

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

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| <p>T.B., Appellant</p> <p>and</p> <p>DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, Philadelphia, PA, Employer</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>Docket No. 10-2294</p> <p>Issued: June 16, 2011</p> |
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Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 September 13, 2010 appellant, through his attorney, filed a timely appeal from an August 23, 2010 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to the Federal Employees' Compensation Act¹ 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 appellant sustained a bilateral wrist condition causally related to factors of his federal employment.

FACTUAL HISTORY

On December 13, 2005 appellant, then a 56-year-old housekeeping aid, filed an occupational disease claim alleging that he sustained numbness to both wrists due to factors of

¹ 5 U.S.C. § 8101 *et seq.*

his federal employment. In a statement dated February 15, 2006, he attributed his bilateral wrist condition to using a mop since 2000.

By decision dated March 14, 2006, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. It determined that he did not submit sufficient medical evidence to establish that he sustained a condition causally related to the identified work factors.

On March 14, 2007 appellant requested reconsideration. In a decision dated June 15, 2007, the Office denied modification of its March 14, 2006 decision. It noted that the medical evidence did not address the cause of the diagnosed condition of carpal tunnel syndrome.

Appellant again requested reconsideration. He submitted a January 29, 2008 report from Dr. John Esterhai, a Board-certified orthopedic surgeon, who diagnosed moderate bilateral carpal tunnel syndrome confirmed by a May 2, 2007 electromyogram (EMG) and nerve conduction study. Dr. Esterhai related that appellant attributed his condition to using a mop at work and found that it was "more than likely reasonable to assume that his carpal tunnel symptoms are directly related to his vocational activities."

In a decision dated March 6, 2008, the Office denied modification of its March 14, 2006 decision. It determined that Dr. Esterhai's opinion was speculative in nature and thus insufficient to meet appellant's burden of proof.

On August 26, 2008 appellant requested reconsideration. In a September 9, 2009 nonmerit decision, the Office denied his request after finding that he did not submit evidence or argument sufficient to warrant reopening the case for further merit review.

On January 29, 2009 appellant, through his attorney, requested reconsideration based on a December 28, 2008 report from Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon, who found a negative Tinel's sign and Phalen's test bilaterally, no atrophy and intact sensation. Dr. Zamarin discussed appellant's work duties, including his use of a mop, vacuum cleaner and buffer. He noted that he did not use a computer. Dr. Zamarin reviewed diagnostic studies dated October 2005 and May 2007, which found bilateral carpal tunnel syndrome. He diagnosed bilateral carpal tunnel syndrome based on appellant's subjective complaints and diagnostic studies. Dr. Zamarin attributed the carpal tunnel syndrome to his work duties, including sweeping, mopping, polishing floors, vacuuming and using a vibrating buffer. He recommended bilateral carpal tunnel releases.

On March 12, 2009 the Office referred appellant, together with a statement of accepted facts (SOAF), to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion examination. The SOAF indicated that his duties included mopping the floor the majority of the day, using a hand wringer to remove excess water from the mop and emptying trash. In a report dated May 12, 2009, Dr. Didizian reviewed appellant's work duties and noted that he vacuumed every other day, buffered floors once a month and mopped. He related that appellant used a cane in either hand to walk due to degenerative disc disease of the knees. Dr. Didizian indicated that appellant used a buffer only once a month and that a vacuum did not vibrate. He stated, "There are approximately 26 causes of carpal tunnel syndrome and these

have to be investigated in [appellant] to make sure that there is no other causation.” Dr. Didizian asserted that using a cane could cause symptoms of carpal tunnel syndrome. He determined that appellant’s carpal tunnel syndrome was unrelated to his federal employment. Dr. Didizian related:

“The criteria do not fit as stated. [Appellant] used his hands in a variable manner. Vibratory tools were not used frequently. [Appellant] worked in that capacity since 2000 and developed symptoms in 2005, again that does not fit the criteria, which indicates that normally if it is on the base of repetitive phenomenon at work, it will manifest itself approximately at the one[-]year level on the basis of accumulation of microtrauma.”²

By decision dated May 18, 2009, the Office denied modification of its prior decision. On May 20, 2009 appellant requested reconsideration. His attorney argued that a conflict existed between Dr. Didizian and Dr. Zamarin. In a May 26, 2009 nonmerit decision, the Office denied appellant’s request after finding that he had not submitted evidence or raised argument sufficient to warrant merit review under section 8128.

Appellant, through his attorney, continued to request reconsideration. In a statement accompanying his July 12, 2009 request for reconsideration, counsel provided a detailed description of his work duties, including the use of vacuum cleaners and buffers that vibrated. In decisions dated June 29 and October 13, 2009, the Office denied modification.

In a report dated May 3, 2010, Dr. Zamarin reviewed the SOAF and discussed appellant’s work duties of mopping the floor most of the day and using a hand wringer to remove water from the mop. He further reviewed the medical evidence of record, including the results of diagnostic studies. Dr. Zamarin diagnosed carpal tunnel syndrome and found that the condition precluded appellant from performing his usual employment. He stated:

“I agree with Dr. Didizian that [appellant] has bilateral carpal tunnel syndrome. Dr. Didizian indicates other reasons that are not related. I respectfully disagree with Dr. Didizian, who does [not] actually explain why [appellant] has carpal tunnel syndrome, but only mentions that there are other possible causes. I agree that there may well be multiple factors contributing to [appellant’s] carpal tunnel syndrome, however, it is my opinion that the work activity described in the [SOAF] also contributed to him developing his condition for which he should consider having surgery. While the use of the cane may also contribute, he developed the bilateral carpal tunnel syndrome long before he started recently using a can[e] on account of the condition of his knees.”

On May 20, 2010 appellant, through his attorney, requested reconsideration based on the May 3, 2010 report from Dr. Zamarin. Counsel also argued that the SOAF prepared by the Office did not adequately set forth the physical requirements of the position. He submitted witness statements from appellant’s coworkers, who agreed that he had accurately described his job duties.

² Dr. Didizian noted that appellant had retired from employment.

By decision dated August 23, 2010, the Office denied modification of its October 13, 2009 decision. It found that Dr. Didizian's opinion represented the weight of the evidence.

On appeal, appellant's attorney argues that Dr. Didizian's report is not rationalized as he did not explain why appellant's carpal tunnel syndrome was not work related. He further contends that a conflict exists between Dr. Didizian and Dr. Zamarin. Counsel also asserts that the SOAF did not adequately describe appellant's work duties.

LEGAL PRECEDENT

An employee seeking benefits under the Act³ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁶ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁷ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁸

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.⁹

ANALYSIS

The Board finds that the case is not in posture for decision due to a conflict in medical evidence between Dr. Zamarin, appellant's attending physician, and Dr. Didizian, an Office

³ *Supra* note 1.

⁴ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁷ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁸ *Beverly A. Spencer*, 55 ECAB 501 (2004).

⁹ 5 U.S.C. § 8123; 20 C.F.R. § 10.321(b); *see also Darlene R. Kennedy*, 57 ECAB 414 (2006).

referral physician, regarding whether appellant sustained bilateral carpal tunnel syndrome due to factors of his federal employment.

On May 12, 2009 Dr. Didizian discussed appellant's work duties and noted that he mopped floors, used a vacuum every other day and buffed floors each month. He indicated that carpal tunnel syndrome could have 26 different causes, including the use of a cane. Dr. Didizian noted that appellant used a cane due to degenerative knee disease. He diagnosed carpal tunnel syndrome but found that it was unrelated to appellant's federal employment. Dr. Didizian explained that appellant did not use vibratory tools and that he developed symptoms after more than one year of exposure, which he opined would not be expected if the condition was employment related.

On December 28, 2008 Dr. Zamarin determined that EMG studies dated October 2005 and May 2007 revealed bilateral carpal tunnel syndrome. On examination he found a negative Tinel's sign and Phalen's test. Dr. Zamarin diagnosed bilateral carpal tunnel syndrome based on subjective complaints and the EMG findings. He asserted that the carpal tunnel syndrome was causally related to appellant's employment duties. On May 3, 2010 Dr. Zamarin reviewed appellant's description of work duties identified as causing the condition. He diagnosed carpal tunnel syndrome and disagreed with Dr. Didizian's finding that it was unrelated to appellant's federal employment. Dr. Zamarin noted that appellant was diagnosed with carpal tunnel syndrome prior to his use of a cane and opined that his work duties contributed to the condition.

Where there exists a conflict of medical opinion between a physician making an examination for the government and the employee's physician, the Office must appoint a third physician to conduct an impartial medical examination to resolve the conflict.¹⁰ On remand, it should refer appellant to an impartial medical specialist to determine whether his bilateral carpal tunnel syndrome was caused or aggravated by his federal employment. The Office should also prepare an updated SOAF containing a more detailed description of his work duties. Following such further development as may be deemed necessary, it shall issue an appropriate final decision on the issue of whether appellant sustained a bilateral carpal tunnel syndrome in the performance of duty.

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict in medical opinion.

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 16, 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