United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 17-1903**
	)	**Issued: July 5, 2018**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 11, 2017 appellant, through counsel, filed a timely appeal from a May 18, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative s collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issue is whether appellant has established a recurrence of total disability commencing July 27, 2004 causally related to his accepted employment injury.

FACTUAL HISTORY

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

On November 13, 1999 appellant, then a 52-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that, on October 22, 1999, he first became aware of numbness in his right hand and fingers. He related this condition to factors of his federal employment on November 12, 1999. On January 20, 2000 OWCP accepted his claim for bilateral carpal tunnel syndrome. Appellant underwent right carpal tunnel release surgery on February 11, 2000. He returned to full-duty work on June 29, 2000.[4]

In a report dated March 4, 2003, Dr. Scott M. Fried, an osteopath and a Board-certified orthopedic surgeon, noted that appellant reported a return of significant symptomatology and discomfort, including numbness in both hands and pain up his arms to his elbows. He diagnosed repetitive strain injury, traumatically-induced median and radial neuropathy and brachial plexitis right greater than left. On August 4, 2003 Dr. Fried indicated that appellant should work only four hours, five days a week.

Appellant underwent an electromyography (EMG) study on September 30, 2003 which demonstrated bilateral brachial plexus neuropathies, bilateral ulnar nerve neuropathies at the elbow, right radial nerve neuropathy, and severe bilateral medial nerve neuropathies at the wrist. His right median nerve was relatively unchanged following surgery, while his left was significantly worse.

On December 4, 2003 Dr. Fried further reduced appellant's work to four hours a day, two days a week.

On February 5, 2004 OWCP referred appellant for a second opinion evaluation with Dr. Richard Mandel, a Board-certified orthopedic surgeon, to determine appellant's disability status. In a report dated February 26, 2004 Dr. Mandel noted that appellant's light-duty job of working four hours per day entailed modified sorting duties of lifting less than 10 pounds with an assistant. He diagnosed chronic bilateral median neuropathies at the level of the carpal canals and found that this condition was work related. Dr. Mandel did not find evidence of ulnar neuropathy, brachial plexopathy, or any other neuropathy. He concluded that appellant could perform light-

[3] Docket No. 12-1701 (issued April 24, 2013). Docket No. 09-1270 (issued March 17, 2010).

[4] On March 13, 2003 OWCP granted appellant a schedule award for 10 percent permanent impairment of each upper extremity.

duty work four hours a day, five days a week with a lifting, pushing, and pulling restriction of five pounds.

On March 29, 2004 OWCP accepted the additional condition of bilateral median neuropathy at the level of the carpal canals. It further noted that Dr. Mandel found that appellant could work four hours a day, five days a week.

In a note dated April 21, 2004, Dr. Fried found that appellant could work one day a week for four hours. On July 27, 2004 he found that appellant continued to be symptomatic at four hours a week. Dr. Fried concluded that appellant was totally disabled from work due to his repetitive strain jury, traumatically-induced median and radial neuropathy, and brachial plexitis.

On August 13, 2004 appellant filed a claim for recurrence of disability (Form CA-2a) alleging that he was totally disabled from work beginning July 2, 2004 due to his accepted employment injury.

OWCP found a conflict of medical opinion evidence between Drs. Fried and Mandel and referred appellant for an impartial medical examination (IME).

OWCP referred appellant to Dr. Richard G. Schmidt, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated September 13, 2004, Dr. Schmidt found that appellant had no residuals or disability causally related to his accepted employment injury. OWCP denied appellant's recurrence claim by decision dated November 30, 2004.

On December 2, 2004 appellant requested a hearing before an OWCP hearing representative. By decision dated November 14, 2005, the hearing representative remanded the case for a new impartial medical evaluation. Appellant was subsequently referred to Dr. William Kirkpatrick, a Board-certified orthopedic surgeon for an impartial medical evaluation. In a report dated June 5, 2006, Dr. Kirkpatrick found no evidence of ongoing carpal tunnel syndrome and opined that appellant's brachial plexopathy was not causally related to the accepted employment injury.

By decision dated September 28, 2006, OWCP found that appellant was entitled to four hours of wage-loss compensation per workday. On October 4, 2006 appellant again requested a hearing before an OWCP hearing representative. By decision dated June 18, 2007 an OWCP hearing representative vacated the September 28, 2006 decision, finding that Dr. Kirkpatrick's June 5, 2006 report was insufficient to resolve the conflict. OWCP subsequently obtained an August 6, 2007 supplemental report from Dr. Kirkpatrick. By decision dated August 17, 2007, it denied appellant's request to expand the acceptance of his claim to include brachial plexopathy or ulnar neuropathy and denied his claim for total disability.

On August 29, 2007 appellant again requested an oral hearing before an OWCP hearing representative. By decision dated February 19, 2008, the hearing representative vacated the prior decision and remanded the case for another supplemental report from Dr. Kirkpatrick. In a report dated April 24, 2008, Dr. Kirkpatrick opined that appellant could perform his modified duties four hours a day, five days a week. OWCP again denied appellant's recurrence claim by decision dated June 3, 2008. Appellant requested a hearing before an OWCP hearing representative on

June 6, 2008. By decision dated February 17, 2009, the hearing representative affirmed the denial of appellant's recurrence claim.

On April 16, 2009 appellant appealed OWCP's June 3, 2008 and February 17, 2009 decisions to the Board. By decision dated March 17, 2010,[5] the Board found that OWCP had properly determined that there was a conflict of medical opinion evidence, but further found that Dr. Kirkpatrick's reports were insufficiently rationalized to resolve the conflict between Drs. Fried and Mandel on both the issue of recurrence of totally disability commencing on July 27, 2004 and the issue of whether additional claimed conditions of ulnar neuropathy and brachial plexopathy were causally related to the accepted employment injury. The Board remanded the case and directed OWCP to obtain rationalized medical opinion from an impartial medical specialist on these outstanding issues.

On return of the case record OWCP referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon for an impartial medical evaluation. By report dated October 20, 2010, Dr. Didizian opined that appellant had not sustained a recurrence of total disability commencing July 27, 2004. OWCP thereafter again denied appellant's recurrence claim on January 6, 2011. On January 14, 2011 appellant again requested a hearing before an OWCP hearing representative. By decision dated July 5, 2011, the hearing representative again remanded the case for preparation of a new statement of accepted facts (SOAF) and a supplemental report. In a report dated September 20, 2011, Dr. Didizian again opined that appellant had not sustained a recurrence of total disability commencing July 28, 2004 and his brachial plexoplathy was not a consequence of the accepted injury.

By decision dated October 19, 2011, OWCP again denied appellant's claim for recurrence of total disability and found that his brachial plexopathy condition was not a consequence of the accepted employment injury. On October 23, 2011 appellant again requested a hearing before an OWCP hearing representative. By decision dated May 14, 2012, an OWCP hearing representative found that OWCP had properly denied expansion of the acceptance of appellant's claim to include brachial plexopathy and properly denied appellant's 2004 recurrence of disability claim.

On August 13, 2012 appellant again appealed to the Board. In its April 24, 2013 decision,[6] the Board found that OWCP must further develop the medical evidence and obtain an IME report containing medical rationale addressing the outstanding issues of recurrence of total disability on July 27, 2004 and the additional condition of brachial plexopathy. The Board set aside OWCP's May 14, 2012 decision and remanded the case for this development.

On remand, in a letter dated August 28, 2013, OWCP referred appellant, a SOAF, and list of questions to Dr. Andrew Sattel, a Board-certified orthopedic surgeon, for an IME. In his September 18, 2013 report, Dr. Sattel reviewed appellant's history of injury and medical history. He performed a physical examination and found that diagnostic tests for brachial plexopathy were negative bilaterally. Tinel's sign at the right and left cubital tunnel resulted in mild tingling. Dr. Sattel found no visible thenar or interosseous atrophy. Appellant provided inconsistent

[5] *Supra* note 3.

[6] Docket No. 12-1701 (issued April 24, 2013).

responses for both the median and ulnar distributions. Dr. Sattel diagnosed bilateral carpal tunnel syndrome and found that appellant's present clinical examination demonstrated evidence for residual median neuropathy on the right. He opined that neither appellant's described work activities nor his clinical evaluation supported a diagnosis of bilateral brachial plexopathy. Dr. Sattel opined that, based on appellant's history and medical records, he "would likely have been able to resume at least light-duty status." He completed a work capacity evaluation (OWCP-5c) and determined that appellant could not lift over 20 pounds, but could work eight hours a day.

By decision dated October 10, 2013, OWCP denied appellant's claim for recurrence of total disability on July 27, 2004 and for the additional condition of brachial plexopathy.

Counsel requested a hearing before an OWCP hearing representative on October 17, 2013.

Dr. Fried completed a report on October 18, 2013 and noted the history of appellant's increasing disability from March 4, 2003 through August 12, 2013. He continued to diagnose bilateral carpal tunnel and median neuropathy, as well as brachial plexopathy/cervical radiculopathy, and radial neuropathy secondary to appellant's work-related injuries.

In her May 9, 2014 decision, OWCP's hearing representative vacated the October 10, 2013 decision and remanded for a supplemental report from Dr. Sattel. In a letter dated May 21, 2014, OWCP requested a supplemental report from Dr. Sattel. Dr. Sattel responded on June 4, 2014 and reviewed Dr. Fried's notes. He again found no physical findings supporting brachial plexopathy or other peripheral neuropathies. Dr. Sattel concluded, "In my opinion, no recurrence of disability from [appellant's] modified job."

By decision dated June 25, 2014, OWCP denied appellant's claim for total disability beginning July 27, 2004 and the additional condition of brachial plexopathy.

On July 12, 2014 counsel requested an oral hearing before an OWCP hearing representative. On October 7, 2014 OWCP's hearing representative vacated the June 25, 2014 OWCP decision. He found that Dr. Sattel's report was insufficiently rationalized and remanded for a supplemental report.

In a letter dated October 29, 2014, OWCP requested a supplemental opinion from Dr. Sattel. Dr. Sattel responded on November 12, 2014, and disagreed with the characterization of appellant's claim as a recurrence of disability. He opined that appellant had not sustained a particular new or objective worsening of his condition and noted that he was unable to comment regarding appellant's work status on July 27, 2004.

By decision dated January 14, 2015, OWCP denied appellant's claim for recurrence of total disability on July 27, 2004 as well as his claim for additional employment-related conditions.

On January 19, 2015 counsel again requested an oral hearing before an OWCP hearing representative.

On August 31, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Raoul Biniaurishvili, a Board-certified neurologist.

By decision dated September 9, 2015, OWCP's hearing representative vacated the January 14, 2015 decision, and remanded the case for additional development of the medical evidence.

In a report dated September 14, 2015, Dr. Biniaurishvili reviewed appellant's history of injury and medical records. He diagnosed bilateral carpal tunnel syndrome. Dr. Biniaurishvili determined that appellant's severe carpal tunnel syndrome was related to his work as a mail handler. He further found that appellant could not return to his date-of-injury position, but could perform light-duty desk work for four hours a day. Dr. Biniaurishvili completed a work capacity evaluation (OWCP-5) and found that appellant could lift, push, and pull up to 20 pounds four hours a day. On November 6, 2015 Dr. Biniaurishvili performed EMG and nerve conduction velocity. He found increased distal latencies and decreased amplitudes which was suggestive of median nerve compression neuropathy consistent with bilateral carpal tunnel syndrome. Dr. Biniaurishvili completed an addendum to his September 14, 2015 report on November 18, 2015 and again diagnosed carpal tunnel syndrome. He also found that electrodiagnostic testing supported mild ulnar nerve neuropathy at the elbow on the right. Dr. Biniaurishvili recommended additional carpal tunnel release surgery. He again concluded that appellant could perform light-duty desk work for four hours a day which did not require heavy lifting or repetitive movements involving both hands.

In a letter dated December 2, 2015, OWCP requested a supplemental opinion from Dr. Biniaurishvili addressing possible diagnoses of cubital tunnel syndrome and appropriate treatments for appellant's diagnosed employment-related conditions.

On December 3, 2015 OWCP referred appellant, a SOAF, and a list of questions for an IME with Dr. Stanley Askin, a Board-certified orthopedic surgeon. Counsel responded on December 28, 2015 and requested proof that Dr. Askin was properly selected as an IME.

Dr. Biniaurishvili completed a supplemental report on December 14, 2015 and diagnosed severe right carpal tunnel syndrome as well as mild right cubital tunnel syndrome. He recommended that right cubital tunnel syndrome should be included in appellant's accepted employment-related conditions. Dr. Biniaurishvili noted that there was no diagnostic evidence supporting left cubital tunnel syndrome.

In a January 6, 2016 decision, OWCP listed appellant's accepted conditions including lesion of the right ulnar nerve, bilateral carpal tunnel syndrome, bilateral lesions of the median nerve, and the additional condition of right cubital tunnel syndrome.

Dr. Askin completed a report on January 27, 2016. He examined and reviewed appellant's medical treatment and understood that bilateral carpal tunnel syndrome was accepted by OWCP as causally related to appellant's employment activities. Dr. Askin found that this condition did not render appellant disabled and further found that the medical evidence did not establish the additional conditions of brachial plexopathy or ulnar neuropathy as related to appellant's employment.

On February 2, 2016 OWCP requested clarification from Dr. Askin regarding whether appellant was capable of performing light-duty work four hours a day on July 27, 2004. Dr. Askin

responded on February 5, 2016 and opined that appellant was always capable of working including June 27, 2004 and onward.

By decision dated February 24, 2016, OWCP denied appellant's claim for recurrence of total disability on July 27, 2004 and further denied his claim for additional employment-related conditions.

On February 29, 2016 counsel requested an oral hearing before an OWCP hearing representative. By decision dated August 25, 2016, OWCP's hearing representative found that Dr. Askin was improperly selected as the IME. The hearing representative set aside the February 24, 2016 decision and remanded the case for OWCP to properly select a new IME.

On October 4, 2016 OWCP referred appellant, a SOAF and a list of questions for an IME with Dr. David Eingorn, a Board-certified orthopedic surgeon.

In a report dated November 22, 2016, Dr. Eingorn reviewed appellant's medical history and diagnostic studies. On physical examination he found no tenderness over the brachial plexus and full range of motion in his shoulders, elbows, and wrists. Dr. Eingorn noted that appellant reported diffuse numbness on sensation examination of his upper extremities from his elbows down to his hands in a glove-stocking distribution. He also noted that appellant reported nonanatomic numbness with Tinel's sign over his elbows, bilaterally. Appellant also reported nonanatomic numbness after Tinel's sign over his wrists, bilaterally. He did not exhibit thenar atrophy nor interosseous wasting, and his grip strength was normal, bilaterally. Dr. Eingorn found that appellant's examination was hysterical in nature rather than anatomic. He found no objective findings of carpal tunnel syndrome. Dr. Eingorn further found that there was no evidence on physical examination of ulnar nerve neuropathy or brachial plexopathy.

On December 14, 2016 OWCP requested a supplemental report from Dr. Eingorn addressing whether or not appellant sustained a recurrence of total disability on July 27, 2004. It noted that appellant had been working four hours a day limited duty from February 11, 2000 through July 27, 2004, when he claimed that he was totally disabled on July 27, 2004.

On January 23, 2017 Dr. Eingorn provided an amended copy of his November 22, 2016 report in which he found that appellant was currently capable of working four hours a day. He responded to the question of whether the evidence supported a recurrence of total disability effective July 27, 2004, with "The answer is no. As stated, [appellant] can continue with his activities of working [four] hours per day, limited duty with 5 to 10 pounds of lifting. Therefore, he is not totally disabled."

By decision dated February 14, 2017, OWCP denied appellant's claim for recurrence of disability on July 27, 2004 based on Dr. Eingorn's report.

On February 21, 2017 counsel requested an oral hearing before an OWCP hearing representative. By decision dated May 18, 2017, OWCP's hearing representative found that appellant failed to establish a recurrence of disability on July 27, 2004 causally related to his accepted bilateral carpal tunnel syndrome.

LEGAL PRECEDENT

OWCP's implementing regulations define a "recurrence of disability" as 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.[7] 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.[8]

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 establishes that the employee can perform the light-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and show that he cannot perform such light duty. As part of this burden of proof, 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.[9] This burden of proof includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[10]

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.[11]

ANALYSIS

The Board finds that this case is not in posture for a decision,

In the last appeal, the Board found an unresolved conflict in medical opinion and remanded the case to OWCP for proper selection of a referee physician. The most recent referee physician properly selected by OWCP is Dr. Eingorn. In his reports dated November 22, 2016 and supplemental report of January 23, 2017, Dr. Eingorn found that appellant's examination was hysterical in nature rather than anatomic. He found no objective findings of carpal tunnel

[7] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.a (June 2013). *See also J.C.*, Docket No. 17-0955 (issued October 23, 2017); *Philip L. Barnes*, 55 ECAB 426 (2004).

[8] *Id.* at § 10.5(x); *J.C., id.*; *J.F.*, 58 ECAB 124 (2006).

[9] *J.C., id.*; *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *J.C., id.*; *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[11] *J.N.*, Docket No. 17-0237 (issued July 13, 2017); *L.S.*, Docket No. 12-0139 (issued June 6, 2012); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001); *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

syndrome. In his supplemental report, Dr. Eingorn further responded to the question of whether the evidence supported a recurrence of total disability effective July 27, 2004, with "The answer is no. As stated, [appellant] can continue with his activities of working [four] hours per day, limited duty with 5 to 10 pounds of lifting. Therefore, he is not totally disabled."

When a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well reasoned and based upon a proper factual background must be given special weight.[12] While the Board finds that Dr. Eingorn's report is based on a proper factual background, it lacks the medical reasoning necessary to resolve the existing conflict of medical opinion evidence. The Board finds that his opinion and supplemental opinion do not have sufficient probative value to resolve the conflict in medical opinion evidence.[13] Although Dr. Eingorn referenced appellant's work capabilities, he provided no medical reasoning in support of his opinion that appellant did not sustain a recurrence of total disability, effective July 27, 2004, due to his accepted employment injuries. To be entitled to special weight, his opinion must contain clear, persuasive rationale on the critical issue in the claim.[14] However, Dr. Eingorn's report does not contain such rationale. As OWCP relied on his insufficient opinion, the case must be remanded for further development.[15]

On remand, OWCP should obtain a supplemental opinion from Dr. Eingorn regarding the issue of appellant's ability to work as of his date of alleged recurrence of total disability on July 27, 2004 and continuing. If Dr. Eingorn is unable or unwilling to elaborate on his conclusion that appellant was no longer totally disabled from work commencing July 27, 2004, or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a new impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[16] Following this and any other development deemed necessary, it shall issue a *de novo* decision in the case.

CONCLUSION

The Board finds that the case is not in posture for decision.

[12] *M.W.*, Docket No. 16-1138 (issued February 22, 2018); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[13] *D.B.*, Docket No. 17-1845 (issued February 16, 2018).

[14] *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

[15] *Id.*

[16] *See J.W.*, Docket No. 15-0020 (issued August 17, 2016); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for additional development consistent with this decision of the Board.

Issued: July 5, 2018
Washington, DC

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

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

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