

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

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**D.B., Appellant**

**and**

**FEDERAL JUDICIARY, CHIEF PROBATION  
OFFICE, Salt Lake, Utah, Employer**

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**Docket No. 10-2094  
Issued: June 22, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 13, 2010 appellant filed a timely appeal from the February 18, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her wage-loss compensation and medical benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 15, 2009.

**FACTUAL HISTORY**

In April 2000, OWCP accepted that appellant, then a 41-year-old probation clerk, sustained right carpal tunnel syndrome (CTS) due to her repetitive work duties. Appellant received compensation for periods of disability.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

In an August 11, 2006 report, Dr. Michael Piansky, an attending Board-certified internist, determined that the original work injury of right CTS was still present. He also noted that appellant had transverse myelitis which was aggravating her underlying bilateral hand weakness and numbness.

On January 26, 2007 appellant was referred for a second opinion evaluation with a Board-certified neurologist to determine whether she had residuals of right CTS. On February 28, 2007 Dr. Charles Nicol, a Board-certified neurologist, found that her neurological examination was fairly normal and that she did not have right CTS. He noted that appellant did not have numbness and tingling solely in the first three fingers of her right hand and that she did not have a Tinel's sign on the right side.

On July 30, 2007 appellant was referred for a referee evaluation to resolve a conflict in the medical opinion between Dr. Nicol, the second opinion examiner and the attending physician, Dr. Piansky. On August 23, 2007 the referee examiner, Dr. David Cohen, a Board-certified neurologist, opined that the diagnostic testing was consistent with transverse myelitis, a condition unrelated to CTS.

In a July 10, 2008 decision, OWCP's hearing representative determined that appellant should be referred for another referee examination with a professorial level neurological specialist to ascertain her current work-related diagnosis or diagnoses.

Appellant was referred to Dr. Joseph D. Weissman, a Board-certified professorial level neurologist, for an impartial medical examination. In an August 7, 2008 report, Dr. Weissman opined that she did not have right CTS and that her current condition was transverse myelitis or multiple sclerosis. He provided an extensive discussion of the medical evidence of record, including electromyogram (EMG) and nerve conduction velocity (NCV) testing from August 22, 2007 which he characterized as showing "rather mild abnormalities." Dr. Weissman indicated that the Tinel's test was negative bilaterally, that the Phalen's test gave more wrist than hand symptoms and that there were very mild tingling sensations in the right fingertips after about one minute. He stated:

"There have been no objective findings on examination to support a diagnosis of significant CTS. Not discussed previously by the patient are the previously documented decreased visual acuity in the left eye that persists and the asymmetric pupillary responses. Various diagnoses have been proposed including: (1) [CTS], (2) thoracic outlet syndrome, (3) cervical radiculopathy and (4) transverse myelitis/multiple sclerosis.

"I think [appellant's] current diagnosis is transverse myelitis which may actually be [multiple sclerosis] when viewed in the entirety of her clinical history and data. It would explain all of her symptoms. I do not see evidence of a clinically significant or disabling [CTS] at this time. In the past it does not look like there was a[n] objectively diagnosed case of [CTS].

“Re: resolution of the [CTS]. [Appellant] had, at best, a mild [CTS] originally and there would appear to be no objective measure of progression in terms of nerve conductions or evidence of motor atrophy.”

In an October 23, 2008 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits. It found that the weight of the medical opinion regarding continuing work-related residuals rested with the opinion of the impartial medical specialist, Dr. Weissman, who determined that she ceased to have residuals of right CTS. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed termination action.

In a November 20, 2008 letter, appellant argued that she continued to have residuals of her work injury and asserted that the opinion of Dr. Weissman was not well rationalized. She submitted medical evidence in support of her position. A magnetic resonance imaging (MRI) scan of appellant’s cervical spine obtained on November 14, 2008 showed unremarkable results and MRI scan testing of her lumbar spine from the same date showed degenerative disc disease at L5-S1 with a very small central disc herniation. A November 26, 2008 letter from Dr. William Tung, an attending Board-certified neurologist, detailed prior diagnostic test results. Dr. Tung stated that appellant’s original work injury was still present and recommended that any job she performed should not involve much in the way of hand movement.

On December 16, 2008 OWCP requested that Dr. Weissman address whether appellant had an employment-related thoracic outlet syndrome in the past or currently. On January 26, 2009 Dr. Weissman stated that appellant did not have and never had a diagnosis of thoracic outlet syndrome. He based his opinion on the statement of accepted facts, his physical examination and other medical evidence of record.

In a March 5, 2009 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective March 15, 2009. It found that the well-rationalized opinion of Dr. Weissman showed that appellant ceased to have residuals of right CTS.

On March 29, 2009 appellant requested a hearing before OWCP’s hearing representative regarding the termination of her compensation. She continued to express her belief that the opinion of Dr. Weissman was not sufficiently rationalized to constitute the weight of the medical evidence.

Appellant submitted a June 8, 2006 MRI scan of her brain which showed normal results with the exception of a single small nonspecific white matter lesion in the left parietal lobe. She also submitted a December 28, 2006 MRI scan of her brain which was unchanged compared with the previous study. Medical reports dated March 25 and June 8, 2009 provided diagnoses of right volar ganglion cyst.

At the November 18, 2009 hearing, appellant further discussed her reasons for disagreeing with the termination of her compensation. She indicated that she had been working

as a substitute teacher intermittently and providing in-home tutoring for two hours a week for the last month. Appellant stated that she was not under active medical treatment.<sup>2</sup>

In a February 18, 2010 decision, OWCP's hearing representative affirmed the March 5, 2009 OWCP decision, indicating that the weight of the medical evidence continued to rest with the opinion of Dr. Weissman.

### **LEGAL PRECEDENT**

Under FECA,<sup>3</sup> once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>5</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

Section 8123(a) of FECA provides in pertinent part: "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."<sup>7</sup> In situations where there exist 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.<sup>8</sup>

### **ANALYSIS**

The Office properly determined that there was a conflict in the medical opinion between Dr. Piansky, an attending Board-certified internist, and Dr. Nicol, a Board-certified neurologist acting as OWCP's referral physician, on the issue of whether appellant had residuals of the accepted right CTS condition. In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Weissman, a Board-certified neurologist of professorial rank, for an impartial medical examination and an opinion on the matter.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Weissman, the impartial medical specialist selected to resolve

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<sup>2</sup> Appellant filed a claim for a schedule award due to her right CTS and, in a July 9, 2009 decision, OWCP denied her claim. The matter of her entitlement to schedule award compensation is not the subject of the present appeal.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>5</sup> *Id.*

<sup>6</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the conflict in the medical opinion. The opinion of Dr. Weissman establishes that appellant ceased to have right CTS.

In an August 7, 2008 report, Dr. Weissman indicated that there had been no objective findings on examination to support a diagnosis of significant CTS. Various diagnoses were proposed including: (1) CTS; (2) thoracic outlet syndrome; (3) cervical radiculopathy and (4) transverse myelitis/multiple sclerosis. Dr. Weissman stated that appellant's current diagnosis was transverse myelitis which might actually be multiple sclerosis when viewed in the entirety of her clinical history and data. He did not see evidence of clinically significant or disabling CTS.<sup>9</sup>

The Board has carefully reviewed the opinion of Dr. Weissman and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Weissman provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>10</sup> He provided medical rationale for his opinion by explaining that appellant's continuing problems were caused by a nonwork-related condition.<sup>11</sup>

On appeal, appellant argued that Dr. Weissman did not perform a comprehensive evaluation of her condition. The Board notes that he carried out an extensive review of the relevant medical evidence and performed a thorough examination of appellant's right arm. Appellant claimed that Dr. Weissman was biased against her as evidenced, in part, by the fact that at the August 7, 2008 examination he wished her good luck in finding a job rather than telling her that he hoped her condition improved. However, she did not adequately articulate the reasons for her belief that Dr. Weissman was biased against her and the Board's review of the evidence of record does not reveal any such bias. Appellant asserted that Dr. Weissman's evaluation was incomplete because he required additional EMG and NCV testing to assess her condition. The Board notes that he reviewed and commented on the most recent EMG and NCV test results obtained prior to his examination and he provided no indication that these test results were not adequate to evaluate appellant's condition.

For these reasons, OWCP met its burden of proof to terminate appellant's disability compensation and medical benefits effective March 15, 2009.

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.

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<sup>9</sup> In a supplemental report dated January 26, 2009, Dr. Weissman clarified that appellant did not have and never had a valid diagnosis of thoracic outlet syndrome.

<sup>10</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>11</sup> Appellant submitted medical evidence which she felt showed that the termination of her compensation was improper, including several reports detailing findings of diagnostic testing. These reports had previously been submitted and they do not show that the termination of her compensation was improper. In a November 26, 2008 letter, Dr. Tung, an attending Board-certified neurologist, stated that appellant's original work injury was still present. However, he did not provide any medical rationale in support of this opinion. Medical reports dated March 25 and June 8, 2009 provided pursuant to the Act<sup>11</sup> and diagnoses of right volar ganglion cyst, but these reports would not show that appellant had residuals of her right CTS.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's disability compensation and medical benefits effective March 15, 2009.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board