United States Department of Labor
Employees' Compensation Appeals Board

T.O., Appellant	)	
and	)	**Docket No. 15-1146**
	)	**Issued: February 2, 2016**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Philadelphia, PA, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 24, 2015 appellant, through counsel, filed a timely appeal of a February 20, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP properly terminated appellant's compensation for wage-loss and medical benefits effective August 24, 2014 as she no longer had any residuals or disability causally related to her accepted employment-related injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the February 20, 2015 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal counsel argues that there was no true conflict in the medical opinion evidence at the time OWCP referred appellant for an impartial medical examination, as both the second opinion physician and appellant's treating physician concluded that she continued to have residuals, but had a minor disagreement on work restrictions. Next, counsel argues that the issue pending at the time of the referral to the impartial medical examiner was whether her claim should be expanded to include a cervical condition. Lastly, counsel argued that there is now an unresolved conflict between appellant's treating physician and the physician selected as an impartial medical examiner as to whether appellant continues to have residuals and disability due to her accepted employment injuries.

FACTUAL HISTORY

On November 29, 2011 appellant, then a 45-year-old sourcing strategy specialist, filed an occupational disease claim (Form CA-2) alleging that she first became aware of her bilateral carpal tunnel condition on November 7, 2011, but was not aware that it was causally related to her working on a computer until November 10, 2011. OWCP accepted her claim for bilateral carpal tunnel syndrome, right radial tenosynovitis, left cubital tunnel, and posterior occipital neuralgia. By letter dated October 4, 2012, it placed appellant on the periodic rolls for temporary total disability effective August 29, 2012. Appellant returned to work on October 12, 2012 working six hours per day for three days per week. She stopped work on April 16, 2013 and has not returned. By decision dated May 28, 2013, OWCP accepted appellant's April 9, 2013 recurrence of total disability.

In a March 12, 2013 progress report, Dr. Scott M. Fried, a treating osteopath, provided physical examination findings and indicated that appellant was capable of part-time light-duty work. He opined that she was disabled from performing her usual work duties and requested she be able to work at home in an ergonomic setting. Diagnoses included tendinitis, bilateral carpal tunnel median neuropathy, right de Quervain's tenosynovitis, right radial neuropathy, left ulnar neuropathy, right brachial plexopathy/cervical radiculopathy, and bilateral carpal tunnel median neuropathy. In concluding, Dr. Fried indicated that appellant was capable of part-time light-duty work.

On April 22, 2013 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's work capabilities and whether she continued to suffer from her accepted employment injuries.

On May 9, 2013 appellant declined a light-duty accommodated job offer of a sourcing strategy specialist from the employing establishment working six hours per day and three days per week. She noted that Dr. Fried concluded that the offered job was not within her restrictions. In an attending physician's report Dr. Fried indicated that appellant was partially disabled for the period May 1 to 9, 2013 and totally disabled for the period May 9 to July 22, 2013.

In a May 17, 2013 report, Dr. Draper diagnosed bilateral carpal tunnel syndrome, left cubital tunnel syndrome, and bilateral wrist de Quervain's tenosynovitis. He opined that appellant continued to have residuals from the diagnosed conditions, but concluded that she was capable of performing sedentary work with restrictions three days per week for six hours per day.

The restrictions included occasional lifting of up to10 pounds, frequent lifting of up to 5 pounds, no excessive overuse of both hands, and no repetitive typing on a keyboard.

On July 31, 2013 OWCP referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Draper and Fried on the issue of her work capability and restrictions.

In an August 19, 2013 report, Dr. Simon, based upon a review of the medical evidence, statement of accepted facts (SOAP) injury, medical history, and physical examination, opined that appellant no longer had any residuals or disability due to her accepted conditions of bilateral carpal tunnel syndrome, right radial tenosynovitis, left cubital tunnel, and posterior occipital neuralgia. He identified the conflict between Drs. Fried and Draper concerning her work restrictions and job duties. A physical examination revealed normal lumbar and cervical range of motion; full range of motion of her shoulders, elbows, wrist, and hands, no evidence of bilateral upper arm, forearm, or hand atrophy, some left palm thenar muscle atrophy, negative bilateral Phalen's test, and negative Finkelstein's test. Dr. Simon diagnosed long-standing and progressive cervical degenerative joint disease and intervertebral disc disease and subjective symptoms of bilateral cervical radiculopathy, which were unconfirmed by electromyogram (EMG). He opined that three months of treatment for carpal tunnel syndrome should have been sufficient to relieve the symptoms. Next, Dr. Simon explained that a diagnosis of bilateral carpal tunnel condition could not be made by the EMG, which found no median nerve bilateral wrist compression neuropathy. He opined that appellant did not have any symptoms causally related to recurrent use of her bilateral upper extremities. Dr. Simon attributed appellant's current condition and symptoms to underlying progressive cervical radiculopathy due to progressive cervical degenerative disc and joint diseases and opined that these conditions were not work related. In addition, he related that he found no evidence of bilateral de Quervain's, ulnar nerve changes, or brachial plexus that could be the result of a repetitive stress injury. Dr. Simon concluded that he agreed with the work restrictions provided by Dr. Draper. However, he explained that the work restrictions were due to her progressive cervical degenerative condition and unrelated to any work-related repetitive stress condition.

In a September 17, 2013 report, Dr. Fried diagnosed bilateral carpal tunnel median neuropathy/repetitive strain injury, tendinitis, right de Quervain's tenosynovitis, right posterior occipital neuralgia, right radial neuropathy, left ulnar neuropathy, and right cervical radiculopathy/brachial plexopathy, which were all work related. He noted that appellant was currently disabled from working due to her employment injuries and that she was applying for disability retirement. Physical examination findings were unchanged from prior reports. Dr. Fried recommended an updated functional capacity evaluation (FCE) once appellant's symptoms were stable enough to determine work restrictions.

In an October 4, 2013 report, Dr. Fried noted a medical and employment history of injury from 2011 until 2013 and reviewed diagnostic data including orthopedic neuromusculoskeletal ultrasound. Diagnoses were unchanged from his prior report. Physical examination findings included positive Tinel's sign at the medial, radial, and ulnar nerve and right thoracic outlet infraclavicular fossa, positive compression testing of the right radial nerve at the elbow, positive bilateral wrist compression testing, and positive Phalen's test in the right hand. Dr. Fried opined that appellant had significant and ongoing bilateral upper extremity nerve injury due to her work

activities which prevented her from performing her usual duties. He noted that she was unable to use a mouse, perform regular keying, reaching, gripping, speaking on a telephone, prolonged neck and head posturing activities, pushing, and pulling. Dr. Fried explained that appellant has attempted multiple times to return to work, even a modified job, and has been unable to do so as a result of her physical limitations. He reported that she had multiple positive tests including neuromusculoskeletal ultrasound evaluation, nerve conduction studies, and Tinel's, Phalen's, Roos, Hunter's, and Compression tests. Dr. Fried opined that appellant was disabled from performing her regular or a similar job as she has strict sedentary requirements and is unable to regularly use her arms and hands.

In progress reports dated February 24, April 10, and May 19, 2014, Dr. Fried noted that appellant was seen for her continued bilateral carpal tunnel, left ulnar, right cervical, and right wrist conditions. Appellant reported that the biggest issue was pain and associated spasms. Dr. Fried noted that appellant continued to be off work due to her accepted employment injuries.

In office notes dated April 1 and May 28, 2014, Dr. Bruce H. Grolssinger, an examining Board-certified neurgologist and pain medicine physician, noted that appellant was currently out of work and continuked to have recurrent headaches, bilateral carpal tunnel pain, greater on the right, and burning neck pain, which extended to both shoulders, midscapular region, and arm. A physical examination revealed reduced cervical range of motion on forward flexion and greater with right lateral rotation, positive bilateral Tinel's sign, and bilateral low paravertebral muscle spasm. Dr. Grossinger opined that appellant continued to have evidence of brachial plexopathy, cervical sprain with right-sided greater joccipatal neuralgia, forearm tendinitis with epicondylitis, bilateral carpal tunnel syndrome, and left ulnar neuropathy, which were due to the accepted November 7, 2011 work injury.

On June 12, 2014 OWCP issued a notice proposing to terminate appellant's compensation benefits based on Dr. Simon's opinion that she no longer had any disability or residuals due to her accepted work-related injuries.

By letter dated June 23, 2014, appellant's counsel disagreed with the proposal to terminate appellant's benefits and argued that there was not a conflict in the medical opinion evidence between Drs. Draper and Simon. Counsel also raised arguments regarding whether Dr. Simon was properly selected as the impartial medical examiner.

In a July 1, 2014 letter, counsel argued that Dr. Simon's report was insufficient to represent the weight of the evidence particularly as he disagrees that appellant has bilateral carpal tunnel syndrome, which is an accepted condition. Counsel argued that Dr. Simon's opinion was also in conflict with the opinions of Dr. Fried, appellant's treating physician, and Dr. Draper, an OWCP second opinion physician. Thus, counsel argued that Dr. Simon's opinion created a new conflict and referral to a new impartial medical examiner is required under section 8123(a). Next, counsel argues that Dr. Simon diagnosed cervical radiculopathy or a cervical degenerative condition, but offers no opinion as to whether these conditions were caused or aggravated by appellant's employment duties. Counsel requested that appellant's claim be expanded to include the cervical conditions.

In progress reports dated July 8, 2014, Dr. Fried reiterated findings from prior reports. He related that appellant's sypmtoms were definitely impacted by activities and use and that she was currently disabled from working.

A July 8, 2014 neuromusculoskelatal ultrasound procedure report revealed radial tunnel nerve compression at 70 percent, substantial nerve swelling at a grade 2, substantial Vascular Leash of Henry, grade 2 perineural scarring, and markedly positive compression testing.

In a July 10, 2014 report, Dr. Fried provided a history of appellant's injury and summarized report findings by Drs. Draper and Simon. He related that he had never found appellant totally disabled as she was capable of working with restrictions. Dr. Fried explained that, following her return to work in 2012, she reported an increase in her fatigue and pain as well as an increase in her hand symptoms. He explained that he diagnosed bilateral carpal tunnel syndrome or repetitive strain injury based on the findings of posterior occipital neuralgia, tenosynovitis, radial neuropathy, and evidence of C5-T1 radiculopathy. Dr. Fried explained that T5-T1 radiculopathy was cervical radiculopathy which he attributed to appellant's work injury and main scarring of the brachial plexus and paracervical musculature, which he opines was consistent with cervical syndrome. He reiterated his opinion that she was capable of working with restrictions including limited keying, reaching, pushing, pulling, grasping, and writing. Dr. Fried noted that when appellant attempted to work six hours per day performing activities within her restrictions that she severely aggravated and exacerbated her work-related conditions. He then summarized the restrictions recommended in a December 16, 2013 FCE. In concluding, Dr. Fried noted his disagreement with Dr. Simon's report and that appellant continues to have residuals and disability as the result of her employment injuries.

On July 22, 2014 OWCP provided Dr. Fried's July 10, 2014 report to Dr. Simon to review and provide an addendum report.

In a July 25, 2014 addendum, Dr. Simon noted that he agreed with the work restrictions set by Dr. Draper and that appellant should not return to using a keyboard or computer. He noted that the conditions accepted by OWCP included bilateral carpal tunnel syndrome, right radial tenosynovitis, left cubital tunnel, and posterior occipital neuralgia. However, Dr. Simon noted that the SOAF did not indicate whether one or all of the accepted conditions were due to repetitive trauma. He further noted that, while he has to accept the diagnoses noted by OWCP, he does "not have to accept the persistence of those diagnoses" when he examined appellant two years later. Dr. Simon concluded by noting that Dr. Fried, Dr. Draper, and he were all in agreement that appellant could return to modified work using Dragon software, a dictation machine, and headphone for answering the telephone. The only disagreement he noted concerns his opinion that appellant's current impairment is unrelated to her work duties or to repetitive trauma.

By decision dated August 19, 2014, OWCP finalized the termination of appellant's compensation benefits effective August 24, 2014.

In a fax request and letter dated August 21, 2014, appellant's counsel requested a hearing before an OWCP hearing representative. A video hearing was held on December 5, 2014.

By decision dated February 20, 2015, an OWCP hearing representative affirmed the termination of appellant's compensation.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification, or termination of an employee's benefits.[3] 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.[4] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

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 a work-related condition, which would require further medical treatment.[7]

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.[8] 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.[9]

ANALYSIS

OWCP accepted appellant's claim for bilateral carpal tunnel, right radial tenosynovitis, left cubital tunnel, and posterior occipital neuralgia. By decision dated August 19, 2014, it terminated her medical and compensation benefits effective August 24, 2014. In making this determination, OWCP gave special weight to the opinion of Dr. Simon as the impartial medical examiner. An OWCP hearing representative affirmed the decision terminating appellant's compensation benefits on February 20, 2015. The Board finds that OWCP improperly terminated her compensation benefits.

[3] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[4] *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[5] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[6] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[7] *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

[8] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[9] *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

OWCP referred appellant to Dr. Simon for an impartial medical examination. At the time of the referral, however, there was no conflict as to whether she had continuing residuals from her accepted conditions. Dr. Fried believed that appellant continued to have residuals and disability due to her accepted conditions, but found that she was able to return to part-time work. He noted in multiple reports that her accepted bilateral carpal tunnel, right radial tenosynovitis, left cubital tunnel, and posterior occipital neuralgia had not resolved. Dr. Draper, the second opinion physician, agreed that appellant continued to have residuals from the accepted bilateral carpal tunnel syndrome, left cubital tunnel syndrome, and bilateral wrist de Quervain's tenosynovitis, but also found that she could return to part-time work.

OWCP referred appellant to Dr. Simon to resolve a conflict in the medical opinion evidence regarding her work capability. In his July 25, 2014 addendum, Dr. Simon noted that he agrees with both Drs. Draper and Fried that she is capable of working with restrictions and concurs with the restrictions set by Dr. Draper. He noted that the only disagreement between his opinion and the opinions of Drs. Draper and Fried was whether appellant's current disability is related to her work duties or repetitive trauma. There was no conflict regarding her ability to work at the time of the referral. Although Dr. Simon's report is not entitled to the special weight afforded to the opinion of an impartial medical specialist, his report can still be considered as a second opinion.[10] He finds appellant able to work part time, but the restrictions refer only to cervical issues unrelated to work. Dr. Simon finds that all the accepted conditions had resolved. Subsequent to Dr. Simon's opinion, Dr. Fried has determined that appellant remained disabled as a result of the employment injuries and that a new FCE was needed to determine her work restrictions.

The Board finds that there now exists an unresolved conflict in the medical evidence between Dr. Fried and Dr. Simon as to whether appellant is able to return to work and whether she has any residuals from her employment injury. Because OWCP bears the burden of proof to terminate benefits, the Board will reverse the hearing representative's decision affirming the termination of benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective August 24, 2014.

[10] *R.C.*, Docket No. 09-2217 (issued September 8, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 20, 2015 is reversed.

Issued: February 2, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board