United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 13-1394**
	)	**Issued: January 8, 2014**
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:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 28, 2013 appellant, through her attorney, filed a timely appeal from the February 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the termination of her compensation benefits. 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 properly terminated appellant's wage-loss and medical benefits effective July 29, 2012.

FACTUAL HISTORY

On October 16, 2009 appellant, then a 43-year-old part-time flexible (PTF) clerk, filed a notice of recurrence of disability due to an August 18, 1999 injury. She had been on limited duty

[1] 5 U.S.C. § 8101 *et seq.*

since November 2000.[2] Appellant stopped work on August 26, 2009. OWCP developed her claim as a new occupational disease. On January 14, 2010 it accepted aggravation of bilateral lateral epicondylitis. Appellant was placed on the periodic compensation rolls.

Appellant received treatment from Dr. Scott Fried, a Board-certified orthopedic surgeon and osteopath. In a report dated August 26, 2009, Dr. Fried placed her off work. He diagnosed ligament injury, scapholunate ligament grade 1 of the right wrist; radial neuropathy left (radial tunnel); bilateral ulnar neuropathy; brachial plexitis, postsurgery left for radial tunnel; and carpal tunnel median neuropathy of both upper extremities. Dr. Fried opined that the conditions were secondary to appellant's work activities.

In a March 31, 2010 report, Dr. Fried noted that appellant presented with ongoing symptoms that were aggravated by her work activities. He noted that additional treatment was warranted and placed her off work. In a February 9, 2011 report, Dr. Fried examined appellant and noted a visible tremor in the left hand with bilateral dysesthesias in the median nerve distribution. He noted that appellant needed a neurology consultation and further treatment. Dr. Fried advised that a functional capacity evaluation would be beneficial to evaluate her capabilities and limitations.

On March 16, 2011 OWCP referred appellant for a second opinion examination by Dr. Stanley Askin, a Board-certified orthopedic surgeon.

In a March 30, 2011 report, Dr. Askin noted appellant's history of injury and treatment as related in a statement of accepted facts and by appellant. Appellant had an onset of symptoms that began in 1998 or 1999 and her work duties involved repetitive activities. Examination showed two surgical scars including a seven centimeter lateral epicondylar scar and a seven centimeter radial tunnel scar. These were the only objective features but she had subjective complaint of carpal tunnel syndrome. Appellant had a full range of motion of her neck; but when rotated to the right, it bothered her on the left side of the neck and vice versa. She had full range of motion of both shoulders, elbows, forearms, wrists, fingers and thumbs, no atrophic or dystrophic changes to either hand and two-point discrimination was within five millimeters for all 10 digits. Dr. Askin noted that appellant's accepted conditions included bilateral epicondylitis, lesion of radial nerves and epicondylitis bilateral aggravation. He stated that appellant's conditions were largely explained by bilateral carpal tunnel syndrome. Dr. Askin opined that there was no relationship between the carpal tunnel syndrome and her employment as carpal tunnel was a very common peripheral neuropathy in the general population and occurred more commonly in women in the middle years of life. He explained that appellant did not have to work to develop carpal tunnel syndrome and, in fact, her symptoms had worsened, despite not having worked. Dr. Askin opined that the limiting factor regarding her complaints and her alleged incapacity was not a work-related condition. He advised that appellant continued to have tenderness at both medial and lateral epicondyles but, as she was not working or exposed to work activity, it should have been curative. As appellant's symptoms persisted and had advanced, her condition was a disease of carpal tunnel syndrome. Dr. Askin stated that there "is no work-

[2] Appellant has a 1999 occupational disease claim that was accepted for bilateral epicondylitis and lesion of radial nerves under claim No. xxxxxx112. An authorized left elbow radial nerve decompression was performed on August 30, 2000. That claim was combined with the present claim.

related reason why she cannot be fully employed." With regard to her accepted condition, appellant could return to unrestricted employment activities and had reached maximum medical improvement. Dr. Askin opined that "what ails her is not work related and I have no work-related restrictions to the resumption of her full duty employment."

In an April 28, 2011 report, Dr. Steven Mandel, a Board-certified neurologist to whom appellant was referred by Dr. Fried, noted appellant's history and treatment. He found tenderness over the left radial tendon, a positive tremor on the left upper extremity predominantly on sustained positioning, that did not increase with intention. Dr. Mandel also noted that rapid alternating movements were slower on the right than the left, and no tremors were noted to the right upper extremity, lower extremities or cranial nerves. He stated that appellant's findings were consistent with left upper extremity tremor and there was controversy within the medical literature as to peripheral nerve injury and presence of tremor, which probably had an association, but the true etiology was unknown. Dr. Mandel noted that to look for other causes of the tremor, appellant would need an MRI scan of the head as well as blood studies.

On September 21, 2011 OWCP proposed to terminate appellant's compensation benefits based on the report of Dr. Askin, which established that her accepted conditions had ceased.

In a September 29, 2011 letter, appellant's counsel argued that Dr. Askin's report was not sufficient to terminate benefits. He argued that Dr. Askin did not have a proper history of injury correct, as it was not caused by a single injury. Counsel asserted that Dr. Askin should have been questioned with regard to whether the diagnosed carpal tunnel syndrome was caused by repetitive work duties. He also noted that Dr. Askin did not refer to any electromyography (EMG) scan findings to support his opinion. Counsel argued that, at a minimum, a conflict in medical opinion arose between Drs. Askin and Fried.

By decision dated July 11, 2012, OWCP terminated appellant's compensation benefits effective July 29, 2012 on the grounds that appellant had no continuing residuals or disability due to employment injury.

On July 18, 2012 appellant's counsel requested a hearing, which was held on November 28, 2012. Appellant contended that Dr. Askin's examination lasted 5 to 10 minutes and that he was very unprofessional. Dr. Askin advised her that the surgery she underwent was unnecessary. Appellant noted that, despite having more questions, he had other patients to see. She noted a constant pulling and achy sensation in her arms and she could not perform her full duties.

In a letter dated November 2, 2012, appellant's counsel reasserted that Dr. Askin's report was either insufficient or created a conflict with Dr. Fried. He submitted a December 1, 2011 report from Dr. Fried who noted appellant's history of injury and treatment commencing in 2001. Dr. Fried disagreed with Dr. Askin's report. He explained that, by August 2009, he expressed concern regarding the repetitive nature of appellant's work activities and her ongoing significant symptoms. Appellant's nerve studies showed worsening carpal tunnel bilaterally and the radial nerve findings on the right were consistent with overuse at the elbow. Dr. Fried provided

appellant with new restrictions and took her off work when her symptoms remained aggravated. He provided the results of functional capacity testing completed in September 2011.

Dr. Fried diagnosed a grade 1 - right scapholunate ligament injury; radial neuropathy left (radial tunnel), ulnar neuropathy left and ulnar neuropathy right; bilateral carpal tunnel median neuropathy due to work activities; and bilateral brachial plexopathy with cervical radiculopathy and discogenic disease. He advised that, following her August 2000 surgery for radial tunnel and lateral epicondylar release, she had a postoperative worsening of radial sensory nerve neuropraxia. Dr. Fried opined that appellant had ongoing evidence of work-related conditions that included bilateral lateral epicondylar and radial tunnel involvement. Appellant had evidence of a classic repetitive strain injury and cumulative trauma and that her repeated work activities and exposures resulted in the ongoing symptoms. Dr. Fried noted she had progressive deterioration in function. He found objective evidence of ongoing pathology that included positive testing and findings and ongoing evidence of pathology at her elbows and ongoing evidence of traumatically-induced median nerve carpal tunnel involvement at the wrist.

Dr. Fried explained that appellant had proximal involvement at the brachial plexus bilaterally which was documented by somatosensory evoked potentials studies and EMG scans. He also noted that functional capacity testing demonstrated an excellent effort and objectively showed severe limitations. Dr. Fried opined that appellant's carpal tunnel median nerve involvements at the wrist were directly and causally related to her work activities as well as abnormal use postoperatively from her radial nerve surgery. He advised that her proximal involvements were due to the head and neck posturing. Dr. Fried opined that appellant remained disabled from her regular work that was secondary to her work injuries with a direct cause and effect relationship between her ongoing diagnoses including her bilateral carpal tunnel, bilateral radial tunnel, bilateral lateral epicondylitis and cervical radicular and brachial plexus involvements. He opined that they were directly and causally related to the work injuries and the work pathologies. Dr. Fried indicated her condition was permanent and required treatment.

In a letter dated January 16, 2012, appellant's counsel provided EMG findings from June 5, 2001, June 20, 2006, July 22, 2009 and June 1, 2010.

By decision dated February 19, 2013, OWCP's hearing representative affirmed the July 11, 2012 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[3] 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

[3] *Curtis Hall*, 45 ECAB 316 (1994).

employment.[4] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[5] 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.[6]

ANALYSIS

OWCP accepted appellant's claim for aggravation of bilateral lateral epicondylitis and lesion of radial nerves. It terminated her compensation benefits effective July 29, 2012 as it found that the weight of the medical evidence, represented by Dr. Askin's March 30, 2011 report, established that her employment-related medical conditions had resolved

In a March 30, 2011 second opinion report, Dr. Askin reviewed appellant's medical history and provided findings on examination. He concluded that there was no evidence of any ongoing neurologic deficit or disability related to the employment injury. Dr. Askin explained that appellant did not have any condition resulting from the work injury. He opined that her condition was explained by her bilateral carpal tunnel syndrome which was not work related. Based on the opinion of Dr. Askin, OWCP concluded that the residuals of the August 26, 2009 injury had resolved and terminated appellant's compensation benefits. The Board finds that the termination was improper based on a conflict of medical opinion between Dr. Fried for appellant, and Dr. Askin for OWCP.

Dr. Fried, the treating physician, submitted reports advising that, since August 2009, appellant was unable to perform her work duties, offered diagnoses, and opined that appellant's disability was secondary to her work. In a December 1, 2011 report, he disagreed with Dr. Askin's findings, and noted findings on examination and testing. Dr. Fried opined that appellant had ongoing evidence of work-related problems that included bilateral lateral epicondylar and radial tunnel involvement. He explained that objective test results, examination findings, and functional capacity testing supported his opinion. Dr. Fried opined that appellant remained disabled from her regular work and that her disability remained due to her work injuries. He explained that there was a direct cause and effect relationship between appellant's work and her ongoing diagnoses of bilateral carpal tunnel, bilateral radial tunnel, bilateral lateral epicondylitis and cervical radicular and brachial plexus involvements.

The Board finds that the opinions of Dr. Fried and Dr. Askin are of virtually equal weight. The physicians reached an opposite conclusion regarding whether the accepted conditions had ceased without residuals, and whether the carpal tunnel condition was caused or aggravated by her employment activities, thereby creating a conflict of medical opinion. When there is a conflict of opinion between the claimant's attending physician and the physician performing an examination for the government, OWCP shall appoint a third physician to resolve

[4] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[5] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[6] *Calvin S. Mays*, 39 ECAB 993 (1988).

the disagreement.[7] As there exists an unresolved conflict in the medical evidence, OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

On appeal, appellant's representative made several arguments including that Dr. Fried's report was sufficient to create a conflict. As noted, the Board finds that there is a conflict in the medical evidence.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in terminating appellant's compensation benefits effective July 29, 2012, as there was an outstanding conflict.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of Office of Workers' Compensation Programs is reversed.

Issued: January 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[7] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).