

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Southeastern, PA,)
Employer)

**Docket No. 15-0490
Issued: September 18, 2015**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 5, 2015 appellant, through counsel, filed a timely appeal from an August 5, 2014¹ merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 19, 2013.

On appeal counsel argues that the report of the impartial medical examiner (IME) was not sufficient to meet OWCP's burden of proof as it was based on a deficient statement of accepted

¹ Contrary to counsel's arguments on appeal, there is no OWCP decision in the record after August 5, 2014 reviewing additional medical evidence.

² 5 U.S.C. § 8101 *et seq.*

facts. He alleges that the statement of accepted facts did not include all the electrodiagnostic testing. Counsel also argues that the IME treated appellant's claim as a traumatic injury rather than an occupational disease. Finally he contends that the IME's report was inconsistent and speculative.

FACTUAL HISTORY

On December 11, 1996 appellant, then a 38-year-old mail processor, filed a claim alleging that on August 5, 1994 she developed injuries to her wrists due to her federal employment. OWCP accepted this claim for right hand strain, right carpal tunnel syndrome and right carpal tunnel release. A nerve conduction velocity (NCV) test dated August 16, 1994 demonstrated moderate carpal tunnel syndrome on the left. OWCP consequently expanded the acceptance of appellant's claim to include left carpal tunnel syndrome as an employment-related condition.

On September 13, 2001 appellant received a schedule award for 33 percent permanent impairment of each upper extremity.

On January 31, 2007 appellant filed a claim alleging that on December 20, 2005 she sustained a recurrence of disability due to her August 5, 2004 employment injury. She noted that she returned to work in a light-duty position making labels and performing nixie work. Appellant stated that she experienced tingling and numbness in her right elbow performing her light-duty work.

By decision dated March 21, 2007, OWCP accepted that appellant sustained a recurrence of disability on December 30, 2006.

In a report dated March 8, 2007, appellant's attending physician, Dr. Scott Fried, an osteopath, diagnosed cumulative trauma disorder bilaterally secondary to work activities, median neuropathy at the wrists and forearms, bilaterally, or carpal tunnel syndrome, radial tunnel syndrome on the left and radiculopathy on the basis of plexopathy. He listed appellant's light-duty as entailing pitching mail with the same motion as throwing a Frisbee, reaching, sorting labels into boxes and labeling with a computer. Dr. Fried recommended further modifications of her duties. He stated that appellant had substantial multilevel nerve involvement consistent with repetitive strains at more than one level in her arms. Dr. Fried agreed with the diagnosis of bilateral carpal tunnel syndrome and also diagnosed additional levels of nerve involvement at the brachial plexus and elbows.

By decision dated April 25, 2007, OWCP denied appellant's claim for compensation for the period January 6 to 19, 2007 and February 17 to March 2, 2007.

In a report dated February 16, 2009, Dr. Fried noted appellant's symptoms of left arm pain. He diagnosed left radial neuropathy.

OWCP proposed to terminate appellant's medical benefits for physical therapy and chiropractic treatment on March 31, 2009. By decision dated May 29, 2009, it terminated appellant's medical benefits for physical therapy and chiropractic care effective June 1, 2009.

Counsel requested an oral hearing before OWCP's Branch of Hearings and Review on June 2, 2009.

In a note dated July 22, 2009, Dr. Fried stated that appellant had increased right arm symptoms with severe pain down through the right radial forearm and increased numbness and tingling in the right hand. Appellant underwent an electromyography (EMG) evaluation on August 7, 2009 which demonstrated nerve compromises at the right brachial plexus, left upper and lower brachial plexus, left ulnar nerve at the elbow, right radial nerve at the radial tunnel, and bilateral median nerve compromises at the wrists worse on the right. On September 10, 2009 appellant reported right radial forearm pain with numbness and tingling in her right fingers. Dr. Fried stated that all nerves were connected and her injuries were progressively worsening. He concluded, "This is directly related to her work and we want to be able to treat all of the areas of work injuries including her brachial plexus which remains significantly symptomatic." Dr. Fried examined appellant on October 26, 2009 and found pain at the right volar wrist spreading up through the radial forearm. Her symptoms had improved on January 4, 2009.

By decision dated November 17, 2009, an OWCP hearing representative affirmed the May 29, 2009 decision terminating physical therapy and chiropractic care for appellant's accepted bilateral carpal tunnel syndrome.

Dr. Fried examined appellant on March 23, 2010 and found a mass in her right forearm over the radial tunnel which he believed was getting larger. Dr. Fried stated that appellant's radial sensory nerve symptoms were worsening and opined that surgery might be warranted. He requested a magnetic resonance imaging (MRI) scan on March 23, 2010 due to a soft tissue mass at the radial tunnel in the right elbow and forearm. The MRI scan on May 13, 2010 found no mass, but mild tendinosis of the common extensor origin. In a report dated May 11, 2010, Dr. Fried included appellant's description of right radial forearm pain as well as an enlarging mass there. He diagnosed neuropathy including radial neuropathy on the right and ulnar neuropathy on the left as well as appellant's accepted carpal tunnel syndrome. Dr. Fried recommended decompression surgery of the radial nerve on July 29, 2010.

OWCP denied this request on August 13, 2010.

Appellant requested a review of the written record from OWCP's Branch of Hearings and Review on September 7, 2010. She argued that she developed severe radial tunnel symptoms in her right forearm due to her employment duties as a nixie clerk. Appellant stated that she worked with a chair that was too low for the high desktop surface. She attributed the mass in her forearm to this work activity.

Dr. Fried examined appellant on September 2, 2010 and argued that appellant's work activities had worsened with ongoing work activities. He again requested right radial nerve surgery. Throughout September, October, November, and December 2010, and April 9, 2011 appellant was sent home from her modified duty under the National Reassessment Process.

In a decision dated February 1, 2011, a second OWCP hearing representative vacated OWCP's August 13, 2010 decision denying authorization for surgery, finding that Dr. Fried had established uncontroverted evidence that appellant's radial nerve condition was employment

related. She remanded the case for a second opinion evaluation on the issue of whether appellant's diagnosed radial nerve condition was causally related to her employment duties.

OWCP referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation on February 23, 2011. Dr. Didizian reported on March 8, 2011 that appellant had signs of bilateral carpal tunnel syndrome, that she could continue to perform modified duty, that she had no evidence of employment-related median or radial nerve condition, that she had reached maximum medical improvement and required no further medical treatment, and that surgery was not indicated.

OWCP denied appellant's request for surgery by decision dated April 21, 2011.

Counsel requested an oral hearing from OWCP's Branch of Hearings and Review in a letter dated May 6, 2011.

By decision dated September 30, 2011, OWCP hearing representative vacated the April 21, 2011 OWCP decision denying appellant's request for surgery and remanded for referral to an impartial medical examiner to resolve the conflict of medical opinion evidence between the second opinion physician, Dr. Didizian, and Dr. Fried on the issues of whether appellant demonstrated right radial neuropathy due to her employment and whether she required surgical treatment for this condition.

On February 7, 2012 OWCP referred appellant for an impartial medical examination with Dr. Jack Abboudi, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence. In a report dated March 9, 2012, Dr. Abboudi described appellant's employment and medical history. He examined appellant and found that any type of provocative maneuver in the wrist and distal forearm was positive for discomfort for appellant with no specific localization of discomfort even to a specific quadrant of the wrist. Dr. Abboudi found that Tinel's sign at almost any location produce a described sense of tingling in the distal extremity including locations that had no anatomic basis for that type of finding. He diagnosed bilateral carpal tunnel syndrome, but noted no wasting atrophy of the muscle innervated by the median nerve through the carpal tunnel and no significant loss of sensory function. Dr. Abboudi opined that this condition had resolved based on EMG findings and nerve conduction studies. He stated that multiple diagnostic tests demonstrated mild borderline and virtually normal findings with no concerning compression of the nerve in the carpal tunnel. Dr. Abboudi noted that appellant described tingling in her fingertips with almost any maneuver and point of examination such that it was difficult to validate her input and subjective descriptions. He further stated that on examination she had no motor or sensory loss to support a continuing diagnosis of carpal tunnel syndrome.

Dr. Abboudi found that appellant had no radial nerve condition in either extremity based on electrodiagnostic testing related to her accepted employment duties. He further found that appellant's light-duty positions since 2004 were not the direct cause, aggravation, precipitation or acceleration of any radial condition, neuropathy, or radial tunnel condition. Dr. Abboudi opined that appellant could return to her date-of-injury position with no restrictions. He stated that appellant's complaints were subjective and that her subjective responses were difficult to validate. Dr. Abboudi stated, "The global nature of her complaints, as has been described with

her multiple points of tenderness and subjective complaints during her history and physical examination, defy any type of localization to any particular anatomic landmarks or structures. In addition, her complaints of tingling in the extremity are such that even nonanatomic testing for tingling in the extremity also produced those symptoms, again invalidating her subjective input.” He also noted that appellant’s grip strength improved by one third when she was distracted which raised a great concern regarding her true cooperative effort with the examination.

By decision dated April 4, 2012, OWCP denied appellant’s request for radial tunnel surgery based on Dr. Abboudi’s report.

Appellant requested an oral hearing and by decision dated June 13, 2012, a third OWCP hearing representative vacated the April 4, 2012 decision, finding that it was not clear from the record that Dr. Abboudi was properly selected as the IME.

OWCP, by letter dated June 5, 2012, proposed to terminate appellant’s wage-loss compensation and medical benefits. It stated that Dr. Abboudi was a second opinion physician on the issue of whether appellant’s accepted employment-related residuals and disability had resolved and that his report was sufficient to establish that she had no medical residuals or disability related to her accepted conditions of bilateral carpal tunnel syndrome and right arm strain.

Counsel disagreed with the proposed termination by letter dated June 14, 2012.

On June 18, 2012 OWCP opined that Dr. Abboudi was properly selected as the IME through the Physician Directory System (PDS) and reissued the denial of surgery effective that date.

Counsel requested an oral hearing of the June 18, 2012 decision from OWCP’s Branch of Hearings and Review on June 19, 2012. He submitted a June 14, 2012 report by Dr. Fried who continued to diagnose carpal tunnel syndrome and radial neuropathy on the right due to appellant’s employment duties. Dr. Fried opined that she could perform modified duties.

By decision dated July 13, 2012, OWCP terminated appellant’s wage-loss compensation and medical benefits effective July 29, 2012 based on Dr. Abboudi’s report.

Counsel requested an oral hearing of the July 13, 2012 termination decision from OWCP’s Branch of Hearings and Review on July 19, 2012. In support, Dr. Fried reported on August 30, 2012 that appellant returned to regular duty on July 27, 2012 and was experiencing increased pain in both arms. He reported findings of positive Tinel’s sign in both wrists, at the ulnar nerve at the bilateral cubital tunnels, and at the radial nerve in the right elbow. Dr. Fried found indications of inflammation and scarring about the nerves of the brachial plexus at the thoracic outlet level. He diagnosed carpal tunnel medial neuropathy, bilaterally, and radial neuropathy on the right. Dr. Fried opined that appellant’s conditions were secondary to work activities.

On August 1, 2012 appellant underwent an EMG study which demonstrated right brachial plexus level nerve compromise, left brachial plexus postganglionic sensory components which had improved, borderline right median nerve compromise at the wrist, borderline left

median nerve sensory abnormality, moderate left ulnar nerve compromise, and moderate right posterior interosseous nerve compromise at the elbow.

On November 9, 2012 Dr. Fried described appellant's current employment duties and reviewed her medical history. He diagnosed right radial neuropathy, left ulnar neuropathy, bilateral carpal tunnel syndrome, and brachial plexus involvement. Dr. Fried stated that appellant's EMG supported her diagnosed carpal tunnel syndrome. He opined that appellant could perform light-duty work. Dr. Fried reviewed Dr. Abboudi's report and opined that as appellant returned to repetitive activities she had increased symptoms. He stated that he would not expect atrophy, but that there was ongoing nerve dysfunction as evidenced by ongoing numbness, tingling and discomfort when attempting work activities.

By decision dated January 11, 2013, a fourth OWCP hearing representative vacated the June 18 and July 13, 2012 decisions of OWCP. He found that Dr. Abboudi was not established as appropriately selected to serve as the IME and that OWCP should select a new physician to serve in this capacity to determine if appellant required radial nerve surgery. The hearing representative also found that benefits must be reinstated effective July 13, 2012. Accordingly, OWCP entered appellant on the periodic rolls effective January 18, 2013.

OWCP referred appellant for an impartial medical examination with Dr. John Donahue, a Board-certified orthopedic surgeon, on February 26, 2013. It provided him with the case record, a statement of accepted facts which described appellant's date-of-injury position, her accepted conditions, and her medical treatment through 2009. The statement of accepted facts provided the dates of appellant's varying employment duties from 2011. OWCP also provided Dr. Donahue with a list of specific questions.

In a report dated March 11, 2013, Dr. Donahue noted appellant's history of injury and history of medical treatment include EMG study reports dated July 7, 2011 and August 1, 2012. He reported appellant's mass below the elbow and stated that this was the region in which she had discomfort. Dr. Donahue found normal strength in the wrist extensors and flexors as well as in appellant's fingers. He found negative Tinel's sign in the cubital tunnels, but variable Tinel's sign and Phalen's test on examination. Dr. Donahue noted that these results were totally inconsistent. He found no evidence of weakness. Dr. Donahue noted tenderness over the lateral epicondylar area. He reported no clear evidence of radial carpal tunnel syndrome, but stated that the large space-occupying lesion of the proximal extensor compartment of the forearm which could contribute to her symptoms, but was not employment related. Dr. Donahue reviewed appellant's electrodiagnostic testing and found no employment-related right radial nerve condition. He stated that appellant's subjective complaints were variable, inconsistent, and not reproducible. Dr. Donahue concluded, "If there are any subjective complaints consistent with radial or carpal tunnel syndrome, it could be due to the previously described large space occupying mass of the right forearm which is not causally related to the workers' comp[ensation] injury of August 4, 1994." Dr. Donahue opined that appellant's accepted condition of bilateral carpal tunnel syndrome and right arm strain did not require further work restrictions or treatment.

By decision dated April 1, 2013, OWCP denied appellant's request for surgery.

Counsel requested a review of the written record from OWCP's Branch of Hearings and Review on April 4, 2013. A fifth OWCP hearing representative issued a decision on October 28, 2013 and found the record did not establish the need for right radial nerve surgery as a result of her accepted employment activities.

Dr. Fried examined appellant on July 22, 2013 and diagnosed bilateral carpal tunnel syndrome, right radial neuropathy, and left ulnar neuropathy. On July 22, 2013 appellant underwent neuromusculoskeletal ultrasounds which demonstrated nerve compression consistent with carpal tunnel median nerve compression, perineural scarring about the median nerve bilaterally. Appellant also demonstrated right radial nerve compression.

Dr. Fried completed a report dated November 11, 2013 which found that Phalen's test was positive bilaterally for dysesthesias in the median nerve distribution as well as positive Tinel's sign at the median nerve of both wrists. He also found positive Roos and Hunter tests demonstrating inflammation and scarring about the nerves of the brachial plexus at the thoracic outlet level. Dr. Fried diagnosed carpal tunnel median neuropathy or repetitive strain injury in the upper extremities, bilaterally. He stated this condition was secondary to work activities. Dr. Fried attributed appellant's thoracic outlet and brachial plexus involvement, her right thoracic neuritis, right trigger finger and cervical strain and sprain to her March 8, 2009 motor vehicle accident.

On November 15, 2013 OWCP issued a Notice of Proposed Termination of both appellant's medical benefits and compensation for wage loss. It based its determination on Dr. Donahue's March 11, 2013 report.

In a decision dated December 19, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective December 19, 2013.

Counsel requested an oral hearing on December 23, 2013 and submitted additional medical evidence from Dr. Fried.

Dr. Fried completed a report on January 30, 2014 and reviewed appellant's history of injury. He reported appellant's symptoms of neck pain, brachial plexus discomfort and with radiation to the shoulder and down to the arms. Dr. Fried stated that appellant's symptoms were worse on the right than the left. He found Tinel's signs at the neck, elbows, and forearms. Dr. Fried reported positive compression tests in the anterior forearm and positive Phalen's test. He found moderate trapezial spasm. Dr. Fried diagnosed cumulative trauma disorder secondary to work activities, carpal tunnel syndrome, right radial tunnel syndrome and moderate cubital tunnel syndrome bilaterally as well as radiculopathy. He opined that appellant developed substantial multilevel nerve involvement consistent with repetitive strains as more than one level in her arms. Appellant underwent orthopedic neuromusculoskeletal ultrasound on July 22, 2013 which demonstrated carpal tunnel median nerve compression, perineural scarring of the median nerve, and flexor tenosynovitis bilaterally. Her ultrasound also demonstrated radial tunnel nerve compression on the right. Dr. Fried disagreed with Dr. Donahue's findings regarding appellant's carpal tunnel syndrome noting that he did not specify where he found appellant's variable Tinel's signs and Phalen's test.

In the August 5, 2014 decision, an OWCP hearing representative found that OWCP met its burden of proof to terminate wage-loss compensation and medical benefits effective December 19, 2013 based on Dr. Donahue's reports and affirmed OWCP's December 19, 2013 decision. She further found that the case was not in posture for a decision and remanded the claim for additional development of the medical evidence in regard to appellant's claim for continuing benefits after December 19, 2013. OWCP hearing representative stated that OWCP should arrange for the impartial medical examiner to review the neuromusculoskeletal ultrasound procedure performed on July 22, 2013.³

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ 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.⁷

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁸ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

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

³ As OWCP hearing representative did not issue a final decision on appellant's entitlement to continuing benefits after December 19, 2013, instead remanding the case for further development of the medical evidence by OWCP, the issue of whether appellant has established continuing employment-related residuals or disability causally related to her employment injuries is in an interlocutory posture. As such, the Board will not address this issue on appeal. See 20 C.F.R. § 501.2(c)(2).

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *Id.*

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

⁹ *R.C.*, 58 ECAB 238 (2006).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁰

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 19, 2013.

Appellant's attending physician, Dr. Fried, supported that appellant had continuing partial disability and medical residuals due to her accepted conditions of bilateral carpal tunnel syndrome. Dr. Abboudi, acting as a second opinion physician on behalf of OWCP, examined appellant on March 9, 2012, describing appellant's employment and medical history. He found that Tinel's sign at almost any location produce a described sense of tingling in the distal extremity including locations that had no anatomic basis for that type of finding. Dr. Abboudi diagnosed bilateral carpal tunnel syndrome by history, but noted no wasting atrophy of the muscle innervated by the median nerve through the carpal tunnel and no significant loss of sensory function. He opined that the accepted condition had resolved based on EMG findings and nerve conduction studies. Dr. Abboudi opined that appellant could return to her date-of-injury position with no restrictions. The Board finds that OWCP properly identified a conflict of medical opinion evidence between appellant's attending physician, Dr. Fried, and the second opinion physician, Dr. Abboudi, on the issues of appellant's continuing disability and need for medical treatment due to her accepted condition of carpal tunnel syndrome. This conflict required referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a).

OWCP referred appellant, a statement of accepted facts and list of questions and the medical record to Dr. Donahue to resolve this conflict of medical opinion evidence. In a report dated March 11, 2013, Dr. Donahue reviewed appellant's history of injury and history of medical treatment including EMG reports dated July 7, 2011 and August 1, 2012. He reported his findings on physical examination including normal strength, negative Tinel's sign in the cubital tunnels, and otherwise variable Tinel's signs and Phalen's tests on examination. Dr. Donahue noted that these results were totally inconsistent. He found no evidence of thenar eminence weakness. Dr. Donahue stated that appellant's subjective complaints were variable, inconsistent, and not reproducible. He concluded, "If there are any subjective complaints consistent with ... carpal tunnel syndrome, it could be due to the previously described large space occupying mass of the right forearm which is not causally related to the workers' comp[ensation] injury of August 4, 1994." Dr. Donahue found that appellant could return to full duty with no restrictions and no need for further medical treatment.

The Board finds that this report is sufficiently detailed and well-reasoned to constitute the special weight of the medical opinion evidence and meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits due to her accepted employment injury of bilateral carpal tunnel syndrome. Dr. Donahue provided a review of the relevant medical records including diagnostic testing, contrary to counsel's argument on appeal. He also provided results of his physical examination and found that appellant's testing results were inconsistent

¹⁰ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

and variable. Dr. Donahue provided a clear opinion that appellant had no need for further medical treatment and had no work restrictions due to her accepted employment injury. The Board finds that the record does not support counsel's arguments that Dr. Donahue improperly evaluated appellant's claim or that his report was inconsistent and speculative.

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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 19, 2013.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 2015
Washington, DC

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

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

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