

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

M.B., Appellant)	
)	
and)	
)	
DEPARTMENT OF HOMELAND SECURITY,)	Docket No. 24-0697
U.S. CUSTOMS AND BORDER PROTECTION,)	Issued: July 25, 2024
JOHN F. KENNEDY INTERNATIONAL)	
AIRPORT, Jamaica, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 16, 2024 appellant, through counsel, filed a timely appeal from a January 23, 2024 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 an 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 January 29, 2024 decision, appellant submitted additional evidence to OWCP. 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, effective October 4, 2022, as she no longer had disability causally related to her accepted May 6, 1999 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability, or after October 4, 2022, causally related to her accepted employment injury.

FACTUAL HISTORY

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

On May 7, 1999 appellant, then a 47-year-old commodity team aide, filed a traumatic injury claim (Form CA-1) alleging that on May 6, 1999 she strained her right hand and wrist when separating and lifting liquidation bundles while in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx830, for tenosynovitis of the right hand. It subsequently expanded the acceptance of the claim to include bilateral carpal tunnel syndrome. OWCP paid appellant wage-loss compensation for total disability on the periodic rolls.⁵

In an October 14, 2020 report, Dr. Walter Rho, a Board-certified orthopedic surgeon, noted that appellant had experienced an employment injury to both hands on May 6, 1999. On examination, he found a positive Tinel's sign and Phalen's test of both hands with reduced sensation to light touch over the median nerve. Dr. Rho diagnosed bilateral carpal tunnel syndrome. He found that appellant could return to work for four hours per day with no lifting over 10 pounds.

On October 29, 2020 OWCP referred appellant, the case record, and a statement of accepted facts (SOAF) to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination.

In a February 4, 2021 report, Dr. Sultan found a negative Tinel's sign and Phalen's test bilaterally and an equivocal Finkelstein's test on the right. He diagnosed bilateral carpal tunnel syndrome, in remission, and bilateral de Quervain's disease, in remission. Dr. Sultan opined that the accepted conditions were no longer causing objective findings and opined that appellant could return to her usual employment without restrictions. In a work capacity evaluation (Form OWCP-5c) of even date, he found that appellant had no work restrictions.

On March 1, 2021 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits as the evidence established that she no longer had any employment-related residuals or disability due to her accepted May 6, 1999 employment injury. It afforded her 30 days to submit evidence or argument if she disagreed with the proposed termination of benefits.

⁴ Docket No. 20-1578 (issued March 25, 2021).

⁵ OWCP additionally accepted appellant's occupational disease claim, filed on November 8, 2000, for left carpal tunnel syndrome under OWCP File No. xxxxxx524, which it administratively combined with the current file number, OWCP File No. xxxxxx830, serving as the master file.

Subsequently, OWCP received February 12 and March 12, 2021 progress reports from Dr. Rho, who diagnosed bilateral carpal tunnel syndrome based on positive physical findings and provided work restrictions. In an attending physician's report (Form CA-20), Dr. Rho diagnosed bilateral carpal tunnel syndrome and checked a box marked "Yes" that the condition was caused or aggravated by an injury to her hands at work. He found that appellant was disabled from her usual employment but could work four hours per day typing and writing with no lifting over 10 pounds.

By decision dated April 1, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 2, 2021.

On April 14, 2021 appellant, through her then counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant continued to submit progress reports from Dr. Rho containing findings similar to those contained in his prior reports.

Following a preliminary review, by decision dated June 30, 2021, OWCP's hearing representative vacated the April 1, 2021 decision. The hearing representative found that a conflict existed between Dr. Rho and Dr. Sultan regarding whether appellant had continued employment-related residuals or disability.

In a Form CA-20 dated March 14, 2022, Dr. Rho diagnosed bilateral carpal tunnel syndrome due to an injury at work and found that appellant could work four hours per day with restrictions of no lifting over 10 pounds.

On April 11, 2022 OWCP referred appellant, the case record, and a SOAF to Dr. Brian Kincaid, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated May 10, 2022, Dr. Kincaid reviewed appellant's history of injury and noted that she had declined surgery for her de Quervain's tenosynovitis and right carpal tunnel syndrome. He found that she developed left carpal tunnel syndrome due to overuse of her left hand. On examination Dr. Kincaid found a positive Finkelstein's test on the right and a positive Tinel's sign and Phalen's test bilaterally. He further found reduced sensation "to light touch in the medial nerve distribution bilaterally." Dr. Kincaid recommended a right de Quervain's release and bilateral carpal tunnel releases and opined that appellant's condition would not improve absent surgery. He advised that the work-related conditions had not resolved based on the positive findings on examination. Dr. Kincaid asserted, "[Appellant] is currently capable to returning to her date-of-injury job. Her diagnoses of right de Quervain's tenosynovitis and bilateral carpal tunnel syndrome do not prevent her from being able to perform her usual job activities."

On June 14 and July 26, 2022 Dr. Rho evaluated appellant for bilateral wrist pain and tingling and diagnosed bilateral carpal tunnel syndrome.

On August 11, 2022 OWCP advised appellant of its proposed termination of her wage-loss compensation as the evidence established that she no longer had any disability due to her accepted May 6, 1999 employment injury. It afforded her 30 days to submit evidence or argument if she disagreed with the proposed termination of benefits.

In a response dated August 24, 2022, appellant noted that Dr. Kincaid found that she had continued medical problems.

By decision dated October 4, 2022, OWCP terminated appellant's wage-loss compensation, effective that date. It found that Dr. Kincaid's opinion as the impartial medical examiner (IME) represented the special weight of the evidence and established that she had no further employment-related disability.

On October 12, 2022 appellant requested an oral hearing before a representative of the Branch of Hearings and Review.

Appellant submitted progress reports from Dr. Rho dated October 12, 2022 and January 11 and March 21, 2023.

A hearing was held on February 16, 2023. Appellant asserted that Dr. Kincaid's opinion was contradictory in nature.

By decision dated April 27, 2023, OWCP's hearing representative affirmed the October 4, 2022 termination decision.

Appellant subsequently submitted progress reports from Dr. Rho dated May through September 2023.

On January 15, 2024 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Kincaid's opinion was conclusory and unsupported by medical rationale.

By decision dated January 23, 2024, OWCP denied modification of its April 27, 2023 decision.

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.⁶ After it has determined that an employee 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.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

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."⁹ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and

⁶ See *L.M.*, Docket No. 22-0342 (issued August 25, 2023); *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁸ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁹ 5 U.S.C. § 8123(a).

OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective October 4, 2022, as she no longer had disability causally related to her accepted May 6, 1999 employment injury.

OWCP properly determined that a conflict existed between Dr. Rho, appellant's treating physician, and Dr. Sultan, an OWCP referral physician, regarding whether she had continued disability due to her accepted May 6, 1999 employment injury. It referred her to Dr. Kincaid, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

Where a case is referred to an impartial medical specialist 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.¹²

In a May 10, 2022 report, Dr. Kincaid discussed appellant's history of injury and provided examination findings of a loss of sensation to light touch in the bilateral median nerve distribution, a right positive Finkelstein's test, and bilateral positive Tinel's sign and Phalen's test. He noted continued residuals of appellant's right de Quervain's tenosynovitis and bilateral carpal tunnel syndrome based on the objective examination findings. Dr. Kincaid indicated that her condition would not improve without surgery. He concluded that appellant's right de Quervain's tenosynovitis and bilateral carpal tunnel syndrome would not prevent her from returning to her regular employment. Dr. Kincaid, however, did not provide any rationale for his opinion. While he found that appellant was able to work, he failed to explain medically how the physical examination findings and history supported this conclusion.¹³ When an IME fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, such opinion is insufficient to resolve a conflict in medical evidence.¹⁴

¹⁰ 20 C.F.R. § 10.321.

¹¹ See *J.P.*, Docket No. 23-0075 (issued March 26, 2023); *C.M.*, Docket No. 20-1647 (issued October 5, 2021); *James P. Roberts*, 31 ECAB 1010 (1980).

¹² *T.L.*, Docket No. 23-0798 (issued January 12, 2024); *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ *G.M.*, Docket No. 21-0401 (issued September 14, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Roger Dingess*, 47 ECAB 123 (1995).

¹⁴ *M.P.*, Docket No 16-0551 (issued May 19, 2017); *James T. Johnson*, 39 ECAB 1252 (1988).

Consequently, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits.¹⁵

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation, effective October 4, 2022, as she no longer had disability causally related to her accepted May 6, 1999 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 25, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.