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

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| **S.M., Appellant** | ) | |
| **and** | ) | **Docket No. 12-1758** |
| | ) | **Issued: April 19, 2013** |
| **U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On August 20, 2012 appellant, through her attorney, filed a timely appeal of a May 18, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) addressing her alleged recurrence of disability on April 1, 2009. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

### ***ISSUE***

The issue is whether appellant has met her burden of proof in establishing that she developed a recurrence of disability on April 1, 2009 causally related to her December 2, 2008 employment injuries.

On appeal, counsel argued that the statement of accepted facts did not accurately describe appellant's light-duty position at the time of her alleged recurrence of disability. He further alleged that, the report of the impartial medical examiner, Dr. Roy Friedenthal, a Board-certified

[1] 5 U.S.C. § 8101 *et seq.*

orthopedic surgeon, supported her claim or in the alternative was not sufficiently well reasoned to constitute the weight of the medical opinion evidence.

## ***FACTUAL HISTORY***

On December 2, 2008 appellant, then a 43-year-old window and distribution clerk filed an occupational disease claim alleging that she developed carpal tunnel syndrome and ulnar neuritis in her right arm. She stated that her symptoms were beginning in her left arm. Appellant attributed her condition to repetitious actions at the employing establishment. Dr. Scott Fried, an osteopath, examined appellant on November 19, 2008 and diagnosed flexor tenosynovitis on the right, radial neuropathy and ulnar neuropathy on the right and ulnar neuropathy on the left. He also diagnosed brachial plexopathy/cervical radiculopathy on the right and carpal tunnel median neuropathy. Dr. Fried attributed appellant's condition to her employment duties and recommended an alternate day work schedule with rest in between. He also restricted her overhead reaching and repetitive activities.

Appellant provided her job descriptions from December 19, 1987. Beginning on January 21, 2008 she performed various duties in three different postal services including Margate, Atlantic City and Ventor. Appellant worked on Monday, Tuesday, Wednesday, Friday and Saturday performing window service, postage due and business reply mail, registry and mail distribution duties. OWCP accepted her claim for cubital tunnel syndrome, carpal tunnel syndrome and wrist sprain all on the right on January 27, 2009.

In a report dated April 9, 2009, Dr. Fried reviewed appellant's functional capacity evaluation on February 26, 2009 and found that this demonstrated diminished abilities to manipulate small objects and significantly increased symptoms with repetitive activities in the upper extremities and with lifting and carrying activities. He opined that she could not return to her full-duty position. The functional capacity evaluation indicated that appellant could sit for four hours, stand for five hours and walk for eight hours a day. She was limited to 30 minutes of sitting at a time and two hours of standing and walking. Appellant could lift up to 10 pounds. She was unable to perform fine manipulation, firm grasping or pushing and pulling. Appellant was limited to sedentary work. The examination noted that she was having significant symptoms working eight hours a day three days a week and suggested that she should be limited to four-hour shifts.

Dr. Fried completed electromyogram (EMG) and nerve conduction velocity studies on February 24, 2009 and reviewed the results on April 20, 2009. He opined that appellant's electrodiagnostic testing revealed brachial plexus involvement on the right, ulnar nerve involvement at the elbows, bilaterally and bilateral median nerve involvement at the carpal canal as well as radial nerve involvement of the right elbow. On April 29, 2009 Dr. Fried noted that she was not working.

Appellant filed a notice of recurrence on May 4, 2009 alleging that on April 1, 2009 she stopped work due to Dr. Fried's recommendations. In a note dated April 1, 2009, Dr. Fried stated that she experienced ongoing significant symptoms without any overall benefits from therapy. He noted appellant's moderate-to-severe pain and paresthesias. Dr. Fried noted that she was working part time, three days a week with a day off in between for rest. He described

appellant's duties as lifting packages up to 10 pounds, operating the register and scanning. Dr. Fried stated that she reported that she was unable to take breaks because of pressure to keep moving. He concluded, "We will pull her from work at this point to focus on rest and treatment and add a trial of the water massage tables."

OWCP requested additional information regarding appellant's claim on May 26, 2009. Appellant provided her employment duties on June 15, 2009. OWCP referred her for a second opinion evaluation with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon. In his June 24, 2009 report, Dr. Hanley diagnosed bilateral overuse syndrome with probable entrapment neuropathies at both elbows and recommended that appellant's left upper extremity condition be accepted as well as her right. He found that she could work with restrictions on her upper extremities including no repetitive work for more than 30 minutes at a time. Dr. Hanley also restricted appellant's lifting, pushing and pulling to 10 pounds for two hours a day. He also restricted her reaching and reaching above the shoulder to two hours each a day, but indicated that she could work eight hours a day.

The employing establishment stated that appellant was a full-time regular sales and window clerk with other duties assigned. Appellant's duties included four hours of back-up window clerk, two hours of prepping mail to be forwarded or returned to the sender and two hours of distribution clerk work. As a distribution clerk she was required to carry up to 70 pounds. The employing establishment noted appellant's restriction on November 19, 2008 of working every other day, no lifting over 10 pounds and no pushing or pulling. It stated that she began working as the main window clerk with assistance for heavy parcels and coworkers moving the wheeled containers as she could not pull or push.

The statement of accepted facts indicated that appellant reduced her work schedule to limited-duty eight hours a day, three days a week on October 22, 2008. Appellant stopped work on March 25, 2009. On August 3, 2009 Dr. Fried continued to support her total disability for work. He examined appellant on August 5, 2009 and diagnosed flexor tenosynovitis right, scapholunate ligament injury right wrist, radial neuropathy right, ulnar neuropathy right and left and brachial plexopathy or cervical radiculopathy on the right, carpal tunnel syndrome due to work activities. Appellant underwent an EMG on August 14, 2009 which demonstrated mild left ulnar nerve compromise at the medial elbow level unchanged from February 24, 2009, normal right ulnar nerve, normal bilateral median nerves and mild right lower brachial plexus nerve compromise.

On September 10, 2009 OWCP requested a supplemental report from Dr. Hanley. On October 28, 2009 Dr. Hanley reviewed a video supplied by the employing establishment and stated that this did not alter his opinion. He attributed appellant's condition to her repetitive duties and noted that she could return to work within his earlier restrictions. In a note dated November 3, 2009, Dr. Hanley responded to OWCP's request for additional information and stated that he had not examined her since June 24, 2009 and could not address whether her condition was ongoing.

By decision dated November 17, 2009, OWCP denied appellant's claim for recurrence. It found that she had not submitted the necessary medical opinion evidence to establish a change

in her injury condition on or after April 1, 2009. Counsel requested an oral hearing before an OWCP hearing representative.

OWCP referred appellant for a second opinion report with Dr. Robert Draper, a Board-certified orthopedic surgeon, on January 6, 2010. In his report dated January 28, 2010, Dr. Draper reviewed the statement of accepted facts and noted her accepted conditions. He performed a physical examination and diagnosed overuse syndrome of the right upper extremity. Dr. Draper found an essentially normal examination with minimal decrease in range of motion for right wrist flexion and extension. He noted that appellant's EMG demonstrated mild changes in the median nerve. Dr. Draper stated that appellant's diagnosis was causally related to her employment. He opined that appellant was capable of performing modified-duty work lifting up to 20 pounds occasionally and 10 pounds frequently. Dr. Draper stated that she could work eight hours a day with no restriction to standing, walking, stooping, bending or sitting. He found that appellant had reached maximum medical improvement.

At the oral hearing on March 11, 2010, appellant described her employment duties. She testified that her arms began going numb in October 2008. Following the oral hearing appellant submitted a report dated March 16, 2010 from Dr. Fried describing her history and noting that, six months prior to his report, she noted progressive increased symptoms on the right with more frequent pain in the medial elbow and radiation of numbness and tingling into her hand. Dr. Fried stated in December 2008, appellant had experienced benefits from therapy and noted that she was working three days a week mostly at the window. He stated that by February 19, 2009 appellant noted intermittent symptoms and increased pain. Dr. Fried stated, "By April 1, 2009 [appellant] felt that she had some improvement with her treatments and continued to work modified[-]duty part time." He stated that her February 24, 2009 EMG corroborated brachial plexus involvement and radial nerve issues on the right, bilateral ulnar nerve involvement at the elbow and bilateral median nerve involvement at the carpal tunnels. Dr. Fried noted that appellant stopped work by April 29, 2009 and felt that her symptoms had improved. He reviewed Dr. Hanley's report and agreed with his diagnoses. Dr. Fried stated that he advised appellant to stop work on April 1, 2009 as her work activities were worsening her problem and she was showing progression of symptomatology trying to perform her work activities. He stated, "She not only had a recurrence but actually a progression of her underlying pathology and this was the cause of her need to come out of work."

The hearing representative set aside OWCP's November 17, 2009 decision on June 1, 2010 and remanded the case. She found that appellant's accepted conditions should include left side overuse syndrome and nerve entrapment. The hearing representative also found that appellant was capable of working four hours a day with restrictions and was entitled to compensation for partial disability beginning April 1, 2009 for four hours a day. She further found a conflict between Dr. Fried and Dr. Hanley regarding the extent of appellant's disability for work. The hearing representative remanded the case for referral to an impartial medical examiner.

In a decision dated July 26, 2010, the Chief of the Branch of Hearings and Review, set aside the hearing representative's June 1, 2010 decision and affirmed the November 17, 2009 decision in part and remanded in part. He found that Dr. Hanley supported that appellant could work eight hours a day with restrictions rather than four hours as found by the hearing

representative. He further found that Dr. Fried's March 16, 2010 report created a conflict with Dr. Hanley and that no benefits would be payable until the medical conflict was resolved.

OWCP referred appellant for an impartial medical examination with Dr. George Glenn, a Board-certified orthopedic surgeon, on September 27, 2010. It completed a statement of accepted facts on August 17, 2010 listing the accepted conditions of cubital tunnel syndrome, carpal tunnel syndrome and wrist sprain on the right. OWCP noted that appellant was not working.

In a report dated November 16, 2010, Dr. Glenn noted that he had reviewed the statement of accepted facts and the medical record. He performed a physical examination and noted appellant's description of pain with flexion and extension of the elbows greater on the right than left. Dr. Glenn stated that she had a host of subjective complaints involving her right neck and entire right arm as well as her left elbow, which could not be explained on the basis of concrete reproducible physical findings. He found no clinical or electrodiagnostic evidence of ulnar compression syndrome at the right elbow, bilateral carpal tunnel syndrome or tendinitis. Dr. Glenn found that appellant was capable of performing modified-duty work eight hours a day. He provided lifting restrictions of 20 pounds occasionally and 10 pounds frequently. Dr. Glenn also stated that appellant should not lift overhead. He completed a work capacity evaluation on November 25, 2010 and indicated that she could work eight hours a day with restrictions and that she should not reach above the shoulder.

On December 28, 2010 OWCP denied appellant's claim for compensation for the period June 6, 2009 to August 13, 2010. Counsel requested an oral hearing on January 4, 2011. At the oral hearing on April 13, 2011, he argued that Dr. Glenn's report did not address the issue of appellant's left upper extremity or her recurrence on April 1, 2009. By decision dated July 6, 2011, the hearing representative set aside the December 28, 2010 decision and remanded for further development. She found that the opinions of Drs. Hanley and Draper were of diminished probative value and required further development. The hearing representative determined that there was not a conflict between Dr. Hanley and Dr. Fried or Dr. Draper and Dr. Fried. She stated that Dr. Glenn's report was therefore not entitled to special weight as he was not properly designated as the impartial medical examiner. The hearing representative determined that Dr. Glenn's report was sufficient to create a conflict with the reports of Dr. Fried and required referral to an impartial medical examiner.

In a letter dated July 21, 2011, OWCP referred appellant to Dr. Friedenthal to resolve the identified conflict of medical opinion evidence. It drafted a statement of accepted facts on July 13, 2011 listing her history of injury, her accepted conditions and her performance of light duty. The statement of accepted facts included appellant's medical treatment and OWCP referrals. OWCP provided Dr. Friedenthal with a list of questions, asking whether he believed that she was disabled on April 1, 2009 from performing the duties of her job.

Dr. Friedenthal completed a report on September 14, 2011. He described appellant's history of injury and medical treatment. Dr. Friedenthal noted his findings of physical examination stating that she limited the range of motion of her neck during examination to less than that demonstrated on observation. He also stated that appellant severely restricted range of motion at both shoulders and complained of severe pain on passive motion of the right shoulder.

Dr. Friedenthal found that she did not have atrophy, joint effusion, crepitus or swelling in her upper arm. He noted that appellant's left thenar muscle showed a very mild scaphoid appearance when compared to the right suggesting mild muscle atrophy. On neurologic evaluation appellant had no focal sensory deficits. She demonstrated give way weakness throughout the right upper extremity. Appellant had positive Tinel's signs at the median nerves at the wrist and ulnar nerves at the elbows. Dr. Friedenthal reviewed her electrodiagnostic testing. He stated that appellant currently had no clear objective deficits with no neural impairment. Dr. Friedenthal stated, "While she reports Tinel's sign at both elbows, she has positive Tinel's sign in nonphysiologic distributions, again reflecting nonphysiologic factors in this individual." He concluded that appellant's ulnar nerve was sensitive to her repetitive work activities and that her variable symptoms in the median distribution may be consistent with developing carpal tunnel syndrome.

Dr. Friedenthal opined that appellant was capable of working eight hours a day with restrictions against lifting greater than 20 pounds occasionally and 10 pounds routinely. He stated that there were no objective clinical findings of right carpal tunnel syndrome, right wrist sprain or right cubital tunnel syndrome or other identified conditions causally related to her employment. Dr. Friedenthal stated that appellant's medical records did not provide evidence of total disability. In regard to diagnostic testing, he stated that while additional studies are necessarily warranted, additional studies would not be inappropriate and might be of value.

In an October 26, 2011 decision, OWCP denied appellant's claim for recurrence of disability on April 1, 2009 finding that Dr. Friedenthal's report established that she was currently capable of working full time with restrictions. Counsel requested an oral hearing.

At the oral hearing on February 29, 2012 counsel argued that Dr. Friedenthal's report did not address the issue of a recurrence of disability on April 1, 2009. He further noted that the statement of accepted facts did not describe appellant's employment duties at the time of her alleged recurrence.

By decision dated May 18, 2012, the hearing representative found that there was no rationalized medical evidence in support of appellant's claim that her condition and disability after April 1, 2009 was due to her accepted work injuries. She further found that Dr. Friedenthal opined that appellant was capable of working full time with restrictions. The hearing representative affirmed OWCP's October 26, 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. This term also means an inability to work that takes place 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.[2] When an

[2] 20 C.F.R. § 10.5(x).

employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[3]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA, which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[4] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[5]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

## ***ANALYSIS***

OWCP accepted appellant's claim for cubital tunnel syndrome, carpal tunnel syndrome and wrist sprain all on the right on January 27, 2009. Appellant began working three days a week on November 19, 2008 with no lifting over 10 pounds and no pushing or pulling. She began working as the main window clerk with assistance for heavy parcels and coworkers moving the wheeled containers as she could not pull or push. Appellant stopped work and filed a notice of recurrence of disability on April 1, 2009.

In support of her claim for total disability beginning April 1, 2009, appellant submitted a report from Dr. Fried dated March 16, 2010 stating that he advised her to stop work on April 1, 2009 as her work activities were worsening her problem. Dr. Fried stated that she had progression of her underlying pathology which resulted in her total disability for work.

OWCP referred appellant to Drs. Hanley and Draper for second opinion evaluations. An OWCP hearing representative initially found that there was a conflict in medical opinion evidence between Drs. Hanley and Fried regarding her disability for work. OWCP referred appellant to Dr. Glenn for an impartial medical examination. A subsequent hearing representative found that, as Dr. Hanley did not fully respond to OWCP's request for questions,

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[5] *R.C.*, 58 ECAB 238 (2006).

[6] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

his reports were not sufficient to create a conflict with Dr. Fried. The hearing representative determined that this rendered Dr. Glenn a second opinion physician for OWCP, rather than an impartial medical specialist. Due to the change in designation, there was a resulting conflict between Drs. Glenn and Fried regarding whether appellant was disabled and sustained a recurrence of total disability.[7] OWCP referred appellant to Dr. Friedenthal for an impartial medical examination. The Board finds that Dr. Friedenthal was properly designated as the impartial medical examiner.

The Board further finds, however, that Dr. Friedenthal's report is detailed and well reasoned but does not resolve the existing conflict of medical opinion evidence, namely whether appellant sustained a recurrence of disability on or after April 1, 2009 due to her accepted employment-related injuries. While he stated that she was currently capable of working with restrictions, in response to OWCP's questions regarding her alleged recurrence of disability in April 2009, his only statement was that her medical records did not provide evidence of total disability. Dr. Friedenthal did not explain how he reached this conclusion or why he discounted Dr. Fried's findings and conclusions. Without medical reasoning supporting his opinion that appellant was never totally disabled, his conclusory statement is not sufficient to resolve the conflict of medical opinion evidence.

The Board further finds that the statement of accepted facts presented to Dr. Friedenthal did not provide him with sufficient information regarding appellant's employment duties either in her date-of-injury position or in her light-duty position at the time of her recurrence to determine whether she could return to work. Dr. Friedenthal provided work restrictions, but these restrictions exceed her date-of-injury position, which required lifting up to 70 pounds. He did not specifically address appellant's light-duty position in determining whether or not she had a period of recurrence of total disability. Furthermore, Dr. Friedenthal did not correlate his positive physical findings including thenar atrophy, ulnar nerve sensitivity and questionable carpal tunnel syndrome to accepted conditions or to electrodiagnostic testing. In regard to diagnostic testing, he stated that additional studies might be of value. Dr. Friedenthal did not request or review such studies.

Due to the deficiencies in Dr. Friedenthal's report, the Board finds that the case is not in posture for decision as the conflict of medical opinion evidence has not been resolved.

## ***CONCLUSION***

The Board finds that OWCP must undertake additional development of the medical evidence to resolve the existing conflict of medical opinion evidence by providing Dr. Friedenthal with a complete statement of accepted facts and requesting a supplemental report addressing the central issue of appellant's alleged recurrence of disability in April 2009.

[7] *See e.g., J.B.*, Docket No. 07-1889 (issued January 29, 2008); *see generally Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that the report of a physician improperly designated as an impartial medical examiner, because there was no existing conflict in medical opinion, could still be considered for its own intrinsic value).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 18, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: April 19, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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