United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 15-72**
	)	**Issued: April 10, 2015**
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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 14, 2014 appellant, through counsel, filed a timely appeal of a July 7, 2014 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability on or after April 1, 2009 due to her accepted employment injuries.

On appeal, counsel argued that an OWCP hearing representative's decision should be set aside on the grounds that it failed to acknowledge that appellant had established *prima facie* evidence of her alleged recurrence of disability. He further argued that the statement of accepted facts (SOAF) and list of questions directed to the impartial medical examiner were misleading and prejudicial as OWCP stated that FECA was not a retirement program and that she was not

[1] 5 U.S.C. § 8101 *et seq.*

entitled to compensation for wage-loss benefits unless she was totally disabled. Counsel argues that the impartial medical examiner did not address the central issue and his report does not resolve the existing conflict of medical opinion evidence.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On December 2, 2008 appellant, then a 43-year-old window and distribution clerk filed an occupational disease 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. OWCP accepted her 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 would move the wheeled containers that she could not pull or push.

Appellant filed a notice of recurrence on May 4, 2009 alleging that on April 1, 2009 she stopped work based on the recommendations of her attending physician, Dr. Scott Fried, an osteopath.

OWCP denied appellant's claimed recurrence on November 17, 2009. Appellant requested an oral hearing. By decision dated July 26, 2010, OWCP's Branch of Hearings and Review found an unresolved conflict of medical opinion evidence between Dr. Fried and Dr. Kevin Hanley, an orthopedic surgeon and second opinion referral physician, regarding whether she had established a change in the nature and extent of her injury-related conditions such that she could no longer perform the duties of her light-duty position, and remanded for additional development. OWCP referred appellant for an impartial medical examination with Dr. George Glenn, a Board-certified orthopedic surgeon, on September 27, 2010. Dr. Glenn found on November 16, 2010 that she 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.

By decision dated 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. In a decision dated July 6, 2011, OWCP's hearing representative determined that Dr. Glenn was not properly designated an impartial medical examiner, but that his report was sufficient to create a conflict with the reports of Dr. Fried and required referral to an impartial medical examiner. She remanded the case for additional development of the medical evidence.

On July 21, 2011 OWCP referred appellant to Dr. Roy Friedenthal, a Board-certified orthopedic surgeon and impartial medical examiner, who reported on September 14, 2011 that there was no objective evidence of right cubital tunnel syndrome or carpal tunnel syndrome, and also no objective evidence of right wrist sprain. Dr. Friedenthal further reported that she was not totally disabled and that she was capable of working with restrictions.

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.

Appellant requested a video hearing of her claim which was held on February 29, 2012. By decision dated May 18, 2012, the hearing representative affirmed OWCP's October 26, 2011 decision. Appellant appealed this decision to the Board and by decision dated April 19, 2013,[2] the Board found that Dr. Friedenthal's report was not sufficiently detailed and well reasoned to resolve the existing conflict of medical opinion evidence. The Board remanded the case, finding 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 SOAF and requesting a supplemental report addressing the central issue of her alleged recurrence of disability in April 2009. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

On July 17, 2013 OWCP referred appellant for evaluation with Dr. Friedenthal. It requested that he provide a supplemental report and provided him with a list of specific questions, an amended SOAF, and authorized diagnostic testing. The SOAF noted that appellant's full-duty position included standing, using a computer, and lifting up to 70 pounds. Appellant's light-duty physical requirements included working three days a week, with no lifting over 10 pounds and no pushing or pulling. OWCP noted that FECA was not a retirement program. Dr. Friedenthal referred appellant for neurologic evaluation including electromyograms and nerve conduction velocity testing on both upper extremities on September 12, 2013.

On September 30, 2013 Dr. Fried opined that appellant could not return to her regular work duties. He recommended additional neurological testing and a functional capacity evaluation.

Appellant's neurological testing on October 7, 2013 demonstrated evidence of mild carpal tunnel syndrome on the left.

In a supplemental report dated November 5, 2013, Dr. Friedenthal stated that he reexamined appellant on August 6, 2013. Appellant reported at that time that once or twice a week, one or both of her arms went numb. On physical examination Dr. Friedenthal found that she had decreased range of motion of the right shoulder and mild crepitus in both shoulders. He found intact rotator cuff strength. Appellant demonstrated normal range of motion in her elbow and wrists with no intrinsic muscle atrophy in the hands. She reported tingling in the ulnar two digits of the left hand with no sensory loss or alteration in the median nerve distribution. Motor muscle testing was characterized by give-way weakness with no consistent deficit. Appellant's right upper arm measured ½ inch less than her left. She demonstrated a positive Tinel's sign over the radial sensory nerve and over the cubital tunnel on the left. Phalen's test resulted in paresthesias in the ulnar digits bilaterally. Dr. Friedenthal reviewed the amended SOAF and listed the duties of appellant's date-of-injury and light-duty positions. He diagnosed electrophysiologic evidence of minimal left carpal tunnel syndrome, overuse injury by history,

[2] Docket No. 12-1758 (issued April 19, 2013).

degenerative disc disease, cervical spine, status post transient ulnar neuropathy, right elbow, and rule-out rotator cuff tendinosis both shoulders greater right than left. Dr. Friedenthal stated that there was no objective clinical evidence of right cubital tunnel syndrome, right carpal tunnel syndrome, or right wrist sprain. He stated that appellant demonstrated mild left carpal tunnel syndrome on electrodiagnostic testing. Dr. Friedenthal opined that her clinical presentation was inconsistent with that diagnosis. He stated that he did not find confirmatory evidence of left carpal tunnel syndrome. Dr. Friedenthal noted that appellant stopped work on April 1, 2009 and reviewed the medical history noting that there were no new diagnoses at that time and that there were no new findings. He stated that she currently could return to full-time work with restrictions. Dr. Friedenthal indicated that appellant should avoid continuous repetitive work, but could lift up to 20 pounds. He recommended that she have the ability to stand or sit freely through the day. Dr. Friedenthal opined that appellant did not require further treatment for the accepted conditions. He stated, "The inconsistent and paradoxical findings reflect nonphysiologic factors active in this individual and those reflect issues that would not be addressed by physical treatment." Dr. Friedenthal concluded that appellant's conditions of right carpal tunnel syndrome, right cubital tunnel syndrome, and right wrist sprain were no longer active.

Dr. Friedenthal completed a work capacity evaluation and indicated that appellant could not return to her date-of-injury position, but could work eight hours a day with restrictions. He indicated that she should not reach above the shoulder due to her nonemployment-related shoulder condition. Dr. Friedenthal limited appellant to pushing, pulling, and lifting 10 to 20 pounds occasionally and 10 pounds frequently. He also recommended morning and afternoon breaks of 15-minute and a lunch break of 30 minutes.

By decision dated November 20, 2013, OWCP denied appellant's claim for recurrence of disability on or after April 1, 2009 based on Dr. Friedenthal's reports.

Appellant's counsel requested an oral hearing before an OWCP hearing representative on November 25, 2013. In a report dated January 27, 2014, Dr. Fried stated that appellant's upper extremity conditions were stable as long as she was careful. He stated that she could not return to regular work activities. Dr. Fried diagnosed ligament injury of the right wrist, scapholunate ligament tear right wrist, radial neuropathy right and median neuropathy on the left, carpal tunnel median neuropathy, and overuse syndrome on the left, as well as ulnar neuropathy bilaterally.

Counsel appeared at the oral hearing on April 22, 2014 and argued that the SOAF as amended did not include a complete picture of appellant's light-duty job requirements. In a report dated May 19, 2014, Dr. Fried repeated his previous findings and conclusions.

By decision dated July 7, 2014, the hearing representative affirmed OWCP's November 20, 2013 decision finding that there was no rationalized medical opinion supporting appellant's claim for disability on or after April 1, 2009 due to her accepted work injury. She found that Dr. Friedenthal based his report on a proper factual background, reviewed diagnostic testing, and determined that appellant was capable of working full time with restrictions.

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.[3] When an 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.[4]

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.[5]

ANALYSIS

The Board previously found that there was a conflict of medical opinion evidence regarding whether appellant had established a change in the nature and extent of her injury-related conditions such that she could no longer perform the duties of her light-duty position. On remand from the Board, OWCP amended the SOAF and requested a supplemental report from Dr. Friedenthal, the impartial medical examiner, as directed. Appellant's accepted conditions were right cubital tunnel syndrome, right carpal tunnel syndrome, and right wrist sprain.

In his November 5, 2013, report, Dr. Friedenthal reported findings in appellant's left wrist and hand. He noted that motor muscle testing was characterized by give-way weakness with no consistent deficit. Appellant demonstrated a positive Tinel's sign over the radial sensory nerve and over the cubital tunnel on the left. Phalen's test resulted in paresthesias in the ulnar digits bilaterally. Dr. Friedenthal reviewed the amended SOAF and listed the duties of appellant's date-of-injury and light-duty positions. He stated that there was no objective clinical evidence of right cubital tunnel syndrome, right carpal tunnel syndrome, or right wrist sprain. Dr. Friedenthal stated that appellant demonstrated mild left carpal tunnel syndrome on electrodiagnostic testing. He opined that her clinical presentation was inconsistent with that

[3] 20 C.F.R. § 10.5(x).

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

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

diagnosis. Dr. Friedenthal stated that appellant could return to full-time work with restrictions of avoiding continuous repetitive work, but lifting up to 20 pounds. He opined that she did not require further treatment for the accepted conditions. Dr. Friedenthal noted that the medical history provided consistent findings and diagnoses before and after April 1, 2009. He found "inconsistent and paradoxical findings reflect nonphysiologic factors active in this individual and those reflect issues that would not be addressed by physical treatment." Dr. Friedenthal concluded that appellant's conditions of right carpal tunnel syndrome, right cubital tunnel syndrome, and right wrist sprain were no longer active.

Dr. Friedenthal completed a work capacity evaluation and indicated that appellant could not return to her date-of-injury position, but could work eight hours a day with restrictions. He indicated that she should not reach above the shoulder due to her nonemployment-related shoulder condition. Dr. Friedenthal limited appellant to pushing, pulling, and lifting 10 to 20 pounds occasionally and 10 pounds frequently. He also recommended morning and afternoon breaks of 15 minutes and a lunch break of 30 minutes.

Contrary to the arguments of counsel on appeal, the Board finds that Dr. Friedenthal's detailed and well-reasoned November 5, 2013 supplemental report entitled to the special weight of the medical opinion evidence afforded an impartial medical examiner. Dr. Friedenthal's report does not support appellant's claim for a recurrence of total disability as the result of a change in the nature and extent of her accepted employment injuries beginning April 1, 2009. He based his report upon the amended SOAF, which the Board finds do contain the necessary physical duties of her date-of-injury and light-duty positions needed for him to assess her ability to work. The Board does not find that the SOAF and list of questions provided to Dr. Friedenthal were misleading, lacking in specificity, or prejudicial. OWCP's inclusion of the statement that FECA is not a retirement program is factually valid,[6] and although fully unnecessary, does not adversely impact appellant's case in anyway. The Board further finds that, based on the findings and conclusions above, counsel's argument regarding the hearing representative's weighing of the medical evidence lacks merit.

In his supplemental report, Dr. Friedenthal provided detailed physical findings, reviewed the medical history as well as additional diagnostic testing, and found that appellant's employment-related conditions had not worsened on or after April 1, 2009 and were currently resolved. He provided work restrictions which were in keeping with her light-duty job requirements and opined that she could work for eight hours a day. Based on this report, the Board finds that appellant has not met her burden of proof in establishing a recurrence of disability on April 1, 2009.

Appellant submitted additional reports from Dr. Fried, in which he continued to opine that appellant's right upper extremity conditions were active and that she could not return to work. These reports do not contain a clear diagnosis of the accepted conditions, do not include medical testing, and do not provide the necessary medical opinion evidence to meet here burden of proof. Furthermore, as Dr. Fried was on one side of the conflict that Dr. Friedenthal resolved,

[6] *See* 5 U.S.C. § 8102(a).

the additional reports from Dr. Fried are insufficient to overcome the weight accorded Dr. Friedenthal's report as the impartial medical specialist or to create a new conflict with it.[7]

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of total disability on or after April 1, 2009 due to her accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

[7] *Dorothy Sidwell,* 41 ECAB 857, 874 (1990).