United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 12-1338**
	)	**Issued: June 10, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Newark, 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:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 6, 2012 appellant, through her attorney, filed a timely appeal from a March 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation and medical benefits as of November 29, 2010.

FACTUAL HISTORY

On January 29, 2005 appellant, then a 40-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging pain and lumps in her wrists from working a culling belt. Her duties included lifting, pulling and pushing heavy equipment. Appellant stopped work on February 18, 2005 and returned to light duty on March 15, 2005. OWCP accepted the claim for

[1] 5 U.S.C. § 8101 *et seq.*

aggravation of bilateral carpal tunnel syndrome. Appellant stopped work again on April 16, 2005 and did not return.

In an October 3, 2007 work capacity evaluation (Form OWCP-5), Dr. Mark P. Filippone, Board-certified in physical medicine and rehabilitation, reported that appellant could not return to her regular duties and remained totally disabled. In an October 5, 2007 report, he stated that electromyogram (EMG) and nerve conduction studies (NCS) performed on March 23, 2007 revealed bilateral carpal tunnel syndrome and evidence of a left C5-6 cervical radiculopathy.[2] Dr. Filippone advised that appellant remained disabled due to residuals of her accepted condition.[3]

After development of the medical evidence, OWCP issued a December 12, 2008 decision terminating appellant's compensation benefits effective December 21, 2008. It found that the weight of medical opinion was represented by Dr. Abbott J. Krieger, a Board-certified neurosurgeon, who was designated as an impartial medical specialist.[4] However, the termination was subsequently set aside in a July 23, 2009 decision of an OWCP hearing representative, who found that there was no conflict in medical opinion at the time of the referral to Dr. Krieger, as Dr. Mormino, the second opinion physician, and Dr. Filippone, appellant's physician, agreed that she had employment-related bilateral carpal tunnel syndrome for which surgery was recommended. Therefore, the report from Dr. Krieger was that of a second opinion specialist and was in conflict with that of appellant's treating physician, Dr. Filippone. The hearing representative reinstated appellant's compensation benefits. OWCP was directed to refer appellant with an updated statement of accepted facts to an appropriate physician for an impartial medical examination.

As relevant to this appeal, Dr. Krieger reported on July 22, 2008 that appellant did not have carpal tunnel syndrome or cervical radiculopathy and that her subjective complaints were out of proportion to the objective findings. He stated that NCS obtained by Dr. Filippone were borderline abnormal and showed no change overtime. Dr. Krieger who conducted an EMG suspected a neuropathic process other than carpal tunnel syndrome, possibly diabetes. He stated that appellant's carpal tunnel condition had stabilized and she had no thenar atrophy, a negative Tinel's and Phalen's sign and nonphysiological sensory and motor findings. Dr. Krieger determined that she required no additional medical treatment and could return to her regular employment full time without any physical restrictions.

In reports dated July 10 and August 12, 2008, Dr. Filippone stated that he obtained follow up diagnostic studies of appellant's upper extremities on March 18, 2008 which showed sensory NCS evidence of bilateral carpal tunnel syndrome, on the right more than the left. There was also evidence of cervical radiculopathy. Dr. Weiss Lawrence, a Board-certified orthopedic surgeon, noted that appellant was under the care of Dr. Teofilo A. Dauhajre, an orthopedic

[2] OWCP did not accept appellant's claim for cervical radiculopathy. For conditions not accepted as causally related to her federal employment, she retains the burden of proof. *See George H. Clark*, 56 ECAB 162 (2004).

[3] The record reflects that OWCP authorized surgery for appellant's carpal tunnel syndrome which she declined.

[4] At the time of the referral to Dr. Krieger, OWCP found a conflict in medical opinion between Dr. Filippone, for appellant, and Dr. Joseph Mormino, a Board-certified orthopedic surgeon, who provided a second opinion report on November 28, 2006.

surgeon, as to the carpal tunnel syndrome and that he intended to operate on her left wrist for a double crush syndrome. Dr. Filippone attributed her condition to her work duties and advised that she was unable to work in any capacity. Appellant's medical condition was unchanged and she was not able to work since April 2005. Dr. Filippone stated that she exhibited positive bilateral Tinel's and Phalen's signs.[5]

In reports dated October 17, 2009 to March 31, 2010, Dr. Dauhajre, a treating orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome, double crush syndrome of the left upper extremity and evidence of left C5-6 cervical radiculopathy supported by the EMG and NCS of the upper extremities. He recommended bilateral carpal tunnel release. The record reflects that appellant declined surgery.

On March 30, 2010 OWCP referred appellant, together with a statement of accepted facts and medical record, to Dr. Weiss for an impartial referee examination to resolve the conflict between Dr. Filippone and Dr. Krieger.[6] In a May 20, 2010 report, Dr. Weiss provided a review of her employment activities and medical treatment, reviewed the diagnostic studies of record and provided findings on physical examination. He noted that appellant, right hand dominant, was hired as a mail handler on October 29, 1994 and last worked in 2005. Appellant performed distribution work and noticed swelling with pain in her wrists and hands. Diagnostic testing was obtained that was suggestive of mild bilateral carpal tunnel syndrome with no evidence of cervical radiculopathy. Appellant was treated conservatively by Dr. Filippone, who found her disabled for work. On examination, she complained of pain from her neck into both shoulders down her arms and into both hands. Dr. Weiss found full cervical, shoulder, wrist, digit and thumb range of motion bilaterally with no muscle spasm or discomfort and no obvious deformity of the spine. On Spurling's test, appellant reported sensation into both arms but not in a specific dermatomal distribution. There was full and equal strength at the biceps, triceps, wrist extensors, finger flexors and hand intrinsics; reflexes were 2+ and symmetric; and sensation grossly intact in all dermatomes and peripheral nerve distributions. Tinel's sign was negative at the cubital tunnels bilaterally; radial tunnel was nontender; and no evidence of medial or lateral epicondylitis or of biceps or triceps tendinitis. There was no crepitus, effusion or instability or evidence of swelling or atrophy about the arms. Dr. Weiss reported no evidence of a ganglion cyst, thenar atrophy or radiating symptoms into the median nerve distribution.

Dr. Weiss diagnosed subjective right and left upper extremity pain and occupational report of bilateral carpal tunnel syndrome. He stated that appellant presented with varying and subjective pain complaints throughout her upper extremities from her neck towards her fingers bilaterally. Dr. Weiss stated that her symptoms were unrelated to any obvious structural

[5] Dr. Filippone subsequently reported that diagnostic testing of August 31, 2009 also showed abnormal prolongation of the medial motor terminal latency in both wrists and supported bilateral carpal tunnel syndrome. He reiterated that appellant was totally disabled due to her accepted condition.

[6] The Board notes that the record contains iFECs screenshots of the selection of Dr. Weiss as the impartial medical specialist under the Physician Directory System. The record also contained a bypass form indicating that no qualified physicians were available in appellant's zip code. A search was conducted in a different zip code area where Dr. Weiss was selected as the IME and an appointment was scheduled. An ME023 appointment schedule notification was also included documenting appellant's referral to Dr. Weiss. The record did not contain any bypass forms which showed other orthopedic surgeons were bypassed for selection as an impartial medical specialist because of unavailability.

abnormality by history or physical examination. He stated that appellant's ongoing symptoms were unrelated to her work history and unrelated to the diagnosis of carpal tunnel syndrome. Dr. Weiss also stated that there was also no active evidence of cervical radiculopathy pattern to explain her symptoms.

Dr. Weiss stated that, at the time appellant was working for the employing establishment, her EMG findings showed borderline carpal tunnel syndrome for approximately four years until the August 31, 2009 EMG showed a difference by comparison to previous EMG testing. He noted that although it had been suggested that she suffered from carpal tunnel syndrome, he did not see active evidence based on physical examination and opined the diagnosis of carpal tunnel syndrome was related to her subjective upper extremity complaints. Dr. Weiss noted that appellant was recovered with respect to the work-related suggestion of carpal tunnel syndrome and he did not find any ongoing active evidence to suggest medial nerve entrapment. He further reported that the most recent EMG from 2009 showed more obvious alteration of her median and sensory latencies that was unrelated towards her work activity and more related towards the nature of median and/or sensory latencies, which could occur developmentally in the absence of any occupational exposure. Thus, any characterization of alteration of median nerve findings by EMG as of August 31, 2009 had occurred in a setting unrelated towards her work activities at the employing establishment.

Dr. Weiss noted that the suggestions of appellant's prior treating physicians for carpal tunnel surgery were made based on reports of EMG alone without examination of history and/or physical examination criteria that would be suggestive of "true" carpal tunnel syndrome. Therefore, proposed carpal tunnel surgery would provide little to no benefit and could make circumstances worse. Dr. Weiss concluded with a reasonable degree of medical certainty that there was no active evidence of any ongoing occupational illness or need for medical restrictions. He stated that any ongoing treatment of appellant's upper extremity complaints was unrelated to her history of work at the employing establishment.

OWCP submitted additional treatment records from Dr. Filippone to Dr. Weiss for his review and comment. In an August 17, 2010 addendum, Dr. Weiss noted that his review of the additional records failed to alter his prior opinion based on his May 20, 2010 medical examination. He reiterated that he failed to identify any active evidence of ongoing occupational illness as stated.

On September 10, 2010 OWCP notified appellant of its proposal to terminate her compensation benefits based the opinion of Dr. Weiss. It noted that as the referee medical examiner, he resolved the conflict in medical opinion between Dr. Krieger and Dr. Filippone. Appellant was provided 30 days to submit additional information.

On September 21, 2010 appellant, through counsel, argued that Dr. Weiss' report was not sufficient to carry the weight of the medical evidence. He contended that it was contradictory and provided insufficient reasons for his conclusion that the carpal tunnel syndrome diagnosis was not conclusive. Appellant's counsel argued that Dr. Weiss had an inaccurate factual background and incorrectly believed that appellant only worked for the employing establishment for three months when in fact she began her postal employment on October 29, 1994 until January 28, 2005, for approximately 10 1/2 years. He concluded that Dr. Weiss failed to address whether she could return to the repetitive nature of her mail handler duties.

Appellant submitted additional reports dated November 10 to October 31, 2010 from Dr. Filippone, including an October 26, 2010 NCS. Dr. Filippone reported that an upper extremity NCS revealed abnormal prolongation of the right median motor terminal latency and abnormal slowing of the calculated median sensory conduction velocities across the carpal canals bilaterally. He stated that the needle EMG studies were abnormal, giving evidence of partial denervation in muscles innervated by the left C5-6 cervical nerve roots and in the abductor pollics brevis bilaterally. Dr. Filippone attributed the electrical abnormalities as the direct result of injuries sustained by appellant while working at the employing establishment. Appellant continued to be totally disabled.

On October 31, 2010 Dr. Filippone reviewed a copy of the reports by Dr. Weiss and disagreed with his conclusion that there was "no active evidence of any ongoing occupational illness and that no restrictions are offered at this time." He noted that appellant worked as a mail handler from 1994 until January 28, 2005. Over 10 years, appellant's work involved strenuous and repetitive activities that included lifting, pulling and pushing. Dr. Filippone noted that Dr. Weiss incorrectly stated that she worked for the employing establishment for only three months, which rendered an incorrect opinion that her condition was not related to her employment. He further stated that appellant's diagnosis of carpal tunnel syndrome had been documented by EMG and NCS. Dr. Filippone diagnosed bilateral carpal tunnel syndrome and cervical radiculopathy, noting that she required carpal tunnel surgical release. He reiterated that appellant's conditions were directly and solely the result of her employment-related injury.

By decision dated November 29, 2010, OWCP terminated appellant's compensation benefits effective November 30, 2010. It found that the weight of medical opinion rested with Dr. Weiss.

By letter dated December 6, 2010 appellant, through counsel, requested a hearing before the Branch of Hearings and Review. She submitted Form CA-20's, prescription slips and reports dated October 27, 2010 to August 31, 2011 from Dr. Filippone, who stated that she remained totally disabled and would require right carpal tunnel release.

At the June 22, 2011 hearing, appellant's counsel argued that Dr. Weiss' report was based on inaccurate medical and factual history. By letter dated July 19, 2011, he argued that Dr. Filippone disagreed with the opinion of Dr. Weiss and submitted a June 29, 2011 report in support of appellant's claim. Dr. Filippone stated that he was responding to Dr. Weiss' August 17, 2010 report. He stated that appellant's last EMG and NCS of October 26, 2011 also showed abnormalities consistent with left C5-6 cervical radiculopathy and bilateral carpal tunnel syndrome. Dr. Filippone referenced that his April 15, 2005 medical report where he provided a medical history and opined that her March 3, 2005 EMG revealed moderate bilateral carpal tunnel syndrome, which Dr. Weiss referred to as milder bilateral carpal tunnel syndrome. The July 6, 2005 EMG study showed electrical evidence of a left C5-6 cervical radiculopathy as appellant's symptoms persisted and developed, as well as bilateral carpal tunnel syndrome. Dr. Filippone stated that Dr. Weiss' opinion stated that "sensation is otherwise grossly intact in all dermatomes and peripheral nerve distributions." He disagreed with this statement. Dr. Filippone cited as objective evidence the sensory NCS of July 6, 2005, which showed a right median sensory conduction velocity slowing of 36.8 across the right carpal canal and the corresponding left at 41.2 meters per second, whereas normal would be in excess of 48 meters per second. He stated that no patient could fake this. Dr. Filippone noted that Dr. Weiss tapped

on the tip of appellant's olecranon and stated that she reported "nonspecific complaints of pain that goes down the hands bilaterally." He explained that he should have tapped the olecranon groove where the ulnar nerve was located rather than the top of the olecranon. Dr. Filippone agreed with Dr. Weiss' statement that appellant's impression of right upper extremity pain was subjective. He noted that her varying subjective complaints from the neck to her hands bilaterally was consistent with her history and abnormal EMG/NCS studies. Dr. Filippone further stated that appellant would benefit from carpal tunnel release surgery. He concluded that his opinion and diagnoses were based on 85 percent history, 10 to 15 percent physical examination and 5 to 10 percent testing in the form of EMG and NCS.

By decision dated September 7, 2011, the hearing representative affirmed the November 29, 2010 decision. The hearing representative found that the weight of the medical evidence rested with Dr. Weiss. The hearing representative further determined that the additional reports from Dr. Filippone and Dr. Dauhajre did not shift the weight of medical opinion or create a new conflict.

By letter dated September 15, 2011, appellant, through counsel, requested reconsideration. Counsel contended that Dr. Filippone had provided abundant medical reasoning for his stated conclusion that she continued to have residuals of her employment-related carpal tunnel syndrome. He submitted CA-17 forms dated August 31, 2011 to February 2, 2012 from Dr. Filippone, who advised that appellant was in need of carpal tunnel surgical release and continued to be totally disabled. In a November 9, 2011 report, Dr. Filippone stated that she experienced continued cervical pain with radiation to the left, more so than the right upper extremity, especially when laterally flexing the neck to the left. He noted increasing numbness and tingling radiating down into the left ring and fifth finger, volar aspect with intermittent neck pain. Both hands continued with numbness into the distal volar aspect of all 10 fingers. Dr. Filippone stated that appellant continued to demonstrate a bilaterally positive Tinel's and Phalen's sign and noted a positive Tinel's sign over the left ulnar nerve at the olecranon groove. He concluded that he would order upper extremity EMG and NCS because of the progression of the carpal tunnel syndrome presentation.

By decision dated March 6, 2012, OWCP affirmed the September 7, 2011 decision. It accorded the weight of medical opinion to Dr. Weiss as the impartial medical examiner.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[7] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[8]

[7] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[8] *Id.*

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[9] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[10] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[11]

When there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist, the opinion of such physician will be given special weight if sufficiently well rationalized and based upon a proper factual and medical background.[12]

ANALYSIS

OWCP accepted that appellant developed bilateral carpal tunnel syndrome due to factors of her federal employment as a mail handler. It terminated her compensation benefits as of November 29, 2010 based on the report of Dr. Weiss, the impartial medical specialist. The Board finds that OWCP met its burden of proof.

OWCP initially terminated appellant's compensation benefits effective December 21, 2008 on the grounds that the weight of the medical evidence rested with Dr. Krieger. By decision dated July 23, 2009, an OWCP hearing representative reversed the termination, finding that Dr. Krieger's status was that of a second opinion specialist and not an impartial medical referee. Appellant's compensation benefits were restored and the case returned with directions to refer her to an impartial medical specialist based on a conflict in medical opinion between Dr. Filippone and Dr. Krieger. The referee was asked to determine whether she had disabling residuals of her accepted bilateral carpal tunnel syndrome.

On remand, OWCP referred appellant to Dr. Weiss for an impartial medical examination. In a May 20, 2010 report, Dr. Weiss correctly noted that she had been employed as a mail handler from 1994 until 2005 doing distribution work, which included loading and unloading mail and utilizing a pallet jack. At times, lifting involved up to 75 pounds with the assistance of the pallet jack. Appellant reported no use of vibration tools and denied any direct trauma to her wrists when the symptoms began. Dr. Weiss reported that she had worked as a mail handler for three months when she first noticed swelling and pain involving her wrists and hands. He set forth a review of appellant's accepted condition and her medical treatment commencing 2004. Dr. Weiss described the diagnostic studies of record, which originally suggested ganglion cysts involving her wrist and a left cervical strain. This was subsequently modified as suggesting carpal tunnel syndrome. Dr. Weiss noted that the March 3, 2005 EMG of Okja Kim, M.D., was suggestive of mild bilateral carpal tunnel syndrome with no evidence of cervical radiculopathy.

[9] *Roger G. Payne*, 55 ECAB 535 (2004).

[10] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[11] *T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 351 (1975).

[12] *See R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Bryan O. Crane*, 56 ECAB 713 (2005).

He reviewed appellant's treatment by Dr. Filippone, who also obtained diagnostic studies. Appellant was also examined by Dr. Krieger, whose reports were reviewed.

Dr. Weiss noted subjective complaints throughout appellant's upper extremities that he stated were unrelated to any obvious structural abnormality by history or physical examination. He noted that she reported symptoms from her neck bilaterally into her arms that did not follow a specific dermatomal distribution. Dr. Weiss set forth findings on physical examination, noting full range of motion with nonspecific discomfort through range of motion. There was no focal swelling of either wrist and full range of motion. No evidence of a ganglion cyst; with various tests reported negative. Appellant described pain in the dorsal and volar aspects of her hands from the mid-forearm down to her fingers without a specific point of maximal tenderness. There was preserved thenar strength; no evidence of atrophy and no radiating symptoms into the median nerve distribution. Median nerve compression testing was also negative.

Dr. Weiss found that appellant's ongoing complaints were unrelated to her history of work at the employing establishment or to any diagnosis of carpal tunnel syndrome that had previously been made. He also founds that there was no active evidence of cervical radiculopathy to explain her symptoms. Dr. Weiss stated that diagnostic studies were borderline for carpal tunnel and remained so over a four-year period, until EMG testing in 2009. As to the diagnosis of carpal tunnel, he noted that he did not find any active evidence based on the physical examination and her history was inconclusive. Dr. Weiss found no active evidence of median nerve entrapment and considered appellant to be recovered. He stated that the findings of the 2009 EMG were related to the nature of median and/or sensory latencies, which can occur developmentally in the absence of any occupational exposure. Dr. Weiss noted that the 2009 findings occurred in a setting unrelated to appellant's work activities, as she had not worked since 2005.

The Board finds that the opinion of Dr. Weiss is sufficient to resolve the conflict in medical opinion as to whether appellant had ongoing residuals or disability causally related to her accepted carpal tunnel syndrome. Dr. Weiss provided a thorough review of the accepted claim, noted her employment activities and addressed the prior medical records and diagnostic studies. He found that appellant's condition had resolved by the time of his examination and stated that she would not benefit from carpal tunnel release surgery, as proposed. Dr. Weiss noted that she had no physical restrictions as her accepted condition had resolved and stated that the ongoing medical treatment of her upper extremity complaints was unrelated to her work history. The Board finds that the opinion of him is of special weight accorded to that of an impartial medical referee.

The Board notes that the additional reports of Dr. Filippone, who was on one side of the conflict in medical opinion, essentially repeated the physician's belief that appellant had ongoing residuals of her accepted carpal tunnel condition.[13] Dr. Filippone provided several reports in which he addressed additional diagnostic tests and stated that physical examination of her supported the findings confirmed by EMG. He expressed his disagreement with the conclusions reached by Dr. Weiss. Dr. Filippone did not believe that appellant's physical findings were negative and cited to EMG and NCS to support her occupational disability, stating that she

[13] *See Kathryn E. Demarsh*, 56 ECAB 677 (2005). Special weight of medical opinion accorded an impartial medical examiner over that of an attending physician who was on one side of the conflict.

would benefit from carpal tunnel release surgery. He reiterated in several reports that she had employment-related bilateral carpal tunnel syndrome and cervical radiculopathy from which she was totally disabled. Dr. Filippone stated that his opinion and diagnoses were based on 85 percent history, 10 to 15 percent physical examination and 5 to 10 percent testing in the form of EMG and NCS. The Board finds that the reports from him are insufficient to overcome the special weight accorded the opinion of Dr. Weiss as an impartial medical referee. The opinion Dr. Filippone provided as to appellant's ongoing disability due to residuals of her carpal tunnel syndrome gave rise to the conflict in medical opinion with Dr. Krieger. His reports following the examination by Dr. Weiss repeat his opinion on disability and residuals. They are not sufficient to create a new conflict in medical opinion.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2013
Washington, DC

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

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

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