

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

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P.J., Appellant)	
)	
and)	Docket No. 23-1168
)	Issued: February 6, 2024
U.S. POSTAL SERVICE, CORONA-)	
ELMHURST STATION POST OFFICE,)	
Corona, NY, Employer)	
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Appearances:
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 11, 2023 appellant, through counsel, filed a timely appeal from a July 13, 2023 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 to consider the merits of this 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish continuing disability or residuals, on or after July 18, 2021, causally related to her accepted May 3, 2012 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 3, 2012 appellant, then a 51-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she missed a step and fell, injuring her right hand while in the performance of duty. She stopped work on May 4, 2012. OWCP accepted the claim for right hand sprain. It paid appellant wage-loss compensation on the periodic rolls, beginning September 4, 2012.

On September 4, 2012 OWCP proposed to terminate appellant's medical benefits, finding that the report of a second opinion physician represented the weight of the medical evidence, establishing that appellant no longer had residuals due to her accepted work-related injury. It afforded her 30 days to submit additional evidence or argument in writing, if she disagreed with the proposed termination of benefits.

By decision dated September 4, 2012, OWCP terminated appellant's wage-loss compensation, effective that date.

On March 27, 2013 appellant, through counsel requested reconsideration.

By decision dated June 25, 2013, OWCP denied modification.

Appellant appealed the June 25, 2013 decision to the Board. By decision dated April 14, 2014, the Board reversed OWCP's June 25, 2013 decision with regard to termination.⁴

Appellant's attending physician, Dr. Ignatius Daniel Roger, a Board-certified plastic surgeon, submitted a series of notes dated October 13, 2014 through January 18, 2021 recounting that she fell and injured her right hand at work on May 3, 2012. He diagnosed tenosynovitis of the right hand and wrist, right carpal tunnel syndrome (CTS), and contusion. Dr. Roger opined that the diagnosed conditions of right CTS and right wrist sprain were directly due to the trauma when appellant fell onto her right hand at work on May 3, 2012. He also indicated that she was capable of performing modified-duty work beginning October 15, 2014.

³ Docket No. 22-0905 (issued November 15, 2022); Docket No. 13-1998 (issued April 14, 2014).

⁴ Docket No. 13-1998 (issued April 14, 2014).

On September 7, 2016 appellant underwent right-hand electromyogram and nerve conduction velocity (EMG/NCV) testing which demonstrated right CTS.

On November 9, 2020 OWCP expanded the acceptance of the claim to include right CTS and right wrist sprain.

On February 24, 2021 OWCP referred appellant along with a statement of accepted facts (SOAF) and a series of questions to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination to determine her ability to return to work and her medical residuals.

In his March 15, 2021 report, Dr. Sultan recounted appellant's history of injury on May 5, 2012 and her medical treatment. On physical examination he found no evidence of ongoing disability due to the accepted employment injuries of May 3, 2012. Dr. Sultan opined that appellant could return to her date-of-injury position with no restrictions and that she had reached maximum medical improvement.

On May 14, 2021 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, finding that the report of the second opinion physician, Dr. Sultan, represented the weight of the medical evidence establishing that she no longer had any residuals or continuing disability from work due to her accepted work-related injury. It afforded her 30 days to submit additional evidence or argument in writing, if she disagreed with the proposed termination of benefits.

By decision dated July 1, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 18, 2021. It found that the weight of the medical evidence, represented by Dr. Sultan's report, established that she no longer had residuals or disability from work due to her accepted May 3, 2012 employment injury.

In a report dated July 19, 2021, Dr. Roger recounted appellant's continuing symptoms of pain and numbness in the right hand and wrist and triggering of the right middle and ring fingers. He diagnosed right CTS and tenosynovitis, right hand.

On February 1, 2022 appellant requested reconsideration. She provided a July 28, 2021 report, wherein Dr. Roger described her history of injury on May 3, 2012 and her medical treatment from May 3, 2012 through July 19, 2021. Dr. Roger diagnosed flexor stenosing tenosynovitis of the right hand with right CTS. He disagreed with Dr. Sultan's findings of normal strength and range of motion of the right wrist and fingers instead reporting decreased mobility of the right wrist and limited dexterity and strength in her dominant right hand. Dr. Roger found that appellant's physical examination was consistent with positive Phalen's test, Tinel's sign, and compression test that correlated with her positive EMG/NCV test findings. He determined that she could not perform the full duties of her date-of-injury position.

By decision dated April 28, 2022, OWCP denied modification.

Appellant appealed to the Board. By decision dated November 15, 2022, the Board affirmed the July 1, 2021 termination decision, finding that OWCP met its burden of proof to

terminate appellant's wage-loss compensation effective July 18, 2021.⁵ The Board further found that the case was not in posture for decision with regard to continuing disability or residuals on or after July 18, 2021 as a conflict of medical opinion evidence existed between Drs. Sultan and Roger. The Board remanded the case for referral to an impartial medical examiner (IME) to resolve the issue of appellant's continuing disability or medical residuals on or after July 18, 2021 causally related to the accepted employment injury.

On December 29, 2022 OWCP referred appellant, a SOAF, and a series of questions to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his February 6, 2023 report, Dr. Pecker detailed the history of the injury and appellant's treatment. He reviewed the SOAF. Dr. Pecker noted findings on examination global tenderness of the right wrist and decreased sensation to pinprick on the right upper extremity, but no wasting or asymmetry and variable motor strength. He diagnosed trapeziometacarpal arthritis and found no residuals of right CTS with a negative Tinel's sign and Phalen's test, no sensory delineation, no motor delineation, nor range of motion issues. Dr. Pecker observed that persistent pain was not consistent with the continued effects of a sprain and that positive findings on EMG/NCV studies were consistent with those of individuals who have asymptomatic CTS. He also reported multiple positive Waddell's signs and declared that there were no longer any objective findings of the accepted work-related conditions and that her employment-related conditions of CTS, sprain of the right wrist, and sprain of the right hand had resolved. Dr. Pecker found that appellant could not perform the lifting requirements of her date-of-injury position, but specified that her inability to intermittently lift 70 pounds was due to her stature, physical strength, and level of physical conditioning and not secondary to any residual of her work injury.

On March 29, 2023 OWCP requested a supplemental opinion from Dr. Pecker, specifically asking that he address whether appellant's medical residuals and disability from work continued on and after July 18, 2021. It observed that his report did not specify when appellant's conditions and work-related disability had resolved. Dr. Pecker did not respond.

By decision dated July 13, 2023, OWCP found that appellant had not met her burden of proof to establish continuing disability or residuals on or after July 18, 2021, causally related to her accepted May 3, 2012 employment injury.

LEGAL PRECEDENT

When OWCP properly terminates wage-loss compensation and medical benefits, the burden shifts to appellant to establish continuing disability or residuals, on or after that date, causally related to the accepted employment injury.⁶ To establish causal relationship between continuing residuals and/or disability and the accepted employment injury, an employee must

⁵ *Id.*

⁶ *K.M.*, Docket No. 21-1351 (issued April 28, 2022); *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *B.A.*, Docket No. 17-1471 (issued July 27, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.⁷

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.⁸ 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.⁹

ANALYSIS

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

Dr. Pecker, the IME, in his February 6, 2023 report, found that appellant's accepted conditions of right CTS and right wrist sprain had resolved without medical residuals or employment-related disability. However, he did not address whether she had any continuing disability or medical residuals on or after July 18, 2021, the date OWCP terminated her benefits. In this case, OWCP sought clarification from Dr. Pecker on March 29, 2023, however, he failed to respond to OWCP's request for a supplemental report.

In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁰

For the above-described reasons, there remains an unresolved conflict in the medical opinion evidence regarding whether appellant has continuing disability and medical residuals on or after July 18, 2021, causally related to her accepted May 3, 2012 employment injury.

The Board will set aside OWCP's July 13, 2023 decision and remand the case for further development of the medical evidence. On remand, OWCP shall obtain a supplemental opinion from Dr. Pecker clarifying whether appellant had any continuing disability or medical residuals on or after July 18, 2021, the date OWCP terminated her benefits. If the IME is unable to clarify his opinion or if his requested supplemental report is also lacking rationale, OWCP shall refer appellant to a new IME for the purpose of obtaining a rationalized medical opinion on the issue.¹¹

⁷ *C.L.*, Docket No. 18-1379 (issued February 3, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

⁸ 5 U.S.C. § 8123(a); *R.M.*, Docket No. 21-1150 (issued April 5, 2022); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁹ 20 C.F.R. § 10.321.

¹⁰ *M.N.*, Docket No. 21-0980 (issued July 24, 2023); *C.C.*, Docket No. 22-1315 (issued July 23, 2023); *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

¹¹ *Id.*; see also *Harold Travis*, 30 ECAB 1071 (1979).

After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 6, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board