



## ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective August 6, 2014 because he no longer had any residuals or disability causally related to his accepted employment injuries.

## FACTUAL HISTORY

On December 8, 2003 appellant, then a 47-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed tendinitis in both his wrists as a result of performing his employment duties for 20 years.<sup>4</sup> He explained that he was required to make thousands of finger, hand, wrist, and arm movements during his workday. Appellant stopped work on November 4, 2003. OWCP accepted his claim for bilateral wrist tendinitis and paid compensation and medical benefits.

Appellant began work as a permanent modified letter carrier for the employing agency on March 8, 2005. By decision dated June 30, 2005, OWCP reduced his wage-loss compensation to zero because his actual wages as a full-time modified letter carrier met or exceeded his wages for the on-the-job injury.

On April 22, 2010 appellant stopped work again when the employing establishment withdrew his modified carrier position due to the National Reassessment Process (NRP). His wage-loss compensation benefits were resumed.

OWCP thereafter referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated January 24, 2013, Dr. Lotman reviewed appellant's medical records, including the SOAF, and noted appellant's accepted wrist condition. He noted that he was unable to find any objective findings upon examination or review of appellant's diagnostic records with regard to any residuals or disability from work as a result of appellant's employment injury. Dr. Lotman opined that appellant could return to his previous employment as a modified letter carrier. On January 27, 2013 he completed a work restriction evaluation noting that appellant had no work restrictions.

In a letter dated January 28, 2013, appellant listed the medications that he was currently taking. He also stated that during the January 24, 2013 second opinion examination the hand back to back testing caused him extreme pain in his wrist. Appellant reported that since the examination he experienced abnormally higher levels of pain and discomfort with mild swelling to both wrists.

On March 18, 2013 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because the medical evidence demonstrated that he ceased to have residuals of his accepted work injuries. Appellant was advised to submit additional evidence or argument within 30 days if he disagreed with the preliminary determination.

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<sup>4</sup> The record reveals that appellant initially filed a Form CA-2a recurrence claim, but OWCP determined that the case should be adjudicated as an occupational disease claim.

Appellant received medical treatment from Dr. Martin Hannemann, a Board-certified family practitioner. In handwritten progress notes dated March 5 to 22, 2013, Dr. Hannemann reported that appellant continued to experience pain upon examination and diagnosed bilateral wrist tendinitis. He recommended that appellant undergo a functional capacity evaluation or be examined by a hand surgeon.

In an April 4, 2013 narrative report, Dr. Hannemann discussed his medical treatment of appellant for his bilateral wrist condition since November 1990. He reported that, although appellant's wrists appeared normal, without redness and swelling, the surrounding underline structure kept a small amount of inflammatory process that responded according to the extent he used his fingers, hands, and wrists. Dr. Hanneman explained that the more appellant used his hands more than what was outlined in his medical restrictions, he increased the risk of developing an even more severe case of tendinitis. He opined that appellant was still disabled from his job as described in the SOAF.

On April 11, 2013 appellant underwent a magnetic resonance imaging (MRI) scan examination of the right wrist by Dr. Bao Nguyen, a Board-certified diagnostic radiologist, related appellant's complaints of chronic wrist pain. He found mild ulnar positive variance plus large central tear of the articular disc, mild extensor carpi ulnaris tendinosis and tenosynovitis at the ulnar styloid process, and additional osteoarthritis of the first carpometacarpal joint.

Appellant underwent a functional capacity evaluation (FCE) on April 14, 2013 by Vickie Mallon, an occupational therapist, who noted appellant's complaints of bilateral wrist and right arm pain during the evaluation and concluded that appellant could work at medium work capacity.

On April 17, 2013 appellant underwent an electromyogram (EMG) and nerve conduction velocity (NCV) study conducted by Dr. Amelia Barrett, a Board-certified neurologist, who reported that appellant had normal EMG and NCV examinations of both upper extremities.

OWCP informed appellant, *via* a letter dated May 2, 2013, that the notice of proposed termination of compensation was put on hold due to the conflict in medical opinion between Dr. Hannemann and Dr. Lotman regarding whether he continued to suffer residuals of his employment injuries and was able to return to work.

On May 21, 2013 appellant was examined by Dr. In Sok Yi, a Board-certified orthopedic hand surgeon, who discussed that a recent NCV study was negative and that an FCE demonstrated that appellant could perform medium-duty work. He reported that the FCE also revealed a subjective increase in pain and inconsistency in appellant's dexterity with repetitive movement. Dr. Yi recommended that appellant could work medium-duty work.

Appellant submitted additional handwritten progress reports by Dr. Hannemann dated July 15, 2013 to May 22, 2014 for treatment for chronic wrist pain and tendinitis. Dr. Hannemann discussed appellant's current complaints and provided examination findings similar to his previous reports.

OWCP referred appellant to Dr. John D. Douthit, a Board-certified orthopedic surgeon, in order to resolve the conflict in medical opinion evidence regarding whether there continued to be

a causal relationship between the accepted work injuries, appellant's current symptoms and his inability to work. In a June 3, 2013 report, Dr. Douthit discussed appellant's medical history, including his prior examinations and diagnostic test results. He pointed out that there were no abnormal electrodiagnostic studies and that although the prior MRI scan suggested a possible triangular fibrocartilage complex tear, this did not correlate with his symptoms. Dr. Douthit reviewed the April 14, 2013 FCE and noted that he contacted Ms. Mallon on June 5, 2013 to discuss her report. He related that Ms. Mallon informed him that she did not observe any swelling or inflammation of the wrists during grip testing. Upon examination of appellant's hands and wrists, Dr. Douthit observed good sensation throughout with no muscle atrophy, swelling, or redness of the wrists even in the areas that appellant reported as painful. He also reported no sensory loss, full hypothenar musculatures, and intact pulses. Dr. Douthit related that appellant complained of localized pain over the palmaris longus tendon or carpal tunnel area of both hands. He provided range of motion findings. Dr. Douthit diagnosed pain syndrome of the wrists. He reported that there were no objective findings on physical examination to support any work restrictions. Dr. Douthit opined that based on the lack of objective findings, appellant was capable of performing the employment duties of his date-of-injury job.

On June 26, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because the medical evidence demonstrated that he ceased to have residuals of his accepted work injuries. Appellant was advised to submit additional evidence or argument within 30 days if he disagreed with the preliminary determination.

In a July 21, 2014 report, Dr. Hannemann discussed his treatment of appellant's bilateral wrist condition since December 1990. He noted that appellant's main deficit was weakness in both hands due to pain caused by the strain of the effort. Dr. Hannemann alleged that Dr. Douthit's pinch, grip strength, and push and pull tests were flawed because they were completed while appellant was medicated and after a long period of preestablished permanent medical restrictions. He claimed Dr. Douthit's assessment of "normal" test results was flawed because appellant had been following his prescribed permanent medical restrictions and was under pain medication. Dr. Hannemann opined that it was more likely than not that if appellant was tested or examined without pain management, appellant could not have achieved any level near what was achieved during the impartial medical examination. He warned that if appellant was required to work he would more likely incur further injury and do irreparable damage to himself. Dr. Hannemann continued to treat appellant and provide handwritten progress reports.

By decision dated August 6, 2014, OWCP terminated appellant's compensation for wage-loss and medical benefits effective August 6, 2014. It found that the weight of the medical evidence rested with Dr. Lotman's second opinion report and Dr. Douthit's referee medical report, which determined that appellant no longer had residuals of his accepted work-related injuries and was capable of returning to his modified letter carrier position.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.<sup>5</sup> It may not terminate compensation

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<sup>5</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

without establishing that the disability had ceased or that it was no longer related to the employment.<sup>6</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>8</sup> 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.<sup>9</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>10</sup> 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.<sup>11</sup> When there exists 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 upon a proper factual background, must be given special weight.<sup>12</sup>

### ANALYSIS

OWCP found that a conflict in medical opinion existed between appellant's physician, Dr. Hannemann, who opined that appellant was unable to work, and the second opinion physician, Dr. Lotman, who opined that appellant had no work restrictions. To resolve the conflict in medical opinion, OWCP referred appellant to Dr. Douthit for an impartial medical examination. The Board finds that OWCP properly found that a conflict in medical opinion existed and referred appellant for an impartial medical examination.

In a June 3, 2013 report, Dr. Douthit noted he reviewed appellant's medical history, including medical records and diagnostic test results. He reviewed the April 14, 2013 FCE and, on his own accord, contacted Ms. Mallon, the occupational therapist who performed the FCE on June 5, 2013 *via* telephone to discuss whether appellant's bilateral wrists were swollen during her evaluation of appellant. Dr. Douthit noted that Ms. Mallon informed him that she did not

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<sup>6</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>7</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

<sup>9</sup> *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, *id.*

<sup>10</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

observe any swelling or inflammation of the wrists during grip testing. The Board finds that this type of communication with an impartial medical examiner undermines the appearance of impartiality.<sup>13</sup> This is not a communication of merely administrative matters, which the Board has held is not an improper oral communication.<sup>14</sup> Section 8123(a) clearly requires that medical opinion evidence obtained from an impartial medical specialist should be based on a completely independent evaluation and judgment.<sup>15</sup> Furthermore, OWCP procedure prohibits someone other than the selected impartial medical specialist from examining the claimant, as part of the impartial medical evaluation.<sup>16</sup> These rules support a finding that the opinion of an impartial medical specialist should be based on a completely independent evaluation and judgment and be free from any outside influence and based solely on his or her own evaluation and observations.

The Board finds that Dr. Douthit's June 5, 2013 telephone conversation with Ms. Mallon, the occupational therapist, raises an appearance of impropriety. Accordingly, his opinion should not be given the special weight of evidence as an impartial medical examiner due to the fact that his opinion does not appear to be solely based on his independent evaluation and judgment as required by Section 8123(a).<sup>17</sup> As the Board finds that OWCP improperly relied on Dr. Douthit's opinion to terminate appellant's compensation, the August 6, 2014 decision of OWCP should be reversed.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective August 6, 2014.

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<sup>13</sup> See *Carlton L. Owens*, 36 ECAB 608 (1985) (the Board found that oral communications or conversations between OWCP or one of its medical advisers or consultants and the impartial medical specialist regarding a disputed issue on the case should not occur because it undermined the appearance of impartiality); see also *P.T.*, Docket No. 7-245 (issued July 2, 2007) (the Board agreed with OWCP's finding that written communication between appellant's attorney and an impartial medical specialist was improper); see also *F.S.*, Docket No. 15-1018 (issued September 10, 2015) (the Board found that oral communications between OWCP and the impartial medical specialist regarding two issues in the claim necessitated exclusion of the improperly obtained reports and the selection of a new impartial medical specialist).

<sup>14</sup> See *David W. Pickett*, 54 ECAB 272 (2002) (the Board found that communication with the impartial specialist concerning the specialist's availability for the examination, the date and time of the examination, and the payment method was not an improper communication).

<sup>15</sup> 5 U.S.C. § 8123(a).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500(4)(g) (July 2011).

<sup>17</sup> *Supra* note 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 27, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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