

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

_____)	
L.S., Appellant)	
)	
and)	Docket No. 20-1204
)	Issued: October 4, 2021
U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ, Employer)	
_____)	

Appearances:
Thomas R. Uliase, 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 May 27, 2020 appellant, through counsel, filed a timely appeal from January 15 and March 23, 2020 merit decisions 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 March 23, 2020 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 properly terminated appellant's wage-loss compensation and medical benefits, effective August 6, 2019, as she had no further disability or residuals causally related to her accepted employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after August 6, 2019 due to her accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board on different issues.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 6, 2000 appellant, then a 39-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained tendinitis causally related to factors of her federal employment.⁵ OWCP accepted her claim for bilateral arm tendinitis and bilateral carpal tunnel syndrome. Appellant underwent an OWCP-authorized left carpal tunnel release on March 22, 2012 and an OWCP-authorized right carpal tunnel release on September 12, 2012. OWCP paid her wage-loss compensation for partial disability based on her wage-earning capacity from April 20, 2003 to May 1, 2013, for total disability on the supplemental rolls from June 2, 2013 to January 10, 2015, and for total disability on the periodic rolls beginning January 11, 2015.

In a progress report dated May 5, 2017, Dr. Teofilo A. Dauhajre, a Board-certified orthopedic surgeon, found a negative's Tinel's sign and Phalen's test of the bilateral wrists. He diagnosed status post right and left carpal tunnel releases and advised that appellant should return as needed.

OWCP referred appellant to Dr. Wayne J. Altman, an orthopedic surgeon, for a second opinion examination.

In a report dated July 21, 2018, Dr. Altman noted that appellant had undergone brain surgery the previous September and was a poor historian. On examination he found a negative Phalen's test and Tinel's sign bilaterally with normal reflexes. Dr. Altman found no evidence of carpal tunnel syndrome or radiculopathy and noted that electrodiagnostic studies from 2015 were normal. He indicated that she had complaints of pain in the upper extremities, but no findings of bilateral arm tendinitis. Dr. Altman opined that appellant could work eight hours per day without restrictions considering her carpal tunnel syndrome. He noted that there were "no medical records concerning bilateral arm tendinitis." Dr. Altman, in an addendum dated October 30, 2018, advised that a functional capacity evaluation (FCE) indicated that appellant could perform sedentary employment full time.

⁴ Docket No. 08-1232 (issued December 18, 2008); Docket No. 10-1818 (issued May 12, 2011); Docket No. 12-0263 (issued May 23, 2012).

⁵ The claim form is not found in the case record.

In response to OWCP's request for clarification, on December 13, 2018, Dr. Altman advised that appellant could return to work performing modified employment.

In February 2019 OWCP requested further clarification from Dr. Altman; however, he had retired.

On May 2, 2019 OWCP referred appellant to Dr. Robert DeFalco, Jr., an osteopath, for a second opinion examination.

In a report dated May 2, 2019, Dr. DeFalco discussed appellant's complaints of continued pain in the wrists, shoulders, and elbows and numbness of the hands bilaterally. On examination he found no instability of the shoulders, full strength with no swelling tenderness, or instability of the elbows bilaterally, and a negative Tinel's sign and Phalen's test of the bilateral wrists with no swelling, effusion, instability, or atrophy. Dr. DeFalco measured reduced motion of the wrists bilaterally. He diagnosed resolved bilateral rotator cuff tendinitis, resolved bilateral elbow tendinitis, and resolved bilateral carpal tunnel syndrome post decompression. Dr. DeFalco found that appellant required no further treatment and could resume her usual employment without restriction. In a work capacity evaluation (Form OWCP-5c) of even date, he indicated that appellant could perform her usual job.

On May 29, 2019 OWCP notified appellant of its proposed termination of her wage-loss compensation and medical benefits as the weight of the evidence established that she no longer had any employment-related residuals or disability due to her accepted employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

In response, counsel argued that a conflict existed between Dr. DeFalco and Dr. Dauhajre. He further maintained that Dr. DeFalco's opinion was insufficiently rationalized to constitute the weight of the evidence, noting that he had not reviewed a description of her job duties.

In a supplemental report dated June 12, 2019, Dr. DeFalco reviewed the position of mail handler and opined that appellant could perform the position without restrictions. On July 16, 2019 he advised that she had subjective findings of reduced range of motion of her wrists bilaterally. Dr. DeFalco advised that appellant had no objective evidence supporting continued residuals of her orthopedic condition.

By decision dated August 5, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective August 6, 2019. It found that Dr. DeFalco's opinion represented the weight of the evidence and established that she had no further disability or residuals of her accepted employment injury.

On August 13, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an August 7, 2019 report, Dr. Dauhajre discussed appellant's history of developing bilateral wrist pain with paresthesia and numbness. He discussed his treatment of appellant beginning in 2009 and her bilateral carpal tunnel releases in 2012. Dr. Dauhajre diagnosed bilateral carpal tunnel syndrome due to her employment duties with a recurrence of symptoms

around October 2014. He recommended an electromyogram (EMG) and nerve conduction velocity (NCV) study.

A telephonic hearing was held on November 25, 2019.

On December 12, 2019 Dr. Dauhajre indicated that he had reviewed Dr. DeFalco's reports. He advised that appellant had developed a recurrence of her carpal tunnel syndrome subsequent to her carpal tunnel releases. Dr. Dauhajre again recommended additional electrodiagnostic testing.

By decision dated January 15, 2020, OWCP's hearing representative affirmed as modified the August 5, 2019 decision. He found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, but that subsequent reports from Dr. Dauhajre were sufficient to create a conflict in medical opinion between Dr. Dauhajre and Dr. DeFalco. The hearing representative instructed OWCP, on remand, to update its statement of accepted facts (SOAF) and refer appellant for an impartial medical examination.

Subsequently, OWCP received the results of an EMG and NCV study performed on March 10, 2015, which yielded normal findings.

On February 4, 2020 OWCP referred appellant to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for an impartial medical examination. It provided him with a statement of accepted facts (SOAF) indicating that it had accepted the claim for bilateral arm tendinitis and bilateral carpal tunnel syndrome. In accompanying questions, OWCP requested that Dr. Pecker address whether she had any further disability or need for further treatment due to the accepted conditions. It advised that it had accepted appellant's claim for bilateral carpal tunnel syndrome of the upper limb, and other synovitis and tenosynovitis of the bilateral upper arms.⁶

In a report dated March 17, 2020, Dr. Pecker obtained a history of appellant developing carpal tunnel syndrome at work in 2002, subsequently treated with surgery. He provided his review of the medical evidence. Dr. Pecker noted that appellant reported decreased sensation in the small finger of the left hand. On examination he found a negative Phalen's test and Tinel's sign bilaterally with no wasting or asymmetry and good interosseous strength. Dr. Pecker found no objective findings of carpal tunnel syndrome bilaterally and opined that she required no further treatment "for her employment[-]related condition." He further found no evidence of disability due to her accepted employment injury or any subsequent injuries. Dr. Pecker opined that appellant could resume her usual employment without restrictions. He explained that objective findings showed no carpal tunnel syndrome and that reliable EMG results were normal.

By decision dated March 23, 2020, OWCP found that appellant's wage-loss compensation and authorization for medical treatment should remain terminated. It determined that Dr. Pecker's opinion represented the special weight of the evidence and established that she had no further employment-related disability or residuals.

⁶ In its questions to Dr. Pecker, OWCP provided the diagnoses from the International Classification of Diseases (ICD)-10.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁷ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁸ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹⁰ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective August 6, 2019, as she had no further disability or residuals causally related to her accepted employment injury.

OWCP properly accorded the weight of the medical evidence to Dr. DeFalco, who provided a second opinion examination. In a report dated May 2, 2019, Dr. DeFalco found that appellant had no swelling, tenderness, or instability of the shoulders and elbows bilaterally. He further found a negative Tinel's sign and Phalen's test of the bilateral wrists, and no swelling, effusion, atrophy, or instability. Dr. DeFalco diagnosed resolved bilateral rotator cuff tendinitis, resolved bilateral elbow tendinitis, and resolved bilateral carpal tunnel syndrome post decompression. He opined that appellant required no further medical treatment and could resume her usual employment without restrictions. In a June 12, 2019 supplemental report, Dr. DeFalco noted that her loss of range of motion of the bilateral wrists was a subjective finding and asserted that she had no objective evidence supporting continued residuals of her orthopedic condition.

Dr. DeFalco based his opinion on a proper factual and medical history and findings on physical examination. He provided medical rationale for his opinion by explaining that there was no objective findings on examination supporting continued residuals or disability due to the accepted conditions.¹² Moreover, there is no contemporaneous medical evidence supporting continued disability or the need for medical treatment. The Board, therefore, finds that OWCP

⁷ *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁸ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁹ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

¹⁰ *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

¹¹ *A.J.*, Docket No. 18-1230 (issued June 8, 2020); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹² See *E.J.*, *supra* note 10.

properly relied upon the reports of Dr. DeFalco in terminating appellant's wage-loss compensation and medical benefits.¹³

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing residuals or disability after that date, causally related to the accepted employment injury.¹⁴ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.¹⁵

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.¹⁶ Where a case is referred to an impartial medical examiner (IME) 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.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision on the issue of whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after August 6, 2019 due to her accepted employment injury.

Subsequent to the termination of appellant's compensation, OWCP properly determined that a conflict in medical opinion existed between Dr. DeFalco and Dr. Dauhajre regarding appellant's current condition, disability, and need for medical treatment after August 6, 2019. In order to resolve the conflict, OWCP referred her to Dr. Pecker for an impartial medical examination pursuant to 5 U.S.C. § 8123(a).

Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently rationalized and based on a proper factual and medical background, must be given special weight.¹⁸

In a March 17, 2020 report, Dr. Pecker provided a history of appellant developing carpal tunnel syndrome in 2002 at work, which had been surgically treated. On examination he found a

¹³ See *L.B.*, Docket No. 19-1380 (issued February 11, 2020).

¹⁴ See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁷ 20 C.F.R. § 10.321; *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

¹⁸ *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Roger Dingess*, 47 ECAB 123 (1995).

negative Phalen's test and Tinel's sign bilaterally. Dr. Pecker opined that appellant had no objective findings of carpal tunnel syndrome bilaterally and required no additional medical treatment for the accepted condition. He found that she had no employment-related disability and could resume her usual work without restrictions. Dr. Pecker advised that he had based his conclusions on objective findings showing no evidence of carpal tunnel syndrome and normal results of reliable EMG studies.

The Board finds that Dr. Pecker failed to properly address whether appellant had further disability or the need for medical treatment due to her accepted condition of bilateral arm tendinitis. Consequently, Dr. Pecker's opinion is not entitled to the special weight afforded an IME.¹⁹

It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate history are of limited probative value.²⁰ Dr. Pecker failed to address whether appellant's accepted condition of bilateral arm tendinitis had resolved.²¹ His medical opinion is, thus, not based on an accurate history and background and is of limited probative value.²² OWCP procedures provide that when a referral physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished.²³ Therefore, the Board finds that Dr. Pecker's opinion was insufficient to resolve the conflict in medical opinion regarding whether appellant had further disability or residuals of her accepted employment injury after August 6, 2019.

Once OWCP undertakes development of the medical evidence, it must produce medical evidence that will resolve the relevant issues in the case.²⁴ When it obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.²⁵ If the IME fails to respond or does not provide an adequate response, OWCP should refer appellant to a new IME for examination.²⁶ On remand, OWCP should obtain a supplemental report from Dr. Pecker addressing whether appellant has further disability or residuals or her accepted condition of bilateral arm tendinitis. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on

¹⁹ See *S.T.*, Docket No. 18-1144 (issued August 9, 2019); *M.R.*, Docket No. 17-0634 (issued July 24, 2018).

²⁰ *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

²¹ See *R.K.*, Docket No. 19-1980 (issued May 7, 2020).

²² *T.H.*, Docket No. 17-0025 (issued July 6, 2017); *L.L.*, Docket No. 15-0672 (issued September 23, 2016).

²³ *T.H.*, *id.*

²⁴ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

²⁵ *B.J.*, Docket No. 18-1186 (issued July 9, 2019).

²⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010); see also *J.K.*, Docket No. 21-0007 (issued July 30, 2021); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

appellant's claim for compensation for continuing employment-related disability or residuals after August 6, 2019 due to her accepted employment injury.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective August 6, 2019 as she had no further disability or residuals causally related to her accepted employment injury. The Board further finds that this case is not in posture for decision regarding whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after August 6, 2019 due to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed and the March 23, 2020 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 4, 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