

ISSUE

The issue is whether appellant met her burden of proof to establish continuing employment-related disability after February 6, 2013 causally related to her accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 16, 2003 appellant, then a 51-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that on February 3, 2003 she first realized her carpal tunnel condition was due to continuous keying of mail. She stopped work on February 4, 2003 and returned to work on February 27, 2003. OWCP accepted the claim for right carpal tunnel syndrome and right ulnar nerve compression.

OWCP also accepted a July 4, 2006 claim for a recurrence of disability. By letter dated May 21, 2007, it placed appellant on the periodic rolls for temporary total disability.

Appellant returned to work in a full-time, limited-duty position on October 3, 2008. She subsequently filed an additional claim for recurrence of disability (Form CA-2a) alleging disability commencing October 23, 2008. OWCP denied appellant's recurrence claim by decision dated April 9, 2009. Appellant retired from the employing establishment effective October 31, 2009.

On April 14, 2009 counsel requested a hearing before an OWCP hearing representative. By decision dated June 11, 2009, OWCP's hearing representative remanded the case for referral to an impartial medical examiner to resolve a conflict in the medical opinion evidence regarding appellant's alleged recurrence of disability commencing October 23, 2008.

OWCP referred appellant to Dr. Stephanie Sweet, a Board-certified orthopedic surgeon, to resolve the identified conflict in medical evidence regarding appellant's claimed recurrence. By report dated October 15, 2009, Dr. Sweet opined that appellant had not sustained a recurrence of disability on October 23, 2008 due to her accepted employment injury.

By decision dated December 2, 2009, OWCP again denied appellant's claim for recurrence of disability commencing October 23, 2008.

On September 10, 2010 appellant, through counsel, filed a timely appeal to the Board. In an order dated September 28, 2011, the Board set aside and remanded the case to OWCP as the

³ Docket No. 10-2399 (issued September 28, 2011); *Order Denying Petition for Reconsideration*, Docket No. 10-2399 (issued May 25, 2012); Docket No. 15-0318 (issued September 8, 2015).

evidence of record was insufficient to establish that OWCP had properly selected Dr. Sweet as an impartial medical examiner.⁴

On December 15, 2011 appellant filed a claim for a schedule award (Form CA-7).

OWCP referred appellant to Dr. John R. Donahue, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding the claimed October 23, 2008 recurrence of disability. Dr. Donahue was also asked to assess permanent impairment of appellant's right upper extremity, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁵

In a September 17, 2012 report, Dr. Donahue concluded that appellant was able to perform her date-of-injury position with no restrictions and no longer required medical treatment. He explained that appellant's physical examination revealed no objective findings of carpal tunnel syndrome or ulnar nerve compression.

By decision dated October 1, 2012, OWCP denied appellant's claim for a schedule award based upon a finding that she had no employment-related permanent impairment. By notice dated October 12, 2012, it proposed to terminate her compensation benefits. OWCP finalized the termination of appellant's compensation by decision dated February 6, 2013.

On February 11, 2013 counsel requested review of the written record by an OWCP hearing representative. On August 14, 2013 OWCP's hearing representative affirmed the termination of appellant's compensation and remanded the case for further development of the evidence regarding the issue of continuing disability. OWCP thereafter requested a supplemental report from Dr. Donahue.

In a supplemental report dated October 3, 2013, Dr. Donahue reviewed a December 11, 2012 electromyography (EMG) and a February 11, 2013 report from Dr. Scott Fried, appellant's treating Board-certified osteopathic orthopedic surgeon, and again reiterated his conclusion that appellant had no residuals of the accepted conditions.

By decision dated December 13, 2013, OWCP found that the evidence of record was insufficient to establish that appellant had residuals of her accepted conditions and that appellant was entitled to further wage-loss compensation. On December 19, 2013 counsel requested an oral hearing before an OWCP hearing representative. By decision dated August 21, 2014, an OWCP hearing representative affirmed the December 13, 2013 OWCP decision.

On November 25, 2014 appellant, through counsel, appealed to the Board. By decision dated September 8, 2015, the Board found that OWCP met its burden of proof to terminate

⁴ Docket No. 10-2399 (issued September 28, 2011). On May 25, 2012 the Board issued an order denying the Director of OWCP's petition for reconsideration. Docket No. 10-2399, *Order Denying Petition for Recon.* (issued May 25, 2012). The Board also issued an order denying appellant's request for an oral argument under Docket No. 10-2399 on May 25, 2012.

⁵ A.M.A., *Guides* (6th ed. 2009).

appellant's compensation effective February 6, 2013.⁶ However, the Board found the case was not in posture for a decision regarding continuing disability. The Board found that there was a new unresolved conflict as to whether appellant continued to suffer from residuals or disability due to her accepted right carpal tunnel syndrome and right ulnar compression conditions. The Board explained that the opinion of Dr. Donahue, the impartial medical examiner, was in conflict with that of the opinions of Dr. Scott Fried, a treating Board-certified osteopathic orthopedic surgeon, and OWCP's medical adviser regarding the interpretation of EMG studies and continued residuals and disability due to her accepted condition.

On remand from the Board and in a letter dated January 7, 2016, OWCP referred appellant for an impartial medical examination with Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, for an opinion as to whether appellant continued to have disability causally related to her accepted employment injury. OWCP selected Dr. Mandel through an ME023 dated January 7, 2016. There was also a screen capture of his selection. The record also contains bypass notes indicating that Dr. Frederic Liss, a Board-certified orthopedic surgeon and hand surgeon, was contacted before Dr. Mandel. However, Dr. Liss was not selected, Code 0, because OWCP was disconnected after being on hold for 10 minutes waiting for an agent.

In a February 16, 2016 report, Dr. Mandel detailed the medical and factual evidence he reviewed, reviewed the statement of accepted facts (SOAF), noted the injury history, and reported that appellant had retired from the employing establishment in 2010. A physical examination revealed full upper extremity range of motion, no pathological reflexes, +1 and symmetrical reflexes, negative carpal tunnel compression test, negative Phalen's test, negative for thoracic outlet syndrome or brachial plexopathy, and no paresthesias. Appellant related having intermittent right forearm, arm and periscapular twitching, and that her right and longer fingers became white when outside and painful in the cold. Dr. Mandel opined, despite the examination inconsistencies and unusual complaints, that appellant suffered from mild right cubital tunnel syndrome and symptomatic right carpal tunnel syndrome.

On February 25, 2016 OWCP requested clarification from Dr. Mandel regarding whether appellant continued to have disability due to her accepted employment injury.

In a March 8, 2016 supplemental report, Dr. Mandel opined that the diagnosed conditions of mild right cubital tunnel syndrome and symptomatic right carpal tunnel syndrome were unrelated to the accepted February 2, 2003 employment injury. Based on the normal 2006 and 2008 electrodiagnostic tests, Dr. Mandel opined that appellant had fully recovered from her accepted right ulnar lesion and right carpal tunnel syndrome and that appellant was capable of performing the duties of a mail processing clerk. Thus, he concluded that appellant was capable of returning to full-duty work without restrictions based on the May 6, 2008 report by Dr. Stephanie Sweet, an impartial Board-certified orthopedic surgeon, and an August 29, 2009 report from Dr. Elliot Menkowitz, an impartial Board-certified orthopedic surgeon. Dr. Mandel also observed that the electrodiagnostic testing by Dr. Sweet revealed a full recovery based on the lack of any ongoing ulnar or median neuropathies. In a March 8, 2016 work capacity evaluation musculoskeletal condition (Form OWCP-5c), he opined that appellant had recovered

⁶ Docket No. 15-0318 (issued September 8, 2015).

from her 2003 work injury and was capable of working eight hours per day with restrictions of no pushing, lifting, or pulling more than 50 pounds and a 10-minute break every 2 hours.

By decision January 30, 2017, OWCP denied appellant's claim for continuing disability. It found that the impartial medical opinion by Dr. Mandel constituted the special weight of the evidence that appellant no longer had any disability from her accepted employment injury.

LEGAL PRECEDENT

Once OWCP properly terminates compensation, the burden shifts to appellant to establish continuing disability after that date causally related to the accepted injury.⁷ To establish causal relationship between the accepted conditions or related disability and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.⁸ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.⁹

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.¹⁰ 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.¹¹ 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.¹²

A physician selected by OWCP to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹³

⁷ *Manuel Gill*, 52 ECAB 282 (2001).

⁸ *R.D.*, Docket No. 16-0982 (issued December 20, 2016).

⁹ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ 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); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ 20 C.F.R. § 10.321.

¹² *Darlene R. Kennedy*, *supra* note 10; *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ *D.A.*, Docket No. 09-936 (issued January 13, 2010); *Raymond J. Brown*, 52 ECAB 192 (2001).

The Medical Management Application (MMA), which replaced the Physician Directory System (PDS), allows users to access a database of Board-certified specialist physicians and is used to schedule referee examinations. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician.¹⁴

The claims examiner is not able to determine which physician serves as the impartial medical specialist. A medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare an ME023 appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled, the claimant and any authorized representative are to be notified.¹⁵

ANALYSIS

In a prior appeal, the Board affirmed OWCP's termination of appellant's compensation, effective February 6, 2013. However, the Board set aside OWCP's August 21, 2014 decision as to whether appellant had established continuing disability causally related to the accepted employment injury after February 6, 2013. The Board found that an unresolved conflict remained between Dr. Donahue, a then selected impartial Board-certified orthopedic surgeon, and Dr. Fried, a treating Board-certified osteopathic orthopedic surgeon, regarding the interpretation of EMG studies and appellant's continuing disability. The Board finds that appellant has failed to meet her burden of proof to establish continuing disability after February 6, 2013.

The Board finds that OWCP properly utilized the MMA in selecting Dr. Mandel as an impartial medical specialist. OWCP utilized the MMA as evidenced by the January 7, 2016 ME023 form. It also documented that Dr. Liss had been selected, but bypassed (Code 0) due to no response to the telephone call, through the MMA.¹⁶ OWCP also included documentation that the MMA was used to schedule the appointment with Dr. Mandel. The Board finds, therefore, that OWCP properly selected Dr. Mandel as an impartial medical specialist.¹⁷

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013); *see also R.C.*, Docket No. 12-468 (issued October 25, 2012).

¹⁵ *Id.*

¹⁶ *Supra* note 14 at Chapter 3.500(6). OWCP's procedures provide that Code 0-Other is appropriate to use when no one answers the phone (*e.g.*, "phone rings continuously with no answer"). In the present case, OWCP documented that the scheduler was placed on hold for 10 minutes and the call was then disconnected.

¹⁷ *C.W.*, Docket No. 12-1211 (issued November 15, 2012); *Darlene R. Kennedy*, *supra* note 10.

The Board further finds that Dr. Mandel's impartial medical opinion is entitled to special weight and establishes that appellant had no disability or residuals due to the accepted employment injury.¹⁸ In a February 16, 2016 report, Dr. Mandel reviewed the SOAF and the medical file and noted essentially normal findings on examination. He opined that appellant had symptomatic right carpal tunnel syndrome and mild right cubital tunnel syndrome despite examination inconsistencies and unusual complaints.

In a March 8, 2016 supplemental report, Dr. Mandel provided a well-rationalized opinion that appellant's accepted work injuries of right carpal tunnel syndrome, which was expanded to include right ulnar nerve compression, had resolved. He opined that appellant's current conditions of symptomatic right carpal tunnel syndrome and mild right cubital tunnel were unrelated to her accepted February 2, 2003 work injury. In support of this conclusion, Dr. Mandel explained that the reports of Drs. Menkowitz and Sweet supported a finding that appellant had fully recovered from her accepted 2003 work injuries. Moreover, the October 2008 electrodiagnostic test performed by Dr. Sweet indicated a full recovery. In a March 8, 2013 Form OWCP-5c, Dr. Mandel concluded that appellant had fully recovered from her 2003 work injury, that she was capable of working with restrictions, and the current work restrictions were due to nonemployment-related conditions.

The Board finds that Dr. Mandel's opinion is based on a proper factual and medical background and is sufficiently rationalized to carry the special weight accorded to an impartial medical specialist.¹⁹ Thus, appellant has not met her burden of proof to establish continuing disability or residuals due to the accepted injury.²⁰

On appeal counsel contends Dr. Mandel's opinion is not entitled to be accorded special weight or meet OWCP's burden. He contends that Dr. Mandel's report does not establish that appellant had recovered from the residuals of her accepted work conditions. Initially, the Board notes that it is appellant's burden to prove continuing disability from her accepted work conditions and not OWCP's burden to prove that the accepted work conditions had resolved without residuals or disability.²¹ As noted above, the Board in the prior decision affirmed the termination of her benefits, but remanded the case due to an unresolved conflict regarding continuing residuals and disability. As discussed above, the Board found that Dr. Mandel's opinion was sufficiently rationalized to constitute the special weight of the evidence finding that she had no residuals or disability due to her accepted employment injury.

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.

¹⁸ See *L.G.*, Docket No. 15-1334 (issued January 28, 2016).

¹⁹ See *M.P.*, Docket No. 17-0459 (issued July 12, 2017).

²⁰ See *S.Y.*, Docket No. 16-1555 (issued April 21, 2017).

²¹ *Id.*

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish continuing employment-related disability after February 6, 2013 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 30, 2017 is affirmed.

Issued: January 4, 2018
Washington, DC

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

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

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