

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

M.B., Appellant)	
)	
and)	Docket No. 24-0820
)	Issued: September 26, 2024
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, New York, NY,)	
Employer)	
)	

Appearances:
Stephen Barszcz, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 8, 2024 appellant, through counsel, filed a timely appeal from a May 7, 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.

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.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 22, 2021, as she no longer had disability or residuals causally related to her accepted employment conditions; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after December 22, 2021, due to her accepted employment conditions.

FACTUAL HISTORY

On November 6, 2006 appellant, then a 39-year-old language specialist, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome (CTS) due to factors of her federal employment including considerable amounts of typing. She noted that she first became aware of her condition and realized its relation to her federal employment on August 30, 2006. Appellant did not initially stop work. On January 16, 2007 OWCP accepted the claim for bilateral CTS. Appellant underwent a right carpal tunnel release and flexor tenosynovectomy on July 19, 2007. She underwent a left carpal tunnel release on February 15, 2010. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing July 19, 2007 and on periodic rolls, effective August 5, 2007.

In a report dated October 23, 2019, Dr. Joseph Daday, Board-certified in family practice indicated that appellant's subjective complaints and evaluation revealed continued pain and objectively positive findings for numbness/tingling in the fingers bilaterally, weakness with a decrease in grasp bilaterally, and claw hand, left worse than right. He diagnosed her with CTS and contractures with claw hand secondary to failed carpal tunnel surgery. In an attending physician's report (Form CA-20) of even date, Dr. Daday opined that appellant was permanently disabled.

In a November 9, 2020 attending physician's report (Form CA-20), Dr. Daday diagnosed appellant with bilateral CTS and neuropathy. He also noted her claw hand with decreased flexion and extension. Dr. Daday concluded that appellant was permanently and totally disabled.

On March 3, 2021 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Frank J. Corrigan, Board-certified in orthopedic surgery, for a second opinion examination to determine that status of appellant's accepted condition, extent of disability, and appropriate treatment recommendations.

In a May 17, 2021 report, Dr. Daday diagnosed bilateral CTS. He explained that appellant had a failed surgery and a permanent left claw hand deformity. Dr. Daday indicated that she was not capable of working at that time.

In a report dated July 1, 2021, Dr. Corrigan recounted appellant's history of injury and medical treatment. He examined her and provided physical examination findings. Dr. Corrigan related that his examination of appellant's wrists and hands demonstrated no perceptible scar; no erythema, ecchymosis, swelling or effusion; no thenar, hypothenar, or interossei atrophy; no tenderness to palpation; and no ligament instability. He found that strength on wrist extension, finger and thumb extension, wrist flexion, and finger/thumb flexion was 5 out of 5; Finkelstein's

test for de Quervain's was negative; Phalen's test for CTS was negative; Tinel's sign for CTS was positive; Froment's sign for ulnar neuropathy was negative; no evidence of muscle atrophy on either hand; two-point discrimination in each digit of 6 millimeters (mm); and normal range of motion (ROM) of the left wrist. Dr. Corrigan explained that he received multiple radiology reports but no imaging studies and that if he received imaging studies, he would provide an addendum to his report. He noted that electromyography (EMG) studies dated June 2, 2010, revealed mild-to-moderate severity bilateral CTS, however, her current examination findings were inconsistent with the diagnosis of CTS. Dr. Corrigan explained that appellant had bilateral CTS release surgery, with the right on July 19, 2007, and the left on February 15, 2010, and that she exhibited limited ROM of her wrist and all of her digits which was inconsistent with CTS. He noted that CTS does not affect ROM, her grip strength did not fit the diagnosis of CTS, and the ulnar nerve was largely responsible for grip strength, rather than the median nerve involved in CTS. Dr. Corrigan also noted that his examination documented that each digit had a two-point discrimination of 6 mm, which was within normal limits and did not fit with the subjective complaints of numbness. He opined that appellant had recovered from her bilateral carpal tunnel release surgeries and noted that the incisional scars were not even perceptible. He explained that her described symptoms did not correlate with her objective examination findings and the diagnosis of bilateral CTS. Dr. Corrigan opined that appellant did not have any residuals from the accepted condition of bilateral CTS and that she could return to her date-of-injury job.

In a notice dated September 16, 2021, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because she no longer had disability, or residuals causally related to her accepted August 30, 2006 employment injury. It found that the weight of the medical evidence rested with Dr. Corrigan, the second opinion physician. OWCP afforded appellant 30 days to submit additional evidence or argument, if she disagreed with the proposed termination.

In an October 6, 2021 report, Dr. Robert W. Mauthe, Board-certified in physical medicine and rehabilitation, noted that electrodiagnostic studies were performed and that despite bilateral carpal tunnel release surgery in 2007 and 2010, appellant developed recurrent symptoms. He explained that the electrodiagnostic findings were consistent with chronic bilateral entrapment of the median nerves consistent with CTS.

In a letter dated October 14, 2021, counsel requested that a copy of Dr. Mauthe's October 6, 2021 report and EMG/NCV studies of even date be provided to the second opinion physician, Dr. Corrigan.

In a November 12, 2021 report, Dr. Daday opined that appellant continued to have bilateral hand weakness, bilateral CTS of the upper extremities with severe complications and acquired bilateral claw hand. He related that she had a greatly diminished capacity of self-care, handling objects, and daily routines, and needed assistance with basic activities of daily living, which was supported by the results of her diagnostic studies and office visits. Dr. Daday opined that appellant had reached maximum medical improvement (MMI).

In a November 12, 2021 attending physician's report (Form CA-20), Dr. Daday diagnosed bilateral CTS with nerve complications, muscle spasms, and claudication. He found that appellant had a claw hand with decreased flexion and extension and checked the box "Yes" in response to

whether he believed the condition was caused or aggravated by an employment activity. Dr. Daday noted again that she was permanently disabled.

On November 19, 2021 OWCP provided the second opinion physician, Dr. Corrigan, with the October 6, 2021 EMG report and inquired whether this diagnostic study changed his previous medical opinion.

In a report dated December 20, 2021, Dr. Corrigan noted that he had reviewed the October 6, 2021 EMG report and opined that, “there is nothing in this material that would in any way change my conclusions...” He further opined that appellant presented with examination findings that were inconsistent with a diagnosis of CTS. Dr. Corrigan explained that she had bilateral carpal tunnel release surgeries in 2007 and 2010, and she had recovered with no residuals. Appellant exhibited limited ROM in the wrist and digits that was inconsistent with CTS, her grip strength did not fit with the diagnosis of CTS, and each digit had a two-point discrimination of 6 mm, which was within normal limits and did not fit with her subjective complaints of numbness. He also noted that the June 29, 2021 values generated with the Jamar dynamometer for grip strength were suggestive of a significant lack of effort.

By decision dated December 22, 2021, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective that date, finding that the weight of the medical evidence rested with Dr. Corrigan.

On December 22, 2022 appellant, through counsel, requested reconsideration and provided copies of previously submitted evidence. Counsel argued that the report of Dr. Corrigan was conclusory and insufficient to establish the weight of the evidence. He further argued that at a minimum, there was a conflict in the medical evidence.

By decision dated October 13, 2023, OWCP denied modification of its prior decision.

Dr. Daday continued to submit reports dated February 20 and March 4, 2024. He continued to opine that appellant had chronic bilateral CTS and he opined that she was disabled and unable to complete any job functions without pain and discomfort.

In a March 5, 2024 report, Dr. Douglas C. Shoenberger, Board-certified in family practice, diagnosed chronic bilateral CTS. He explained that his diagnosis was confirmed by EMG testing October 6, 2021, and appellant’s history of numbness and tingling in both upper extremities, difficulty with fine motor skills, dropping items, being woken up during the night due to pain, and problems completing/doing activities with grasping, gripping, and handling objects, as well as using both her hands for work such as typing. Dr. Shoenberger opined that appellant’s test results were abnormal, and that appellant had chronic bilateral entrapment of the median nerves consistent with CTS. He noted that his examination found claw formation to both hands with atrophy of muscles, her fingers did not extend properly, hand grip was slightly weak, fine writing skills were extremely poor, thumb to finger testing was very poor and very slow, and pinprick testing demonstrated decreased sensation. Dr. Shoenberger opined that the diagnosis of chronic bilateral CTS was caused by the type of work appellant had performed in the past which involved quite a bit of typing, and that she was disabled and unable to complete any job functions due to lack of function, pain and discomfort.

On May 6, 2024 appellant, through counsel, requested reconsideration. Counsel argued that the report of the second opinion physician was insufficient to carry the weight of the evidence and that at a minimum, a referee examination was warranted. He requested that termination be reversed, and her benefits reinstated.

By decision dated May 7, 2024, OWCP denied modification of the October 13, 2023 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.³ 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.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁷

Section 8123(a) of FECA 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 When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.⁹ Where a case is referred to an

³ See *T.C.*, Docket No. 19-1383 (issued March 27, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *K.W.*, *supra* note 5; see *A.G.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁸ 5 U.S.C. § 8123(a). See *J.J.*, Docket No. 23-0440 (issued December 21, 2023); see *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

⁹ See *M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 22, 2021.

Appellant provided several reports from her treating physician, Dr. Daday, including reports dated October 23, 2019, November 9, 2020, May 17, 2021, and November 12, 2021, wherein he opined that appellant continued to have bilateral CTS and left claw hand due to failed CTS surgery. Dr. Daday continued to report that appellant was permanently disabled from work. In an October 6, 2021 report, Dr. Mauthe explained that the electrodiagnostic studies performed that day were consistent with findings of chronic bilateral entrapment of the median nerves consistent with CTS. He noted that despite bilateral carpal tunnel release surgery in 2007 and 2010, appellant developed recurrent symptoms.

The second opinion physician, Dr. Corrigan, in a report dated July 1, 2021, opined that appellant's accepted condition of bilateral CTS had resolved and that she was not disabled from work. He explained that her examination findings were inconsistent with a diagnosis of CTS. Dr. Corrigan also provided a supplemental report dated December 20, 2021, in which he noted that he had reviewed appellant's October 6, 2021 electrodiagnostic studies and his opinion remained unchanged.

The Board finds that there is an unresolved conflict of medical opinion between Dr. Corrigan, the second opinion physician, and appellant's treating physicians, Drs. Daday and Mauthe as to whether appellant's disability and/or residuals due to the accepted employment injury had ceased.¹¹ As noted, Section 8123(a) of FECA 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.¹² However, OWCP failed to refer the case to an IME to resolve the conflict in the medical evidence.

As there remains an unresolved conflict in the medical opinion evidence, the Board finds that OWCP failed to meet its burden of proof to terminate her wage-loss compensation and medical benefits.¹³

¹⁰ *M.E., id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

¹¹ *See P.C.*, Docket No. 22-1320 (issued July 11, 2023); *G.F., id.*; *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

¹² *Supra* note 8.

¹³ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 22, 2021.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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