

U.S. DEPARTMENT OF LABOR  
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of [REDACTED] Claimant; Employed by Department of Agriculture, Philadelphia, Pennsylvania. Case No. 030254742. Hearing was held on April 15, 2008, via telephone.

The issue for consideration is whether the claimant has continuing disability causally related to the accepted conditions.

The District Office accepted that the claimant, [REDACTED] born July 1, 1951, developed bilateral trigger fingers and left medial epicondylitis as a result of performing her Food Inspector (Slaughter) duties on August 14, 2000. Appropriate benefits for wage loss were paid. Following a January 2001 functional capacity evaluation, the Office referred the claimant for vocational rehabilitation services and job placement assistance in March 2001. By decision dated March 4, 2003, the Office reduced the claimant's compensation finding that the position of Manager, Quality Control, represented her wage-earning capacity. In its June 4, 2003, June 28, 2004 and July 15, 2005 reconsideration decisions, the Office denied modification of its March 4, 2003 decision.<sup>1</sup> On appeal to the Employees' Compensation Appeals Board (Board), the Board found that the Office had properly reduced the claimant's compensation effective March 4, 2003, based on the identified position and properly determined her wage-earning capacity. The Board found, however, that new medical evidence submitted subsequent to the March 4, 2003 decision warranted further consideration by the Office. The Board explained that Dr. Scott Fried's September 15, 2003, March 24 and April 12, 2004 reports and his February 18, 2004 review of the February 2004 functional capacity evaluation were supportive of the claimant's argument that she sustained a material change in the nature and extent of her accepted work condition warranting further development by the Office. The Office was directed to develop the medical evidence obtaining an opinion regarding the claimant's condition and modification of the March 2003 LWEC followed by a *de novo* decision.

On remand, the Office referred the claimant to Dr. R.A. Smith, a board-certified orthopedic surgeon, for a second opinion evaluation. In his November 1, 2006 report, Dr. Smith opined that the claimant had no continuing disability related to or as a result of the employment injury.

By decision dated November 8, 2006, the Office proposed to terminate the claimant's compensation finding that the weight of medical opinion rested with Dr. Smith's assessment and opinion ruling out continuing disability. The claimant was afforded 30 days to submit evidence if she disagreed with the Office's actions. The Office received Dr. Fried's November 27 and December 4, 2006 reports, August, October and November 2006 (unsigned) treatment records as well as the attorney's December 4, 2006

<sup>1</sup> The claimant appealed to the Employees' Compensation Appeals Board following the June 2004 denial. In its March 17, 2005 decision, the Board found that various documents from 2003 were missing from the file and remanded the case to the Office directing the Office to reconstruct the file and issue an appropriate decision to preserve the claimant's appeal rights. The Office re-issued the 2004 decision in its July 2005 notice explaining that the file had been reconstructed.

letter outlining his argument in response to the Office's proposed actions. Dr. Fried's December 20, 2006 report and Dr. Douglas Tase's September 14, 2006 report were also received.

The Office determined that a conflict of medical opinion regarding continuing disability existed between Drs. Fried and Smith, and Office referred the claimant to Dr. William Kirkpatrick, a board-certified orthopedic surgeon, for a referee evaluation. In his April 9, 2007 report, Dr. Kirkpatrick ruled out any continuing disability related to the employment injury.

By decision dated May 4, 2007, the Office finalized the termination of benefits finding that the weight of medical opinion rested with Dr. Kirkpatrick's referee evaluation report. The claimant disagreed with the decision and through her attorney requested a hearing with an OWCP Representative.

Dr. Fried's June 26, 2007 and January 9 and March 13, 2008 reports and Dr. Fred Weinblatt's March 20, 2008 reports were received by the Office.

A telephone hearing was held on April 15, 2008, where Gordon Reisel assisted the claimant as the attorney of record. Mr. Reisel referenced the Board's June 2006 findings that additional medical development was necessary based on the receipt of Dr. Fried's reports and a functional capacity evaluation assessment arguing that the referenced medical reports were supportive of the fact that the claimant's condition had worsened. He noted that the issue was whether the evidence established that the accepted conditions had ceased arguing that the Office's March 2003 LWEC decision indicated that the claimant's conditions were permanent in nature. Mr. Reisel explained that although there was no specific finding that the claimant's conditions were permanent, the Office issued LWEC decisions based on permanent conditions arguing that the claimant's conditions were not considered temporary. Mr. Reisel explained that Dr. Smith saw the claimant for approximately four minutes and his report was not sufficient to establish a conflict of medical opinion with Dr. Fried. He argued that Dr. Smith's report was not based on a complete medical and factual background noting that Dr. Smith failed to reference the objective findings found on testing including positive EMG findings discussed in Dr. Fried's December 2006 and June 2007 reports as well as the findings discussed by other physicians including Dr. S. Valentino, an orthopedic surgeon, who made an assessment based on an MRI and a September 2003 bone scan, Dr. James Barrett, who determined diagnoses of brachial plexus with radial and medial nerve involvement, and Dr. Michael Cohen, who in a September 2004 evaluation made an assessment of upper extremity repetitive strain syndrome. Mr. Reisel further questioned whether Dr. Smith considered the multiple diagnostic studies as the studies were not addressed in his report. He argued that Dr. Smith stated that there was no clinical evidence of ongoing residuals, however, he did not have the positive EMG/NCS studies performed on February 3, 2004 or February 1, 2007, completed after his evaluation, which clearly demonstrated abnormal upper extremity findings. The attorney argued that Dr. Smith did not have an understanding of the mechanism of injury noting that he made no mention of the claimant's job duties. The attorney argued that although Dr. Smith noted that there was no evidence of entrapment in the ulnar median radial nerves, he failed to explain what tests or tasks he used to support his conclusions versus Dr. Fried, who utilized various tests including Phalen's, Wright, Roos, Hunter and Tinsel, to establish and/or in support of his conclusion. Mr. Reisel also pointed out that there was a Dr. Robert A. Smith, practicing in Philadelphia, Pennsylvania, who had previously had his medical license revoked by the Drug Enforcement Agency noting that his research revealed that the physician had been found to present a cavalier disregard for the law. Mr. Reisel explained that he

inquired to the Office if the physicians were the same persons in consideration of *prima facie* evidence regarding Dr. Smith's conduct, however, the Office refused to research or consider his argument. Mr. Reiselt referenced the Board's decision of *Geraldine Foster*,<sup>2</sup> in which the Board found that the referee physician was found to exhibit an arrogant calculated perjury akin to a cavalier disregard of the law, and while Dr. Smith was a second opinion evaluator, the Board's findings should be considered in the instant case. The attorney argued that Dr. Kirkpatrick should be considered a second opinion evaluation. Mr. Reiselt questioned the process to select Dr. Kirkpatrick as an examining physician explaining that additional argument was forthcoming with respect to the Office's use of the Physician's Directory System. He noted, however, that Dr. Kirkpatrick stated that the claimant had significant upper extremity complaints and symptoms but failed to explain his conclusion ruling out causal relationship referencing the Board's decision of *George A. Hill*, in which the referee physician also failed to explain his conclusions ruling out continuing disability where there continued to be objective findings and the Board therefore found that the referee's report could not constitute the weight of medical evidence. Mr. Reiselt explained that Dr. Fried noted that Dr. Kirkpatrick's clinical testing demonstrated findings contrary to own assessment based.

The claimant testified that Dr. Smith's evaluation was very brief. She testified that she provided Dr. Smith with x-rays, MRI studies and bone scan studies, however, he only reviewed a cervical x-ray study. The claimant testified regarding her current symptoms explaining that she has swelling and pain in her fingers and they "lock" throughout the day and while she's sleeping. The claimant explained that she also experiences arm and hand numbness and fatigue, swelling and numbness in the clavicle area causing swallowing problems. She testified that she also has tightness in the thoracic area causing inhaling problems when her neck is rotated and experiences muscle spasms. The claimant testified that she has numbness in her tailbone resulting in hip problems and pressure to the right knee. The claimant also testified that she has a right foot, grasping, breathing, digesting and memory problems and experiences sleeplessness, double vision, dizziness, etc, as a result of her employment injury.

In his April 21, 2008 letter, the attorney argued that the reports referenced in the Board's decision clearly indicated that the claimant's work-related and other conditions not accepted by the Office, had worsened. He stated that the Office was directed to determine whether the claimant's "permanent" accepted work-related conditions of bilateral trigger fingers and left medial epicondylitis had resolved, however, the Office had failed to establish such through adequate medical evidence. Various records to include Dr. Weinblatt's March 20, 2008 report were submitted for consideration of the attorney's argument regarding the unresolved accepted conditions, declaration of a medical opinion conflict, weighing medical evidence, unsupported medical conclusions and the physicians' inadequate review of medical records. Dr. Tony Bellini's April 18, 2008 report and Dr. H.J. Einsig's May 19, 2008 report were also received following the hearing. The claimant submitted corrections to the transcript in her May 10, 2008 statement. In her May 13, 2008 statement, the claimant advised that there were missing statements in the transcript regarding her claim as occupational in nature rather than traumatic injury and a cervical x-ray study from Dr. Callichio. The agency did not submit comments following the hearing.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of

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<sup>2</sup> Dkt. No. 02-66 (2003).

compensation benefits.<sup>3</sup> After it has been determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition requiring further medical treatment.<sup>5</sup>

The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits shifts to the claimant.<sup>7</sup>

In the present case, the Board directed the Office to further develop the medical evidence to determine whether the evidence established that the accepted conditions had materially worsened. The Office referred the claimant to Dr. Smith for a second opinion evaluation. In his November 2006 report, Dr. Smith concluded that there was no clinical evidence of ongoing residuals of the accepted conditions explaining that there was no demonstrable pathology with regard to the accepted left elbow or hands at the time of his evaluation and no further treatment or testing was necessary. Dr. Smith stated that the claimant's accepted conditions had resolved. In response to the Office's proposed termination notice, the Office received Dr. Fried's December 4, 2006 report, and determined that a conflict of medical opinion existed with Drs. Smith and Fried. The claimant was referred to Dr. Kirkpatrick for a referee evaluation to resolve the medical conflict regarding continuing disability related to the employment conditions. In his April 2007 report, Dr. Kirkpatrick discussed the claimant's complaints and his review of the medical records and diagnostic test results. He stated that the history was taken from the claimant and the records provided by the Office and the claimant. He concluded that the claimant did not continue to suffer from residuals of the accepted conditions, bilateral trigger fingers and left medial epicondylitis. He stated that although there was a history of the conditions, the claimant's evaluation did not reveal any evidence of triggering in either hand, there was no evidence of locking of the fingers nor did she have evidence of the epicondylitis upon exam. Dr. Kirkpatrick noted that the claimant had various overall complaints and had been provided with multiple diagnoses, however, he found no specific relationship of the employment and her multiple conditions.

On appeal, the attorney argued that Dr. Smith's report was deficient, that his findings (or lack of) were not in line with the claimant's treatment records and that his conclusion ruling out continuing disability was not well rationalized to constitute one side of a conflict of medical opinion with Dr. Fried as declared by the Office.

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician

<sup>3</sup> *Jorge E. Sotomayer*, 54 ECAB 223 (2000).

<sup>4</sup> *Mary E. Lowe*, 52 ECAB 223 (2001).

<sup>5</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

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

<sup>7</sup> See *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

of the employee, the Secretary shall appoint a third physician who shall make an examination.”<sup>8</sup> 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.<sup>9</sup>

At the time of the referral to Dr. Kirkpatrick, I do not find that the record demonstrated a conflict of medical opinion between Drs. Smith, the second opinion evaluator, and Fried, the treating physician. While Dr. Smith concluded that the claimant's condition had resolved, he offered no rationale or discussion in support of his opinion. Although Dr. Smith's assessment conflicted with Dr. Fried's December 2006 report, without rationale to support his conclusions, Dr. Smith's report was insufficient to warrant a referee evaluation. As such, the referral to Dr. Kirkpatrick would constitute a new second opinion evaluation rather than a referee as designated at the time of the Office's termination.<sup>10</sup> In his 2007 report, Dr. Kirkpatrick provided a well discussed history of the claimant's condition and resulting treatment noting that she was undergoing chiropractic care as of the time of his examination. He noted that he had reviewed records that were provided to him by the claimant and the Office and made references to specific diagnostic studies in consideration of his assessment. Dr. Kirkpatrick explained that on exam, there was no evidence of problems of the fingers or residuals of the accepted elbow condition thoroughly outlining his findings on examination. He stated that the records clearly showed multiple diagnoses and the claimant had multiple complaints, however, his exam demonstrated no problems of the condition of the elbow or fingers to support continuing work-related disability. On appeal, the claimant argued that Dr. Kirkpatrick did not request to review any records that she made available for the evaluation, including various diagnostic studies and reports. In his report, Dr. Kirkpatrick stated that he reviewed records submitted by the Office and the *claimant*; given her argument, it is unclear what records Dr. Kirkpatrick reviewed that were provided *by the claimant*, however, based on the claimant's June 19, 2007 affidavit, it appears that the records she made available to Dr. Kirkpatrick were already of record, *with the exception of any physical imaging studies*, and had been made available by the Office for his review.

Dr. Kirkpatrick provided a conclusive opinion ruling out continuing disability due to the accepted conditions based on his evaluation of the claimant and the records made available to him. He addressed the issue presented to him, whether there was any continuing disability related to the accepted conditions, and opined that there were no ongoing residuals or findings of either accepted condition detailing his examination findings. The attorney has argued that Dr. Kirkpatrick did not explain his discussion regarding the claimant's *other* upper extremity findings and diagnoses as presented in the reports of Dr. Fried and the claimant's other examining physicians.

As it has been found that Dr. Kirkpatrick was a second opinion physician rather than a referee physician, I find that Dr. Kirkpatrick should be required to explain his conclusion ruling out the claimant's then-current complaints and multiple diagnoses to the employment or factors of the employment, specifically

<sup>8</sup> 5 U.S.C. § 8123(a); see also *Raymond A. Fondats*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>9</sup> *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>10</sup> The determination that Dr. Kirkpatrick was not a referee evaluator would make the attorney's argument moot regarding the Office's selection process of a referee evaluator and special weight afforded to a referee evaluator.

as concluded by Dr. Fried.

While Dr. Kirkpatrick concluded that the claimant's accepted conditions had resolved as of his examination and that there was no residual disability, at the time of the Board's decision, the Office was directed to develop the issue of whether the accepted conditions had worsened after March 2003, as suggested in Dr. Fried's reports. Although Dr. Kirkpatrick ruled out continuing disability as of his examination, he did not address the issue of a worsening of the accepted condition after March 2003, following the Office's wage earning capacity determination. If Dr. Kirkpatrick is of the opinion that the claimant's accepted condition under the instant case had worsened to warrant modification of the wage loss determination, then the claimant would be entitled to total wage loss benefits until it was determined that the accepted conditions, under the instant case, had resolved.

At the hearing, claimant argued that her claim of injury was a result of her continuous duties in the course of her employment. The claimant explained that she submitted a traumatic injury for the August 14, 2000 incident of injury, a CA-2a, claiming a recurrence of her February 3, 1999 injury claim *and* an occupational disease claim, however, the Office only addressed the traumatic injury claim and failed to address her other injury complaints as filed on her occupational claim. The claimant requested that her injury claim be expanded to include all conditions claimed as discussed in her physicians' medical reports. In consideration of the claimant's argument that she filed a recurrence claim, I note that the claimant provided a copy of her August 14, 2000 Ca-2a, in which she claimed a recurrence of a February 3, 1999 injury. While the Office's records do not reflect an injury claim for 1999,<sup>11</sup> the recurrence claim does correspond to an occupational disease claim accepted under case 030240177, for bilateral trigger finger as of November 7, 1997.<sup>12</sup> Under the 1997-injury claim, the Office had advised the claimant that new work factors were involved and a new injury claim should be filed.<sup>13</sup> The Office did not develop the recurrence under the 1997-claim nor was a copy of the CA-2a made a part of that record. The Office's records indicate that an occupational disease claim for an injury as of August 14, 2000, was filed and received by the Office; the claim, 030253684, was denied by the Office on or about September 26, 2000.

Upon return of the case record, the Office should amend the Statement of Accepted Facts (SOAF) to reference the 1997-injury claim and the claimant's occupational disease claim filed for an August 14, 2000 condition, which was subsequently denied. The Office should then refer the claimant back to Dr. Kirkpatrick with the medical records and SOAF, and request that he provide a detailed report discussing his review of the medical records, *particularly* Dr. Fried's September 2003 and March and April 2004 reports and Dr. Fried's February 18, 2004 review of the February 2004 work capacity evaluation, which the Board found supportive of the claim of a change in the claimant's accepted work conditions. Dr. Kirkpatrick initially stated that there were no imaging studies available for his review; the Office should also ensure that he is provided with copies of all diagnostic reports of file and if determined necessary, the claimant should be advised to provide the imaging studies that she has available for his review. Dr. Kirkpatrick should be requested to provide his rationale in support of his conclusion that the claimant's multiple diagnoses as discussed in Dr. Fried's reports are not related to the accepted employment injury

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<sup>11</sup> The Office's retired records were also searched for a 1999-injury claim.

<sup>12</sup> The Office initially denied the claim by decision dated November 1, 2004; the denial was reversed on appeal to the Branch of Hearings & Review in a decision dated May 3, 2005.

<sup>13</sup> The new injury claim was considered under the case 030253684.

of August 14, 2000, provide an opinion of whether the evidence demonstrated a material worsening of the accepted condition after March 2003, following the wage earning decision, and offer an opinion with rationale as to when the evidence established that the accepted conditions resolved in support of his conclusion that the claimant has no continuing work-related disability. If it is determined necessary, the Office should schedule a new evaluation of the claimant with Dr. Kirkpatrick. Following any further development considered necessary, including weighing the opinions of Drs. Kirkpatrick and Fried, the Office must determine if a conflict of medical opinion is established or if the evidence is sufficient to warrant a new decision regarding the claimant's entitlement to benefits.

Consistent with the above, the decision of the District Office dated May 4, 2007 is set aside and the case is remanded for further medical development as indicated. Until a determination regarding the extent of the claimant's accepted condition is made, the claimant is entitled to reinstatement of her benefits as outlined in the Office's 2003 wage loss determination.

Dated: **AUG 15 2008**  
Washington, D.C.



Rashawnda Snell  
Hearing Representative  
for  
Director, Office of  
Workers' Compensation Programs