that she could not use her hands to perform any work duties.⁴

In a progress report dated September 20, 2006, Dr. Barot diagnosed peripheral neuropathy and residual symptoms of carpal tunnel syndrome. He indicated that she “has not been able to work” and found that she could not perform repetitive movements with her hands.

On October 11, 2006 Dr. Richard D. Knauff, a Board-certified orthopedic surgeon, found a positive Tinel’s sign and Phalen’s test on examination. On May 3, 2007 he performed a left carpal tunnel release.

³ In 1994 OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and bilateral trigger finger in file number xxxxxx662. She received disability compensation under file number from 2002 until January 24, 2005, when she returned to limited-duty employment. Appellant stopped work on March 9, 2005 and filed a notice of recurrence of disability, which OWCP denied in decisions dated September 1, 2005, January 12, 2007 and April 9, 2008 in file number xxxxxx662. In a decision dated March 23, 2009, OWCP vacated its April 9, 2008 decision. It found that the medical evidence from her attending physician established that she had sustained a new occupational disease due to her work duties from January 24 through March 9, 2005. OWCP indicated that it was creating a new occupational disease claim using her notice of recurrence of disability.

⁴ On March 23, 2006 Dr. Barot noted that appellant’s symptoms increased whenever she used her hands or attempted to work.

In a report dated August 27, 2008, Dr. Barot related that appellant “engaged in repetitive wrist movements as she retrieved and filed receipts in numerical order in filing cabinets.” He asserted that the positive Tinel’s sign he found on March 10, 2005 showed “objective evidence of worsening of her condition.” Dr. Barot also noted that appellant’s symptoms were supported by the nerve adhesions found at the time of her May 2007 release. He stated:

“In summary [OWCP] seems to think that [appellant] is claiming a recurrence of disability as the result of a spontaneous return or worsening of the original conditions without any intervening cause. However, it is my opinion that it was the work that she performed from January 25 to March 9, 2005 that permanently aggravat[ed] her preexisting bilateral carpal tunnel syndrome and left wrist ulnar tendinitis conditions and contributed to her disability from work after March 9, 2005.”

In a report dated January 9, 2009, Dr. Barot related that he had treated appellant beginning in April 2001. Following carpal tunnel releases in 1996 and 1999, appellant returned to work as a file clerk on January 24, 2005 but stopped on March 9, 2005. Dr. Barot evaluated her on March 10, 2005 at which time he found a positive Tinel’s sign and peripheral neuropathy of the lower extremities. At the time he believed that appellant’s work duties aggravated her median neuropathy and mild bilateral carpal tunnel syndrome due to her repetitive hand use. Dr. Barot stated: “In my opinion, which I hold to a reasonable degree of medical certainty, the work [appellant] performed from January 24 to March 9, 2005 permanently aggravated the bilateral carpal tunnel syndrome and permanently aggravated right hand distal median neuropathy, causing these conditions to become much more symptomatic and disabling from work.”

Dr. Barot concluded that appellant was disabled from work as a file clerk.

In a form report dated August 26, 2009, Dr. Barot diagnosed carpal tunnel syndrome and checked “yes” that the condition was caused or aggravated by employment. He found that appellant was totally disabled.

On October 30, 2009 Dr. Barot related that appellant was no longer able to perform work that involved her hands due to her carpal tunnel syndrome but might be able to work with no use of the hands. In an April 23, 2010 work restriction evaluation, Dr. Barot found that appellant could perform sedentary work with no use of the hands.

By decision dated June 3, 2010, OWCP denied appellant’s claim for compensation beginning March 10, 2005. It found that she submitted evidence which duplicated that considered under file number xxxxxx662 and that it had previously reviewed the evidence and found that it did not show a recurrence of disability.

On July 2, 2010 appellant requested an oral hearing before an OWCP hearing representative.

In a report dated August 10, 2010, Dr. Knauft listed examination findings of a positive Tinel’s sign and no two-point discrimination. He related that appellant’s “accepted injury conditions are still present and disabling her.” Dr. Knauft discussed appellant’s history of

problems beginning in 1994 with subsequent releases and opined that he believed appellant could work with the January 24, 2005 work restrictions.

On September 3, 2010 appellant requested that an OWCP hearing representative issue a subpoena for her supervisor and her daughter. On September 24, 2010 the hearing representative denied the subpoena request as the issue was medical in nature and as she could submit written statements from the individuals.

At the telephonic hearing, held on November 4, 2010, appellant asserted that Dr. Knauff's finding that she could return to work with the restrictions in January 2005 was a typographical error.

By decision dated January 21, 2011, OWCP's hearing representative affirmed the June 3, 2010 decision. The hearing representative noted that appellant's claims had been combined into master file number xxxxxx662.

On appeal appellant argues that Dr. Barot's opinion that she could work with no use of her hands establishes that she is disabled from employment.

LEGAL PRECEDENT

The term disability as used in FECA⁵ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁶ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁷ 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.⁸ 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.⁹

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.¹⁰ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹¹

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

⁶ *Paul E. Thams*, 56 ECAB 503 (2005).

⁷ *Id.*

⁸ *Id.*

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

¹⁰ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹¹ 20 C.F.R. § 10.121.

ANALYSIS

OWCP accepted that appellant sustained an aggravation of bilateral carpal tunnel syndrome and an aggravation of bilateral tendinitis of the wrist due to her work as a file clerk from January 24 to March 9, 2005. Appellant initially filed a notice of recurrence of disability on March 9, 2005 due to a prior injury accepted for bilateral carpal tunnel syndrome and bilateral trigger finger in file number xxxxxx662. OWCP found, however, that the medical evidence indicated that the injury was a new occupational disease rather than a recurrence of disability.

Appellant filed a claim for compensation beginning March 10, 2005. On June 30, 2005 Dr. Barot diagnosed peripheral neuropathy and median neuropathy and recommended that she avoid repetitive activity. He further found that appellant had attempted to work but was unable because of her symptoms. On May 19, 2006 Dr. Barot advised that appellant should not use her hands to perform work duties and that her symptoms had not changed such that she could resume employment. In a report dated August 27, 2008, he discussed her work duties as a file clerk. Dr. Barot asserted that after appellant worked as a file clerk her condition worsened as demonstrated by positive objective findings. He concluded that her employment activities from January 25 to March 9, 2005 aggravated her bilateral carpal tunnel syndrome and left ulnar tendinitis and resulted in disability after March 9, 2005. In a report dated January 9, 2009, Dr. Barot opined that appellant was disabled from work as a file clerk. In a form report dated August 26, 2009, he diagnosed employment-related carpal tunnel syndrome and advised that she was disabled from employment. In reports dated October 30, 2009 and April 23, 2010, Dr. Barot found that appellant might be able to work with no use of the hands.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹² The Board has reviewed Dr. Barot's reports and notes that he provided a clear opinion that appellant was disabled beginning March 2005 due to employment-related carpal tunnel syndrome. Dr. Barot based his finding on the objective evidence of carpal tunnel syndrome found on examination and in an operative report. He evidenced a thorough knowledge of appellant's work duties before finding that she was unable to work as a file clerk. Dr. Barot's opinion is supportive, unequivocal, bolstered by objective findings and based on a firm diagnosis and an accurate work history. His opinion lacks only an explanation of why appellant became disabled beginning March 9, 2005. Consequently, while the medical evidence from Dr. Barot is insufficiently rationalized to meet her burden of proof to establish that she was disabled beginning March 10, 2005 due to her accepted work injury, it raises an undisputed inference of causal relationship sufficient to require further development by OWCP.¹³

Accordingly, the Board will remand the case to OWCP. On remand, it should further develop the medical record to determine whether appellant has established that she is entitled to

¹² A.A., 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹³ *Id.* On August 10, 2010 Dr. Knauff listed positive findings of carpal tunnel syndrome on examination and found that appellant's work injury was "still present and disabling her." While he also indicated that she could work in January 2005 with restrictions, it appears from the context of his report that this may be a typographical error. Further, the evidence from Dr. Barot is sufficiently supportive to warrant further development of the record by OWCP.

compensation for total disability and, if so, for what period. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.¹⁴

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2011 decision of the Office of Workers' Compensation Programs is set aside; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 26, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request for a subpoena is moot.