

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated March 17, 2010, the Board found that the reports from the referee physician, Dr. William Kirkpatrick, a Board-certified orthopedic surgeon, were insufficient to resolve the conflict in the medical evidence.² The Board found that Dr. Kirkpatrick did not provide a rationalized medical opinion with respect to a recurrence of disability commencing July 27, 2004, or with respect to whether appellant sustained a brachial plexopathy or ulnar neuropathy as a result of his employment injury.³ The history of the case as provided in the Board's prior opinion is incorporated herein by reference.

On return of the case record, OWCP selected Dr. Noubar Didizian, a Board-certified orthopedic surgeon, as a referee physician. The record indicates that five physicians were bypassed during the selection process, with a screenshot documenting the reasons each physician was bypassed. The record also contains an ME023 appointment schedule report identifying Dr. Didizian as the selected physician.

In a report dated October 20, 2010, Dr. Didizian provided a history and results on examination. He reported that appellant had a positive Tinel's at the wrist for the median nerve bilaterally, with Phalen's and compression tests negative. Dr. Didizian stated that the clinical examination was negative for any evidence of brachial plexopathy or thoracic outlet syndrome. He indicated that appellant had cubital tunnel syndrome bilaterally with some subluxation of the ulnar nerves, which he opined was not related to the accepted carpal tunnel syndrome, as these conditions were completely different. Dr. Didizian also stated, "It is my medical opinion that the patient did not sustain any recurrence of total disability on [July 27, 2004] causally related to the accepted employment injury of bilateral carpal tunnel syndrome."

By decision dated January 6, 2011, OWCP found that appellant had not established a recurrence of disability commencing July 27, 2004. It also found that the medical evidence did not establish brachial plexopathy or ulnar neuropathies as employment related.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 13, 2011. By decision dated July 5, 2011, the hearing representative found that Dr. Didizian did not provide a rationalized medical opinion with respect to whether there was an employment-related brachial plexopathy. He found that the opinion was rationalized with respect to ulnar neuropathies. The hearing representative did not specifically discuss Dr. Didizian's opinion as to a recurrence of disability commencing July 27, 2004. He directed OWCP to prepare an amended statement of accepted facts (SOAF)⁴ and refer the case to Dr. Didizian for an electromyogram/nerve conduction velocity (EMG/NCV) study and a

² Docket No. 09-1270 (issued March 17, 2010).

³ OWCP accepted a bilateral carpal tunnel syndrome and bilateral median neuropathy as a result of employment activity as a mail handler.

⁴ The hearing representative stated that the SOAF should include information provided by appellant as to rowing activity, since appellant was concerned as to when he could return to such activity. In addition, OWCP was directed to include information regarding appellant's work duties and to omit information as to receipt of government benefits.

supplemental report as to brachial plexopathy and a recurrence of disability commencing July 27, 2004.

In a report dated September 20, 2011, Dr. Didizian stated that the EMG/NCV study showed chronic, moderately severe carpal tunnel syndrome on the right and moderate carpal tunnel syndrome on the left. He stated, "It is my medical opinion that the patient did not sustain any total disability on [July 27, 2004] and he was capable of continuing to work. It is also Dr. Didizian's medical opinion that the patient does not have any brachial plexopathy as a consequence of the accepted employment injury."

By decision dated October 19, 2011, OWCP denied the claim for a recurrence of disability commencing July 27, 2004. It also found that the brachial plexopathy condition was not established as a consequence of the employment injuries.

Appellant requested a hearing before an OWCP hearing representative, which was held on February 28, 2012. In a report dated December 16, 2011, the attending osteopath, Dr. Scott Fried, opined that appellant remained disabled due to employment-related carpal tunnel syndrome, median neuropathies and brachial plexopathies.

By decision dated May 14, 2012, the hearing representative found OWCP had properly denied expansion of the claim to include brachial plexopathy and properly denied a 2004 recurrence of disability claim. The hearing representative stated that there was no rationalized medical evidence in support of appellant's claims and that Dr. Didizian represented the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁵ OWCP regulations state that a recurrence of disability also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."⁶

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a modified position the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, the employee must show either a change in the nature and

⁵ 20 C.F.R. § 10.5(x).

⁶ *Id.*

extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁷

In situations where OWCP secures an opinion from a referee examiner for the purpose of resolving a conflict in the medical evidence under 5 U.S.C. § 8123(a), and the opinion requires clarification or elaboration, OWCP has a responsibility to secure a supplemental report that properly resolves the conflict.⁸

ANALYSIS -- ISSUE 1

As the prior Board decision indicated, there was a conflict in the medical evidence as to the issue of an employment-related recurrence of disability on or about July 27, 2004. OWCP selected Dr. Didizian as a referee physician to resolve the conflict. On appeal, appellant has asserted that Dr. Didizian was not properly selected in accord with OWCP procedures.⁹ The selection in this case was supported by an ME023 report identifying Dr. Didizian. In addition, the record contains screen shots documenting the reasons any physician was bypassed prior to the selection of Dr. Didizian. As the Board noted in *K.S.*, such documentation is sufficient to establish that OWCP met its obligation to properly select an impartial referee physician.¹⁰ The Board finds Dr. Didizian was properly selected as a referee physician in this case.

Having established that Dr. Didizian was properly selected as a referee physician, the issue is whether his reports properly resolved the conflict in the medical evidence. In the Board's prior decision, the requirement that a physician's opinion must be accompanied by medical rationale was clearly stated. With respect to a recurrence of disability as of July 27, 2004, Dr. Didizian stated, in both his October 20, 2010 and September 20, 2011 reports, that appellant did not have a total disability as of July 27, 2004, but this opinion was not accompanied by any supporting explanation or discussion of evidence that would constitute medical rationale. He did not refer to evidence as to the time period in question and explain why he did not believe there was a recurrence of total disability. OWCP should have asked Dr. Didizian to provide the necessary medical rationale to support his opinion. As the Board noted in its prior decision, OWCP has the responsibility to secure a rationalized medical opinion from the referee physician on the issues presented.¹¹

⁷ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *Phillip H. Conte*, 56 ECAB 213 (2004).

⁹ At the time of the referral to Dr. Didizian, OWCP used the Physician Directory Service (PDS) to select a referee physician. As of July 2011, the Medical Management Application was used to select a referee physician. Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012).

¹⁰ Docket No. 12-184 (issued September 11, 2012) (ME023 and screen shots showing reasons for bypass were sufficient to establish referee was properly selected from PDS). *See also C.W.*, Docket No. 12-1211 (issued November 15, 2012).

¹¹ *See Phillip H. Conte*, 56 ECAB 213 (2004).

The Board accordingly finds that the case must again be remanded to OWCP. Dr. Didizian should be asked to provide a supplemental report containing medical rationale with respect to his opinions on the issues presented. If he is unable or unwilling to provide such a report, OWCP should select another referee physician in accord with its procedures. After such further development as OWCP deems necessary, it should issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 2

With respect to consequential injuries, it is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.¹² The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹³

ANALYSIS -- ISSUE 2

As with the recurrence of disability issue discussed above, the case was referred to Dr. Didizian to resolve a conflict in the medical evidence. In his October 20, 2010 report, Dr. Didizian stated that the clinical examination was negative for evidence of a brachial plexopathy. The hearing representative remanded the case for a rationalized opinion as to whether a brachial plexopathy condition had developed as a consequence of the employment injuries. In the September 20, 2011 report, Dr. Didizian discussed the results of current EMG/NCV studies with respect to carpal tunnel syndrome, and then opines that appellant did not have a brachial plexopathy as a consequence of the accepted employment injury. He did not provide any explanation that would constitute a rationalized medical opinion on the issue.

The case will accordingly be remanded to OWCP to secure a rationalized medical opinion on this issue as well, in accord with the above instructions. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case must be remanded to OWCP for further development with respect to both the recurrence of disability and consequential injury issues.

¹² *Albert F. Ranieri*, 55 ECAB 598 (2004).

¹³ *See A. Larson, The Law of Workers' Compensation* § 10.01 (November 2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2012 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 24, 2013
Washington, DC

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

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

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