



## **ISSUES**

The issues are: (1) whether appellant is entitled to wage-loss compensation for the periods November 16, 1999 to June 14, 2002, August 14 to November 25, 2002, December 26, 2002 to July 27, 2004 and on or after October 5, 2004; and (2) whether appellant has established that his claim should be expanded to include cubital tunnel syndrome, right dorsal wrist ganglion condition, left radiocarpal degenerative disease, left degenerative lunotriquetral ligament changes and a left triangular fibrocartilage complex (TFCC) tear.

On appeal appellant contends that he is entitled to wage-loss compensation on and after November 16, 1999 and that OWCP erred in failing to expand his claim to include the additional conditions.

## **FACTUAL HISTORY**

On July 29, 1999 appellant, then a 51-year-old regional director, filed an occupational disease claim alleging that on May 20, 1996 he first became aware of aggravation of pain in his forearms, wrists, hands and shoulders. It was not until June 10, 1996 that he realized his condition was caused by his employment duties. OWCP accepted the claim for bilateral carpal tunnel syndrome.<sup>4</sup> Appellant was placed on administrative leave on April 23, 1999 unrelated to his medical condition, was placed in a leave-without-pay (LWOP) status on November 16, 1999 and resigned from the employing establishment effective April 21, 2000.<sup>5</sup>

On April 3, 2000 appellant filed a claim for wage-loss compensation (Form CA-7) beginning November 16, 1999 when he was placed on LWOP and continuing for intermittent periods.<sup>6</sup>

By decision dated May 17, 2000, OWCP denied appellant's claim for wage-loss compensation on and after November 16, 1999.

In an August 10, 2000 decision, before the hearing was held, an OWCP hearing representative vacated the May 17, 2000 decision and remanded the case for further development of appellant's job duties and alleged work-related conditions.

On November 3, 2000 appellant requested that his claim be expanded to include additional conditions. He alleged that his repetitive work duties aggravated his preexisting conditions of collagen/vascular disorder, spinal stenosis, right shoulder injury and inflammation of the muscles, tendons and nerves of the forearm, wrists, hands and fingers. Appellant submitted reports from his treating physician, Dr. Charles Schacherer, a Board-certified

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<sup>4</sup> OWCP later authorized several carpal tunnel surgeries.

<sup>5</sup> On October 4, 2000 the Office of Personnel Management approved appellant's claim for disability retirement.

<sup>6</sup> In a memorandum dated April 21, 2000, the employing establishment informed OWCP and submitted supporting evidence that appellant was self-employed beginning November 16, 1999 as principal owner of the "Hygeia Group."

neurologist, who found appellant totally disabled and found that all his conditions stemmed from work factors.

OWCP referred appellant to a second opinion examination with Dr. Charles E. Graham, a Board-certified orthopedic surgeon. Based on that report, by decision dated April 4, 2001, it proposed to terminate appellant's medical benefits for the accepted conditions as Dr. Graham found there was no evidence of carpal tunnel syndrome. Dr. Graham found that appellant's complaints were more likely related to the preexisting conditions of collagen vascular disorder or cervical spinal stenosis. By decision dated May 11, 2001, OWCP finalized the termination of medical benefits.

By decision dated September 10, 2002, an OWCP hearing representative set aside the May 11, 2001 decision finding an unresolved conflict in the medical opinion as to whether appellant continued to have residuals of the accepted work-related condition of bilateral carpal tunnel syndrome. OWCP was also instructed to prepare a more complete and accurate statement of accepted facts and to further develop the medical evidence to determine whether appellant's preexisting conditions had been aggravated by his employment duties.<sup>7</sup>

After further development of the factual evidence on January 30, 2003 OWCP referred appellant to Dr. Kenneth S. Bayless, a Board-certified orthopedic surgeon, to resolve the conflict as to whether there were any residuals from the accepted condition and to determine whether the work duties had aggravated any preexisting conditions. In a February 18, 2003 report, Dr. Bayless, based upon a review of the medical and factual evidence and physical examination, diagnosed bilateral entrapment wrist neuropathy, right shoulder rotator cuff repair, cervical disc disorder and mixed connective tissue disorder. He indicated that referral to a rheumatologist was required to determine whether appellant's wrist scleroderma and collagen vascular disorder or Reiter's syndrome had been aggravated by his employment duties. Dr. Bayless opined that appellant's cervical and right shoulder conditions had not been caused or aggravated by his employment duties as the duties he performed would not have caused any aggravation. With respect to appellant's ability to perform his work duties, Dr. Bayless opined that he was capable of performing his work duties if appropriate accommodations were made.

On April 7, 2003 OWCP referred appellant to Dr. Lige E. Rushing, a Board-certified internist with a subspecialty in rheumatology. In his April 25, 2003 report, Dr. Rushing, based upon a review of the medical evidence, statement of accepted facts and physical examination, opined that the current objective findings did not support the diagnoses of collagen vascular disease, Reiter's disease or scleroderma. He noted that, while the conditions might have been present in the past, it was not currently present based on the negative scleroderma antibody, negative rheumatoid factor test and negative antinuclear antibody test. Dr. Rushing determined that appellant's work duties had not aggravated any underlying vascular or Reiter's disorder. With respect to aggravation of a preexisting right rotator cuff tear, he stated that this condition

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<sup>7</sup> In reaching her decision, the hearing representative relied, in part, upon an unsigned statement from a coworker, supportive of the extent of appellant's work duties. The coworker, upon learning of this proffered unsigned statement, obtained a copy of the document from OWCP and submitted a signed statement to the record disputing the facts in the statement and acknowledging that, although appellant had requested her to sign the document, she had refused.

could be aggravated by repeated use of the mouse for extended time periods but that any aggravation would have been temporary.

In April 17 and July 24, 2003 supplemental reports, Dr. Bayless agreed with Dr. Rushing that appellant would have been unable to continue in his employment without additional carpal tunnel surgery and that, following the right endoscopic carpal tunnel release surgery, appellant would have been able to return to clerical sedentary work after four to six weeks. He also agreed that, following the left endoscopic carpal tunnel release surgery, appellant would have been able to return to a clerical sedentary position within four weeks of the surgery. Dr. Bayless noted that appellant would have been able to return to sedentary clerk work six to eight weeks following nonemployment-related right shoulder arthroplasty and rotator cuff repair surgery.

By decision dated August 8, 2003, OWCP denied appellant's request to expand his claim to include aggravation of his preexisting conditions of collagen vascular disease, right rotator cuff tear and cervical stenosis. It also retroactively authorized carpal tunnel surgeries performed on June 14 and November 26, 2002 and wage-loss compensation for the periods June 14 to August 14, 2002 and November 26 to December 26, 2002.

Following a request for a hearing, which was held on April 2, 2004, an OWCP hearing representative, by decision dated July 9, 2004, affirmed the denial of expansion of appellant's claim to include aggravation of his preexisting conditions, but found the reports of Drs. Bayless and Rushing to be vague, equivocal and unrationalized. The case was remanded for referral to a new independent medical specialist after updating the statement of accepted facts.

On August 11, 2004 OWCP referred appellant to Dr. M. Lewis Frazier, Jr. to resolve the remaining conflict as to the periods of disability.

In a November 2, 2004 report, Dr. Frazier, based upon a review of the medical and factual evidence and statement of accepted facts, noted significant preexisting conditions of cervical degenerative disc disease and stenosis; collagen vascular disease or Reiter's syndrome since 1975; a 1954 wrist injury; osteoporosis; fibromyalgia, possibility of Raynaud's; gynecomastia; plantar fasciitis and tarsal tunnel syndrome; and right shoulder injury with rotator cuff tear and repair. He noted that OWCP had accepted bilateral carpal tunnel syndrome but opined that appellant would have been able to perform his employment duties due to the minimal physical requirements of the position and the availability of assistive devices.

In a November 29, 2004 decision, OWCP denied appellant's claim for the requested periods of wage-loss compensation based on Dr. Frazier's opinion.

In an August 8, 2005 report, Dr. Schacherer opined that appellant's dorsal ganglion cyst of the right wrist had been aggravated by the repetitive work duties that had caused the accepted bilateral carpal tunnel condition. He related that medical literature supported that ganglion cysts could be aggravated by repetitive activities.

By decision dated September 8, 2005, an OWCP hearing representative set aside the November 29, 2004 decision. As the issue concerned not only past periods of disability but also

whether appellant had continuing residuals of the accepted conditions, the case was remanded for a physical examination by an independent medical specialist, rather than simply a review of the record.<sup>8</sup>

OWCP referred appellant to Dr. Thomas C. DiLiberti, a Board-certified orthopedic surgeon, for an independent medical evaluation. In a November 17, 2005 report, Dr. DiLiberti noted reviewing the medical and factual evidence and provided physical findings on examination. He found no significant atrophy, a palpable mass on the right wrist dorsal aspect, well-healed wrist surgical incisions and negative Tinel's sign bilaterally at the median nerve. A review of an October 23, 2001 magnetic resonance imaging (MRI) scan revealed left lunate degenerative change and right radiocarpal degenerative change. Dr. DiLiberti's review of x-ray interpretations showed calcification in the lunotriquetral area. Based on his review of the medical evidence and medical history, he opined that appellant was not disabled from performing his date-of-injury employment duties. Dr. DiLiberti noted that, with modification of his duties and work accommodations, appellant would have been able to work. Next, he found no evidence that appellant's right dorsal wrist ganglion had been caused by or aggravated by his employment. Dr. DiLiberti related that this condition was first discussed on June 8, 2005 and there was no evidence showing the existence of a ganglion cyst prior to this date.

In a November 29, 2005 supplemental report, Dr. DiLiberti opined that the conditions of lunotriquetral ligament degenerative changes, radiocarpal degenerative disease and TFCC tears were unrelated to appellant's employment duties as a regional director. In support of this conclusion, he reported that the record he reviewed contained no documentation of any work activity which would have caused these conditions. Next, Dr. DiLiberti reported that he found no evidence of any scarring around the area where appellant had left carpal tunnel release surgery.

By decision dated November 3, 2005, OWCP's District Director denied appellant's previous October 7, 2005 hearing request as premature.<sup>9</sup>

By decision dated December 16, 2005, OWCP denied appellant's claim for the additional wage-loss compensation as the medical evidence did not establish that he was totally disabled. It also found the evidence insufficient to warrant expansion of his claim to include right dorsal wrist ganglion condition, left radiocarpal degenerative disease, left degenerative lunotriquetral ligament changes and left TFCC tear. Additional surgeries were also denied.<sup>10</sup>

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<sup>8</sup> Thereafter, on September 21, 2005 appellant submitted a request to OWCP to appoint a new claims examiner as to continue to have his case handled by the same claims examiner would be prejudicial to his case. By letter dated October 4, 2005, the District Director clarified that OWCP had not been instructed to order a new claims examiner and thus his request was being denied. On October 7, 2005 appellant requested an oral hearing due to the bias of the hearing representative.

<sup>9</sup> *Id.*

<sup>10</sup> Appellant's physician had previously requested authorization for repeat carpal tunnel surgery. This request was forwarded to OWCP's medical adviser who noted that his carpal tunnel symptoms had improved until appellant had more recently been engaged in overhead painting. The medical adviser recommended denying the additional surgery based on the overhead painting and the fact that Dr. Rushing had found appellant's carpal tunnel symptoms temporary. No decision had previously been issued on that request.

On December 26, 2005 appellant requested an oral hearing, which was held before an OWCP hearing representative on January 24, 2007. Additional new medical evidence was also submitted.

In addition to February 2007 reports of Dr. Schacherer, a February 15, 2007 report was received from Dr. Rushing which found that appellant continued to have the same symptoms as when he had been previously examined on April 25, 2003.<sup>11</sup> Dr. Rushing opined that appellant was unable to manage a computer keyboard or mouse due to the previously described disabilities.

By decision dated April 19, 2007, an OWCP hearing representative, affirmed the December 16, 2005 denial of appellant's claim for any further wage-loss compensation based on the weight of Dr. DiLiberti's reports.<sup>12</sup> By letter dated May 7, 2009, appellant requested reconsideration contending that the hearing representative had erred by not reviewing all of the newly submitted medical evidence.

On May 16, 2007 OWCP received a February 16, 2007 report from Dr. Schacherer who opined that appellant was disabled from working due to his accepted conditions.

Appellant reiterated his request for reconsideration on June 27, 2007.

By decision dated August 15, 2007, an OWCP senior claims examiner denied modification of the April 19, 2007 decision, finding that the hearing representative had considered all the evidence.

Appellant subsequently submitted another request for reconsideration arguing that a senior claims examiner did not have the authority to review an error by a hearing representative. He claimed that only a Director of Hearings and Review could correct that error. Appellant requested a hearing.

By decision dated February 18, 2009, OWCP's hearing representative, without conducting a hearing, reaffirmed her April 19, 2007 decision denying his claim for wage-loss compensation.<sup>13</sup> She stated that she had reviewed the medical evidence that appellant had contended had not been reviewed and found it insufficient to overcome the weight of Dr. DiLiberti's opinion.<sup>14</sup>

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<sup>11</sup> Dr. Rushing became appellant's treating physician after serving as a second opinion physician for OWCP.

<sup>12</sup> The hearing representative did not address the remaining issues of the expansion of his claim and the denial of the additional surgical procedures. It also erroneously referred to the previous decision as November 3, 2005, rather than December 16, 2005.

<sup>13</sup> Again the hearing representative did not address the remaining issues of the expansion of his claim and the denial of the additional surgical procedures and erroneously referred to the previous OWCP decision date of November 3, 2005, rather than December 16, 2005.

<sup>14</sup> Appellant requested reconsideration on May 8, 2009 claiming that having the same hearing representative for subsequent hearings violated OWCP procedures. There was no decision on this request in the record.

On June 10, 2010 appellant's physician, Dr. Schacherer, requested authorization to perform repeat left carpal tunnel release surgery. By letter of June 21, 2010, appellant filed a request for a decision on the requested surgical procedures. OWCP considered that request to be a claim for recurrence, and as there had been no exposure to work factors in several years, OWCP requested further information from appellant. Appellant responded on September 7, 2010.

By decision dated September 13, 2010, OWCP denied appellant's claim for a recurrence of disability finding the evidence insufficient to establish that the requested surgery was related to the accepted conditions.

OWCP reissued the September 13, 2010 decision on September 16, 2010 to correct an error. Appellant requested an oral hearing.

By decision dated November 26, 2010, an OWCP hearing representative found that the case was not in posture for a hearing as OWCP had improperly characterized his request for surgery as a recurrence claim. In fact, the hearing representative found that a recurrence claim was only appropriate if appellant had been released from treatment for the accepted condition. As appellant continued to receive medical treatment for the accepted condition, he had never been released from treatment. The question as to whether the requested surgery would be related to the accepted conditions would have to be resolved by an independent medical examiner as there was now a conflict of medical evidence between Dr. Schacherer and Dr. DiLiberti, as Dr. DiLiberti had not been selected to resolve that conflict.

The hearing representative remanded the case for a determination by an independent medical specialist as to whether appellant had sustained cubital tunnel syndrome, ganglion cyst, radiocarpal degenerative changes, lunotriquetral ligament changes or a left TFCC tear causally related to the work duties or to the subsequent carpal tunnel surgeries in 2002. Also, OWCP was to have the independent medical specialist determine whether the 2004 surgical revision of the right carpal tunnel had been warranted to treat the effects of the work injuries or was warranted due to the previous 2002 carpal tunnel surgeries and to determine whether any other requested surgeries were work related. The hearing representative also noted that no decision had been issued by OWCP on the previous outstanding May 8, 2009 request for reconsideration.<sup>15</sup>

By decision dated February 23, 2011, OWCP denied the previous May 8, 2009 request for reconsideration. It found that, as the hearing representative had simply reissued her previous decision, it was not necessary to have a new hearing representative. Appellant again, on November 24, 2011, requested reconsideration.

On February 24, 2011 OWCP referred appellant to Dr. Richard E. Jones, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion.

In his March 28, 2011 report, Dr. Jones, based upon a physical examination, review of the medical evidence and statement of accepted facts, opined that the July 27, 2004 right carpal

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<sup>15</sup> *Id.*

tunnel surgery was due to appellant's accepted employment injury. He noted findings from the medical record he reviewed. Dr. Jones concluded that the bilateral cubital syndrome was employment related and that the ganglion cyst was more likely than not due to either the work injury or subsequent treatment. As to the conditions of radial carpal degenerative changes and lunotriquetral changes, he opined that they were most likely not work related. Lastly, Dr. Jones found that, based on an October 23, 2001 MRI scan, there was no evidence of a TFCC tear.

On May 11, 2011 appellant requested further expansion of his claim to include the new condition of bilateral upper extremity repetitive motion injury.

OWCP's medical adviser reviewed Dr. Jones' March 28, 2011 report and concurred that the right carpal tunnel surgery performed in June 2004 was due to appellant's accepted employment injury. However, the medical adviser found Dr. Jones' opinion insufficient to warrant acceptance of cubital tunnel condition or other conditions as Dr. Jones had not obtained a history or performed an examination of the relevant area.

On May 31, 2011 OWCP retroactively authorized right carpal tunnel surgery which had been performed on July 27, 2004.

In an August 31, 2011 report, Dr. Schacherer opined that appellant developed bilateral upper extremity problems including bilateral medial and lateral epicondyles due to his employment duties. In a September 9, 2011 progress note, he provided physical findings and diagnosed bilateral upper extremity problems.

In a letter dated October 21, 2011, OWCP informed appellant that he was entitled to wage-loss compensation due to the authorized surgical procedures. The periods of authorized wage-loss compensation included the previously authorized June 14 to August 14, 2002 and November 26 to December 26, 2002 periods and the new period July 27 to October 5, 2004. Appellant was advised, however, that as he was currently receiving retirement benefits from the Office of Personnel Management, no payment could be made until an election of benefits was completed.

In a December 21, 2011 progress note, Dr. Schacherer provided physical findings and noted that appellant's radial tunnels were very sore. He also noted a positive Tinel's sign for both cubital tunnels.

By decision of January 19, 2012, OWCP denied modification of the February 23, 2011 decision and, after reviewing all the new evidence in the record since the February 23, 2011 decision, found that, while Dr. Jones had addressed some of the diagnoses in question, he had not provided sufficient rationalization for expansion of the claim.

In a February 8, 2012 progress note, Dr. Schacherer provided physical findings and reported that appellant was still positive for carpal tunnel syndrome and noted the presence of lateral epicondylar tenderness and a bit of right dorsal wrist ganglion. In the May 9, 2012 note, he related that appellant continued to have bilateral cubital tunnel irritability.

On June 9, 2012 appellant requested reconsideration and submitted a May 14, 2012 report from Dr. Schacherer in support of his request.

By decision dated August 16, 2012, OWCP reviewed the newly submitted medical evidence and determined that it was insufficient to warrant modification of the January 19, 2012 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>16</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>17</sup> For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>18</sup> Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>19</sup>

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>20</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>21</sup> An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>22</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.<sup>23</sup>

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<sup>16</sup> 5 U.S.C. §§ 8101-8193.

<sup>17</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

<sup>18</sup> See *id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

<sup>19</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>20</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

<sup>21</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>22</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>23</sup> See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

Section 8123(a) of FECA provides in pertinent part: “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.”<sup>24</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>25</sup>

### **ANALYSIS -- ISSUE 1**

Appellant claims that he is entitled to wage-loss compensation for the periods November 16, 1999 to June 14, 2002, August 14 to November 25, 2002, December 26, 2002 to July 27, 2004 and on or after October 5, 2004. The record establishes that appellant resigned from the employing establishment on April 21, 2000 and his claim for disability retirement was approved by the Office of Personnel Management on October 4, 2000. OWCP accepted appellant’s claim for wage-loss compensation the periods June 14 to August 14, 2002, November 26 to December 26, 2002, and July 27 to October 5, 2004 based on its retroactive authorization for carpal tunnel surgeries performed on June 14 and November 26, 2002 and July 27, 2004. The issue on appeal is whether appellant has established that his disability and resulting wage-loss compensation for the periods he claimed were due to his accepted employment injury.

The Board finds that appellant failed to meet his burden of proof to establish total disability for these periods. The record reveals that he has not worked at the employing establishment since April 23, 1999 when he was placed on administrative leave. Appellant is claiming wage-loss compensation beginning November 16, 1999, when he was placed on LWOP and continuing for intermittent periods. OWCP denied his claim for wage-loss compensation on December 16, 2005, which was affirmed by an OWCP hearing representative on February 18, 2009 based upon the opinion of Dr. DiLiberti, an impartial medical examiner. Since the February 18, 2009 decision, OWCP has issued multiple decisions denying modification.

Most recently, OWCP found a conflict in medical opinion was created between Dr. Graham, a second opinion Board-certified orthopedic surgeon, and Dr. Schacherer, a treating Board-certified orthopedic surgeon, on the issue of disability for work. In his November 17, 2005 report, Dr. DiLiberti, the impartial medical examiner, noted the medical and factual evidence and reviewed physical findings on examination. Based on his review of the medical evidence and medical history, he opined that appellant was not disabled from performing his date-of-injury employment duties. Dr. DiLiberti noted that, with modification of his duties and work accommodations, appellant would have been able to work.

The Board finds that Dr. DiLiberti’s opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant but also reviewed his medical records and reported accurate medical and employment histories. Accordingly,

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<sup>24</sup> 5 U.S.C. § 8123(a); *see also* *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>25</sup> *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

Dr. DiLiberti's opinion that appellant was capable of performing his date-of-injury job is accorded special weight.<sup>26</sup> The reports that appellant submitted are insufficient to overcome the weight of Dr. DiLiberti's opinion or to create a new conflict in the medical evidence with respect to disability for work. The Board notes that Dr. Schacherer was on one side of the conflict resolved by Dr. DiLiberti regarding the issue of disability for work and did not otherwise present new findings or rationale to support his opinion.<sup>27</sup> Thus, these reports are insufficient to support his claim for wage-loss compensation for the periods claimed by appellant.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

A claimant seeking benefits under FECA<sup>28</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,<sup>29</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>30</sup>

The evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>31</sup> The claimant must submit a rationalized medical opinion that supports a causal connection between his or her current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.<sup>32</sup>

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

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<sup>26</sup> In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Bryan O. Crane*, 56 ECAB 713 (2005); *Gary R. Sieber*, *supra* note 27.

<sup>27</sup> *See S.J.*, Docket No. 09-1794 (issued September 20, 2010); *I.J.*, 59 ECAB 408 (2008); *John D. Jackson*, 55 ECAB 465 (2004); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>28</sup> 5 U.S.C. §§ 8101-8103.

<sup>29</sup> *C.B.*, Docket No. 08-2268 (issued May 22, 2009); *J.P.*, 59 ECAB 178 (2007); *Amelia S. Jefferson*, *supra* note 19.

<sup>30</sup> *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *G.T.*, 59 ECAB 447 (2008); *Frankie A. Farinacci*, 56 ECAB 723 (2005); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>31</sup> *W.D.*, Docket No. 09-658 (issued October 22, 2009); *T.H.*, 59 ECAB 388 (2008); *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Thomas L. Agee*, 56 ECAB 465 (2005).

<sup>32</sup> *D.U.*, Docket No. 10-144 (issued July 27, 2010); *D.G.*, 59 ECAB 734 (2008); *Donald W. Wenzel*, 56 ECAB 390 (2005).

clarification or elaboration, OWCP has a responsibility to secure a supplemental report that properly resolves the conflict.<sup>33</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly found a conflict in medical opinion between Drs. DiLiberti and Schacherer regarding the issue of whether appellant's claim should be expanded to include additional conditions and referred him to Dr. Jones for resolution of this conflict. However, the Board finds that Dr. Jones' March 28, 2011 report is insufficient to resolve the conflict.

In his March 28, 2011 report, Dr. Jones, based upon a physical examination and a review of the medical evidence and statement of accepted facts, opined that the July 27, 2004 right carpal tunnel surgery was due to appellant's accepted employment injury. He noted findings from the medical record he reviewed. Dr. Jones concluded that the bilateral cubital syndrome was employment related and that the ganglion cyst was more likely than not due to either the work injury or subsequent treatment. He further opined, without adequate explanation, however, that the radial carpal degenerative changes and lunotriquetral changes were most likely not work related and that the TFCC tears was not employment related based on his review of an October 23, 2001 MRI scan.

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of the specialist, if sufficiently well rationalized, must be given special weight.<sup>34</sup> The Board finds that Dr. Jones' speculative opinion did not resolve the conflict as to whether appellant's diagnosed bilateral cubital syndrome, wrist ganglion cyst, radial carpal degenerative changes, lunotriquetral ligament changes and a TFCC tear were employment related. For these reasons, the Board finds that his report is of diminished probative value and is insufficient to resolve the conflict.

As OWCP selected Dr. Jones as the impartial medical examiner, and as he did not resolve the issue, OWCP should have sought a supplemental opinion from him.<sup>35</sup> The case will be remanded to OWCP for further development of the medical evidence, including a medical examination and a supplemental opinion from Dr. Jones. If Dr. Jones is unable or unwilling to conduct the examination and provide a supplemental opinion, OWCP shall refer appellant to another impartial medical examiner in the appropriate field of medicine for conflict resolution of whether the additional conditions of cubital tunnel syndrome, right dorsal wrist ganglion cyst, left radiocarpal degenerative disease, left degenerative lunotriquetral ligament change and a left TFCC tear were causally related to the accepted bilateral carpal tunnel syndrome or the subsequent authorized surgical procedures. It should also determine whether the newly

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<sup>33</sup> *Phillip H. Conte*, 56 ECAB 213 (2004).

<sup>34</sup> See *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, *supra* note 27; *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>35</sup> See *Phillip H. Conte*, *supra* note 35.

requested condition of bilateral upper extremity repetitive motion is work related.<sup>36</sup> After such further development as OWCP deems necessary, an appropriate merit decision should be issued regarding this matter.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish entitlement to wage-loss compensation for any period other than the rehabilitation from his accepted surgical procedures, June 14 to August 14, 2002, November 26 to December 26, 2002, and July 27 to October 5, 2004. The Board also finds this case is not in posture for a decision on the issue of whether his claim should be expanded to include the additional conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 16, 2012 is affirmed in part and set aside in part and remanded for further proceedings consistent with the above opinion.

Issued: March 5, 2014  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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<sup>36</sup> See *Edwin L. Lester*, 34 ECAB 1807 (1983); *Harold Travis*, 30 ECAB 1071 (1979).