

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

G.F., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
MANHATTAN VA MEDICAL CENTER,
New York, NY, Employer**

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**Docket No. 20-0497
Issued: May 20, 2021**

Appearances:

*Erik B. Blowers, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 3, 2020 appellant, through counsel, filed a timely appeal from a December 18, 2019 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 over the merits of this case.³

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.*

³ The Board notes that, following the December 18, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 12, 2019; and (2) whether appellant met her burden of proof to establish continuing residuals and disability on or after June 12, 2019.

FACTUAL HISTORY

On February 11, 2004 appellant, then a 45-year-old diagnostic radiologic technician, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2004 she developed pain and numbness in her left wrist, radiating to her neck and shoulder, after her wrist popped when she was adjusting an x-ray machine while in the performance of duty. OWCP accepted the claim for left wrist carpal tunnel syndrome.⁴ Appellant stopped work on the date of injury. OWCP authorized left carpal tunnel syndrome and removal of left wrist/forearm lesion, which occurred on August 24, 2004.⁵ It paid appellant wage-loss compensation on the supplemental rolls as of March 19, 2004 and on the periodic rolls as of July 11, 2004.⁶

On September 24, 2004 appellant filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome in the performance of duty. She noted that she first became aware of her condition and its relationship to her federal employment on February 4, 2004. Appellant indicated that OWCP had accepted left traumatic carpal tunnel syndrome due to a February 2, 2004 traumatic injury. Since the February 2, 2004 employment injury, she developed bilateral carpal tunnel syndrome from overuse of her right hand to compensate for her left hand conditions. OWCP accepted the claim for bilateral carpal tunnel syndrome.⁷

On November 1, 2004 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work beginning October 13, 2004, which OWCP accepted, by decision dated February 24, 2005.⁸

On May 1, 2009 OWCP referred appellant, together with a statement of accepted facts (SOAF), list of questions, and medical record, to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 12, 2009, Dr. Lakin noted the

⁴ OWCP assigned OWCP File No. xxxxxx815.

⁵ The record contains two operative reports dated August 24, 2004. The first operative report noted postoperative diagnoses of left distal radius fracture plus distal radioulnar joint disruption and operative procedures of open reduction and internal fixation of left distal radius fracture, closed reduction of distal radioulnar joint, and application of long arm splint. The second operative report noted a postoperative diagnosis of left wrist median nerve compression and wrist flexor tenosynovitis and operative procedure of wrist tenosynovitis of the flexor tendons and wrist median nerve compression.

⁶ In a letter dated August 16, 2005, the Office of Personnel Management (OPM) advised that it had approved appellant's application for disability retirement. On October 13, 2006 appellant elected to receive FECA benefits effective August 13, 2005, the date her disability retirement had been approved.

⁷ OWCP assigned that claim OWCP File No. xxxxxx401. On February 4, 2010 OWCP administratively combined OWCP File No. xxxxxx401 with OWCP File No. xxxxxx815, with the latter serving as the master file number.

⁸ Appellant related that she returned to work on October 13, 2004 and worked four days before stopping on October 20, 2004.

accepted conditions were left carpal tunnel syndrome and left hand tenosynovitis. On examination he found negative Tinel's sign, Finkelstein's test, and Phalen's test, and decreased bilateral thumb and fourth finger sensation. Dr. Lakin determined that it appeared that appellant's accepted left carpal tunnel syndrome and left hand tenosynovitis had resolved and she could return to her date-of-injury job without restrictions. He observed there was no evidence of carpal tunnel syndrome or tenosynovitis.

Dr. Lakin, in a June 4, 2009 addendum, determined that appellant also had no evidence of right wrist carpal tunnel syndrome or any right upper extremity orthopedic condition. Thus, he determined there was no disability due to right carpal tunnel syndrome.

On October 22, 2009 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits based on the opinion of OWCP's referral physician, Dr. Lakin, who concluded that appellant no longer had any residuals or disability due to her accepted employment conditions.

In a November 7, 2009 report, Dr. Robert A. Adair, a treating physician Board-certified in preventive medicine, detailed appellant's employment and medical histories, summarized examination findings, and noted diagnostic test results. On examination performed on November 2, 2009, he found evidence of continued bilateral carpal tunnel syndrome including bilateral wrist weakness, decreased muscle strength, decreased left hand range of motion (ROM) and mobility, and significant swelling and weakness at the carpal tunnel release site. A review of a December 4, 2008 nerve conduction velocity (NCV) study indicated chronic permanent left carpal tunnel syndrome. Dr. Adair found appellant had a permanent partial disability due to her bilateral carpal tunnel syndrome, which was greater on the left.

On March 10, 2010 OWCP referred appellant to Dr. Seth Kane, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Adair, a treating physician, and Dr. Lakin, an OWCP referral physician, regarding appellant's continuing disability. In a March 22, 2010 report, Dr. Kane provided examination findings, which included found bilateral Tinel's sign at the median and ulnar nerves, negative for radial nerves, and positive left Phalen's sign. He explained that appellant continued to have residuals of her accepted left carpal tunnel syndrome. Dr. Kane found appellant was disabled from performing her date-of-injury job, but was capable of working with restrictions. He indicated that he agreed with Dr. Lakin that appellant was not totally disabled and many of her symptoms were not supported by an anatomic explanation. Dr. Kane concluded that appellant had reached maximum medical improvement (MMI) from her accepted bilateral carpal tunnel syndrome.

Appellant continued to be followed by Dr. Adair who submitted reports and follow-up evaluations covering August 3, 2010 through October 6, 2016, which continued to find appellant totally disabled due to the accepted bilateral carpal tunnel syndrome.

On May 17, 2017 OWCP referred appellant, together with a SOAF, list of questions, and medical record, to Dr. Richard Semble, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 31, 2017, Dr. Semble diagnosed left carpal tunnel syndrome and tenosynovitis. On examination he found positive Tinel's sign and Phalen's test, decreased bilateral strength, and subjective thumb, index, and long finger numbness. Dr. Semble concluded that the accepted conditions had not resolved and that no further medical treatment was necessary.

In an attached work capacity evaluation form (Form OWCP-5c), he provided permanent work restrictions.

In a report dated April 11, 2018, Dr. Gerald Gaughan, a Board-certified physiatrist and appellant's treating physician, noted appellant's February 2, 2004 employment injury, reviewed the SOAF, and diagnosed bilateral carpal tunnel syndrome. On examination he found bilateral thenar atrophy, bilateral wrist tenderness, bilateral Tinel's and Phalen's signs, decreased sensation, and restricted bilateral range of motion. Dr. Gaughan recommended physical therapy.

On June 11, 2018 OWCP referred appellant, together with a SOAF, list of questions, and medical record, to Dr. Lakin for another second opinion evaluation. In a report dated July 3, 2018, Dr. Lakin diagnosed bilateral carpal tunnel syndrome. On examination he found negative Tinel's sign and Finkelstein's, Phalen's, and Allen's tests and no thenar or hypothenar atrophy. Dr. Lakin determined that appellant had no objective findings of carpal tunnel syndrome and required no further medical treatment. He determined that appellant had no disability due to her accepted bilateral carpal tunnel syndrome. Dr. Lakin concluded that appellant was capable of working. On an attached work capacity evaluation form (Form OWCP-5c), he checked "Yes" to the questions of whether appellant could return to her date-of-injury job and whether MMI had been reached. Dr. Lakin also checked the section indicating that appellant was capable of performing restricted duty.

On September 6, 2018 OWCP requested clarification of the Form OWCP-5c completed by Dr. Lakin as he indicated that appellant could return to her date-of-injury job and also indicated that she was capable of working with restrictions. In a Form OWCP-5c dated September 11, 2018, Dr. Lakin checked "Yes" to the questions of whether appellant could return to her date-of-injury job and whether MMI had been reached.

On November 7, 2018 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits based on Dr. Lakin's July 3, 2018 opinion.

Following the proposed notice of termination, OWCP received forms dated September 21, and November 2, 2018 from Dr. Gaughan diagnosing bilateral carpal tunnel syndrome. Dr. Gaughan noted an onset of injury date of February 4, 2004 and that appellant had 100 percent temporary total disability.

OWCP also received a narrative report from Dr. Gaughan dated September 21, 2018. Dr. Gaughan noted injury dates of February 2 and 4, 2004 and that the claims had been combined. He diagnosed bilateral carpal tunnel syndrome and recommended further testing to determine the presence and severity. On examination Dr. Gaughan found bilateral thenar hand muscle atrophy, bilateral wrist tenderness, worse on the right, positive Tinel's and Phalen's signs, and decreased sensibility to vibration.

On November 30, 2018 appellant, through counsel, objected to the notice of proposed termination. Counsel asserted that OWCP failed to notify him when it referred appellant for a second opinion evaluation. Additionally, he asserted that there was an unresolved conflict in the medical opinion evidence between Dr. Lakin and Dr. Gaughan.

Dr. Gaughan, in a November 9, 2018 narrative report, reiterated examination findings and diagnoses from prior reports.

In additional form reports dated November 12 and 15, and December 5 and 17, 2018, Dr. Gaughan diagnosed bilateral carpal tunnel syndrome. He noted a date of injury/onset of illness of February 4, 2004 and that appellant had 100 percent “temporary impairment.”

On February 6, 2019 OWCP referred appellant for another second opinion evaluation with Dr. Lakin. In a February 25, 2019 report, Dr. Lakin noted that appellant had previously been evaluated on July 3, 2019 and no diagnostic imaging studies had been submitted for his review. Diagnoses included bilateral carpal tunnel syndrome. On examination Dr. Lakin found negative Tinel’s sign and Finkelstein’s, Phalen’s, and Watson shift tests, sensation intact to light touch, negative bilateral carpal compression test, and no evidence of right wrist thenar or hypothenar atrophy. He determined that appellant had no objective findings of carpal tunnel syndrome and required no further medical treatment for this condition. Dr. Lakin determined that appellant had reached MMI, had no disability due to her accepted bilateral carpal tunnel syndrome and could work full time with no restrictions. In an attached Form OWCP-5c, he diagnosed bilateral carpal tunnel syndrome and checked “Yes” to the question of whether appellant was capable of performing his/her usual job without restrictions.

On March 29, 2019 OWCP issued a notice proposing to terminate appellant’s wage-loss compensation and medical benefits based on the March 1, 2019 opinion of OWCP’s referral physician, Dr. Lakin.

In progress notes dated April 4, 2019, Dr. Eric M. Spencer, a treating Board-certified orthopedic surgeon, detailed appellant’s medical history including right carpal tunnel release surgery performed in 2004. Diagnoses included bilateral recurrent carpal tunnel syndrome. On examination Dr. Spencer found bilateral mild thenar flattening, positive bilateral carpal tunnel direct compression test, mildly positive direct bilateral cubital tunnel direct compression test, bilateral negative Phalen’s test, and severe tenderness on palpation over bilateral basal joints. He referred appellant for an electromyography/nerve conduction velocity (EMG/NCV) study for an evaluation of her condition. In a disability note of even date, Dr. Spencer advised that appellant was unable to work due to her injuries.

By decision dated June 11, 2019, OWCP finalized the termination of appellant’s wage-loss compensation and medical benefits effective June 12, 2019.

On July 9, 2019 appellant, through counsel, requested a hearing before a representative of OWCP’s Branch of Hearings and Review, which was subsequently changed to a request for review of the written record. Accompanying her request was a June 5, 2019 EMG/NCV study, which found evidence of moderate left carpal tunnel syndrome and mild right carpal tunnel syndrome.

By decision dated December 18, 2019, the hearing representative affirmed the June 11, 2019 termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee’s benefits.⁹ After it has determined that an employee

⁹ *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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.¹⁰ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹² 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.¹³

Section 8123(a) 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.¹⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 12, 2019.

The evidence of record establishes that there remains a conflict between Dr. Lakin, the second opinion physician, and Drs. Gaughan and Spencer, appellant's treating physicians, as to whether appellant had residuals from her accepted bilateral carpal tunnel syndrome. In his July 3, 2018 and March 1, 2019 reports, Dr. Lakin noted reviewing the SOAF and medical records, but noted that he had not reviewed any diagnostic tests. He found, based on his examination, that there were no objective findings to support ongoing residuals from appellant's accepted bilateral carpal tunnel syndrome. Dr. Lakin determined that appellant had reached MMI and could return to her date-of-injury position with no restrictions.

Appellant's treating physician, Dr. Gaughan, however, submitted reports and form reports through December 12, 2018, wherein he noted that he continued to treat appellant for bilateral carpal tunnel syndrome. Dr. Gaughan explained that appellant had bilateral thenar hand muscle atrophy, bilateral wrist tenderness, worse on the right, positive Tinel's and Phalen's signs, and

¹⁰ *M.T.*, Docket No. 20-0677 (issued December , 2020); *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹¹ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018); *Del K. Rykert*, 40 ECAB 294, 295-96 (1988).

¹² *C.R.*, *id.*; *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

¹³ *C.R.*, *supra* note 12; *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁴ 5 U.S.C. § 8123(a); *M.T.*, *supra* note 11; *B.S.*, Docket No. 19-0711 (issued October 17, 2019); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994) *see also* *G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that OWCP improperly terminated the claimant's wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion specialist).

¹⁵ *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

decreased sensibility to vibration. Similarly, Dr. Spencer found that appellant continued to have residuals of her bilateral carpal tunnel syndrome based on examination findings. The examination findings included bilateral mild thenar flattening, positive bilateral carpal tunnel direct compression test, mildly positive direct bilateral cubital tunnel direct compression test, bilateral negative Phalen's test, and severe tenderness on palpation over bilateral basal joints. Both Dr. Gaughan and Dr. Spencer concluded that appellant was disabled from work due the accepted bilateral carpal tunnel syndrome. The Board finds that an unresolved conflict of medical evidence remains between the opinions of Dr. Lakin, an OWCP referral physician, and Drs. Gaughan and Spencer, appellant's treating physicians, as to whether appellant had residuals and disability from the accepted bilateral carpal tunnel syndrome.¹⁶

As a conflict remains in the medical opinion evidence prior to June 12, 2019 as to whether appellant's accepted conditions had resolved, the Board finds that OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 12, 2019.¹⁷

¹⁶ *Supra* note 15.

¹⁷ In light of the disposition of this case, issue number 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT December 18, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 20, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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