

Anderson, Peggy

AGGRAVATION (RCW 51.32.160)

Objective evidence requirement

Consistently positive Tinel's sign and positive Phalen's test constitute objective physical or clinical findings of worsening and are not merely subjective complaints or symptoms.
...In re Peggy Anderson, BIA Dec., 09 11986 (2010)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: PEGGY S. ANDERSON**) **DOCKET NO. 09 11986**
2 **CLAIM NO. Y-698937**) **DECISION AND ORDER**
3 _____)

4 **APPEARANCES:**

5 Claimant, Peggy S. Anderson, by
6 Farley & Dimmock, per
7 Andrew S. Dimmock

8 Employer, Regency Care Center/Arlington, by
9 Approach Management Services,
None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Joanna R Giles, Assistant

13 The claimant, Peggy S. Anderson, filed an appeal with the Board of Industrial Insurance
14 Appeals on February 27, 2009, from an order of the Department of Labor and Industries dated
15 January 2, 2009. In this order, the Department affirmed the October 29, 2008 order, in which it
16 denied the claimant's application to reopen her claim. The Department order is **REVERSED AND**
17 **REMANDED.**

18 **ISSUE**

19 Did Ms. Anderson's left-sided carpal tunnel syndrome objectively worsen between May 11,
20 2006, and January 2, 2009?

21 **EVIDENTIARY AND PROCEDURAL MATTERS**

22 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
23 review and decision. In its Reply to Claimant's Petition for Review, the Department contends that
24 Ms. Anderson's Petition for Review was untimely filed. The deadline for filing the petition was
25 extended to September 27, 2010. In our Order Granting Petition for Review, we stated that the
26 petition was filed on September 29, 2010. That was the date it was received. However, it was
27 mailed on September 27, 2010, and filing is perfected by mailing. RCW 51.52.104. Thus, the
28 claimant filed a timely Petition for Review of the July 30, 2010 Proposed Decision and Order, in
29 which the industrial appeals judge affirmed the January 2, 2009 Department order. All contested
30 issues are addressed in this order.

1 The Board has reviewed the evidentiary rulings in the record of proceedings. During the
2 deposition of Greg Sanders, M.D., the claimant objected to testimony regarding past narcotics use
3 based on relevance. Sanders Dep. at 27. That objection is sustained and the testimony from
4 page 26, line 14, through page 31, line 6, is stricken. We find that no other prejudicial error was
5 committed, and the remaining evidentiary rulings are affirmed.

6 **DECISION**

7 The resolution of this appeal is complicated by the fact that Ms. Anderson has filed multiple
8 claims for carpal tunnel syndrome. According to the parties, a claim for right-sided carpal tunnel
9 syndrome is pending at the Department. The current appeal involves a claim for left-sided carpal
10 tunnel syndrome. In addition, on the same date that the industrial appeals judge issued the
11 Proposed Decision and Order in this appeal, our judge issued a separate Proposed Decision and
12 Order involving a claim for bilateral carpal tunnel syndrome, in Claim No. AJ-18784,
13 Docket No. 09 20382.

14 Pursuant to ER 201, we take notice of the following: Ms. Anderson filed an occupational
15 disease claim for bilateral carpal tunnel syndrome in AJ-18784 (Docket No. 09 20382) and an
16 application to reopen Claim No. Y-698937 (Docket No. 09 11986) after her symptoms worsened
17 over a three-day period of employment with Dri-Ease in September 2008, on assignment from
18 Human Resources of Mount Vernon, a temporary staffing company. The Department denied both
19 the new claim and the application to reopen. Ms. Anderson appealed, and the cases were
20 consolidated for hearing. The industrial appeals judge de-consolidated them on his own motion in
21 July 2010, and issued two different Proposed Decisions and Orders. In Docket No. 09 20382,
22 involving the new occupational disease claim, he dismissed for failure to present a prima facie
23 case. No Petition for Review was filed, and that order has become final.

24 Because the appeals were consolidated, the medical witnesses addressed whether
25 Ms. Anderson had a new occupational disease of bilateral carpal tunnel syndrome, and whether her
26 accepted left-sided carpal tunnel syndrome had worsened. They also testified regarding the
27 separate right-sided carpal tunnel syndrome claim. However, the only issue currently before us is
28 whether the left-sided carpal tunnel syndrome accepted under Claim No. Y-698937 worsened
29 between May 11, 2006, and January 2, 2009.

30 The first terminal date closing examination was performed on March 9, 2006. At that time,
31 both the Tinel's signs and Phalen's tests were normal bilaterally at the wrists and the forearms, and
32 Ms. Anderson had a 0 percent impairment. The claim was closed with no permanent partial

1 disability on May 11, 2006. Ms. Anderson returned to work in various capacities thereafter and was
2 able to self-limit or modify how she performed tasks whenever her symptoms started to reappear.
3 However, problems began to emerge even before her employment with Dri-Ease from
4 September 18, 2008, through September 22, 2008, which was the focus of her occupational
5 disease claim in Claim No. AJ-18784, Docket No. 09 20382. Ms. Anderson worked for a temporary
6 staffing agency, Terra Staffing, from August 28, 2008, through September 2, 2008. By the third day
7 of that employment, she described her symptoms as "horrible." 4/8/10 Tr. at 22. When she
8 complained, she was let go.

9 She then went to another temporary staffing agency, Human Resources of Mount Vernon,
10 and was assigned to Dri-Ease. After three days of assembly line work there, her pain increased,
11 and she went to the emergency room. On September 30, 2008, she returned to see Greg
12 Sanders, M.D., who had treated her prior to the initial claim closure and had last seen her on
13 September 2, 2004. On October 22, 2008, Ms. Anderson filed an application to reopen her claim,
14 which the Department denied on October 29, 2008.

15 When Dr. Sanders saw Ms. Anderson on September 30, 2008, and October 23, 2008, she
16 had positive Tinel's signs bilaterally and was tender in both wrists. On December 9, 2008,
17 Dr. Sanders referred her for electrodiagnostic testing, which was performed on April 2, 2009. In the
18 meantime, Ms. Anderson had protested the denial of her application to reopen, and on January 2,
19 2009, the Department affirmed the October 29, 2008 order.

20 The electrodiagnostic testing was negative on the left. However, when Mark D. Holmes,
21 M.D., saw Ms. Anderson on June 6, 2009, she had a mildly positive Tinel's sign bilaterally at the
22 wrists and forearms. She also had a positive Phalen's test bilaterally at the wrists and forearms.
23 Nonetheless, Dr. Holmes concluded that Ms. Anderson's left carpal tunnel syndrome had not
24 worsened, primarily because he did not believe the short period of work at Dri-Ease could have
25 aggravated her condition. In addition, based on a comparison of the electrodiagnostic tests
26 performed on April 2, 2009, with the testing performed by Dr. Crispen Wilhelm in June and
27 December 2004, and February 2005, he believed Ms. Anderson's condition had improved.
28 Dr. Holmes considered electrodiagnostic testing the most reliable, objective tool for assessing
29 carpal tunnel syndrome.

30 However, the claimant underwent five surgeries before the first terminal date—two carpal
31 tunnel releases on the right and one on the left, as well as a pronator release on each side. It is not
32 entirely clear when each procedure occurred. The claimant's memory is poor. Dr. Sanders only

1 gave one date, April 2003, for a right carpal tunnel release. Dr. Holmes received the medical
2 records out of chronological order, and he discussed them in the order received. Furthermore, in
3 his review he did not give the dates or specifics for all of the surgeries. The dates he did give do
4 not always match the claimant's estimated dates. We have relied on his recitation for the most part,
5 because it is based on a review of the records. As best we can determine several of the surgeries
6 on both the right and left sides occurred in 2005, after Dr. Wilhelm's June 2004, December 2004,
7 and February 2005 electrodiagnostic testing.

8 That is consistent with Dr. Holmes' testimony on cross-examination, when he agreed that
9 Dr. Wilhelm's testing was performed prior to the claimant's surgeries. When asked if her condition
10 would have been improved through the surgery, he responded that he assumed the treatment had
11 been helpful. Thus, a comparison of the April 2, 2009 electrodiagnostic testing with that performed
12 in 2004 and early 2005 is not determinative on the question of whether there has been an
13 improvement in the claimant's left carpal tunnel syndrome condition since the first terminal date of
14 May 11, 2006, because the claimant underwent surgery after the testing and prior to claim closure.

15 At the same time, the April 2, 2009 electrodiagnostic testing does not show any worsening of
16 Ms. Anderson's carpal tunnel syndrome on the left. That leaves the Tinel's signs and Phalen's
17 tests. There is no dispute that they were normal as of the first terminal date and became positive
18 thereafter. The question is whether the change in those findings provides objective evidence of
19 worsening.

20 The claimant's attorney did not ask Dr. Sanders that specific question. He did ask whether
21 there were "findings, objective findings or positive tests" during Dr. Holmes' examination. Sanders
22 Dep. at 16. Dr. Sanders' responded: "Yes. . . . She had tests that were positive, including Tinel's on
23 the left and right, Phalen's in the wrist and the forearms." Sanders Dep. at 16.

24 The claimant's attorney did not ask Dr. Sanders whether Ms. Anderson's left carpal tunnel
25 syndrome objectively worsened between May 11, 2006, and January 2, 2009. Instead, he asked if
26 what Dr. Sanders saw in September 2008 was a worsening or a new injury. In Dr. Sanders'
27 opinion, it was a worsening, because he did not think a three-day exposure to repetitive work at
28 Dri-Ease was sufficient to cause carpal tunnel syndrome on its own. However, he did not explain
29 the basis for his opinion regarding worsening, nor did he specifically say he was relying on a
30 comparison of the Tinel's and Phalen's findings.

31 In Dr. Holmes' opinion, Tinel's signs and Phalen's tests are not objective. However, he did
32 not doubt Ms. Anderson had bilateral carpal tunnel syndrome and rated her impairment at 5 percent

1 for both upper extremities, based on those findings. Like Dr. Sanders, Dr. Holmes was not
2 specifically asked whether Ms. Anderson's accepted left-sided carpal tunnel syndrome objectively
3 worsened between May 11, 2006, and January 2, 2009. He was asked to assume that "on the left,
4 Ms. Anderson's claim closed on May 11th, 2006, and the IME corresponding to that closing date
5 was the IME you reviewed of March 9th, 2008, were you able to find objective signs of worsening?"
6 Holmes Dep. at 26. He answered "no," but his main reason appears to have been that he did not
7 think an aggravation could have happened during three days of work at Dri-Ease. That is not the
8 question before us in this appeal.

9 Furthermore, Dr. Holmes does not appear to have understood that Ms. Anderson's claim for
10 left-sided carpal tunnel syndrome had been allowed, and that she was trying to reopen that claim.
11 He knew she had an accepted September 29, 2004 right carpal tunnel syndrome claim, and he
12 knew about the claim for bilateral carpal tunnel syndrome that Ms. Anderson filed after she worked
13 for Dri-Ease. He initially related Ms. Anderson's bilateral carpal tunnel syndrome to that
14 employment, under the mistaken impression that the Department had administratively accepted a
15 new occupational disease claim. When the Department corrected him, he changed his opinion.
16 However, when asked if his conclusions would change if he were made aware of "a prior industrial
17 claim—wherein the left-sided carpal tunnel syndrome was accepted," he responded: "If it was
18 accepted, if the Department accepted both sides, sure. Yes, I'd have to say that." Holmes Dep.
19 at 46.

20 The closure of the claim on May 11, 2006, with no permanent partial disability award and
21 testimony that the claimant now has a 5 percent impairment is not sufficient, in and of itself, to
22 establish aggravation of condition. *In re Leona McCleneghan*, BIIA Dec., 24,922 (1967);
23 *In re Clifford M. Takamoto*, Dckt. No. 06 19559 (February 4, 2008). "The mere existence of a
24 permanent impairment on the second terminal date does not establish permanent aggravation."
25 *Takamoto* at 7-8. Ms. Anderson must also prove that her condition worsened between May 11,
26 2006, and January 2, 2009, based at least in part on comparative objective findings.

27 As the industrial appeals judge points out, a worker's subjective complaints of increased pain
28 are not sufficient to show worsening. There must be some objective findings to support the
29 complaints of increased pain and loss of function. *In re John Anderson*, BIIA Dec., 91 6315 (1992).
30 We believe there are such objective findings here, in the form of the repeated findings of positive
31 Tinel's signs by Dr. Sanders and Dr. Holmes, and the positive Phalen's test by the latter.
32

1 Dr. Holmes is not the final arbiter of what is considered a sufficiently objective finding. To make
2 that determination, we turn to medical aid rules.

3 The word "objective" appears frequently in the rules. For example, WAC 296-20-19000
4 provides: "Washington's Industrial Insurance Act requires that permanent partial disability be
5 established primarily by objective physical or clinical findings establishing a loss of function."
6 WAC 296-20-19030 provides: "A worker's subjective complaints or symptoms, such as a report of
7 pain, cannot be objectively validated or measured. . . . When rating a worker's permanent partial
8 disability, reliance is primarily placed on objective physical or clinical findings that are independent
9 of voluntary action by the worker and can be seen, felt or consistently measured by examiners."
10 WAC 296-20-220(1)(i) and (j) define objective and subjective as follows:

11 (i) Objective physical or clinical findings are those findings on examination which
12 are independent of voluntary action and can be seen, felt, or consistently measured
13 by examiners.

14 (j) Subjective complaints or symptoms are those perceived only by the senses and
15 feelings of the person being examined which cannot be independently proved or
16 established.

17 Dr. Sanders described the Tinel's sign as follows: "That's where you tap on the dorsal wrist,
18 and classically you'll get some tingling in some or all of the three middle fingers of that hand."
19 Sanders Dep. at 17-18. He described the Phalen's test as follows: "It's where you put your –you
20 flex both wrists, and then you put the dorsal aspect of the hands together and put pressure on
21 them, and if it's positive, there'll be tingling in some of the digits." Sanders Dep. at 17.

22 Thus, the Tinel's sign involves a combination of the doctor tapping a certain spot and asking
23 the patient to report symptoms. The clinician must then determine if the nature and location of the
24 reported symptoms correlate with a diagnosis of carpal tunnel syndrome. Likewise, with the
25 Phalen's test, the doctor puts the patient's hands in a particular posture, applies pressure, and asks
26 the patient to report any symptoms and their location. Once again, it is up to the clinician to
27 determine whether the symptoms reported during this maneuver correspond with a diagnosis.

28 In *In re Troy L. Hanford*, Dckt. No. 08 17708 (December 7, 2009), we addressed a similar
29 scenario. *Hanford* involved the question of whether the claimant's left shoulder impingement
30 syndrome had objectively worsened. In analyzing whether positive impingement findings were
31 objective, we noted:

32 While subjective complaints alone are not sufficient, Dr. Phipps conducted
impingement and range of motion testing specifically designed to determine clinical
deterioration of the shoulder joint. The claimant's pain complaints and loss of
function were corroborated by Dr. Phipps' clinical examination. While it might be

1 possible for Mr. Hanford to manipulate these results, the range of motion testing is
2 so specific to the impingement syndrome that it has an objective component.
3 These findings present a prima facie case for aggravation of the left shoulder
4 based on the holdings in *Wilbur v. Department of Labor and Industries*, 61 Wn.2d
5 439 (1963) and *In re John F. Anderson*, BIIA Dec. 91 6315 (1992).

6 *Hanford*, at 6.

7 We directed the Department to reopen the claim "based on the objective component of the
8 impingement testing." *Hanford*, at 9.

9 In the current case, the Tinel's sign and Phalen's test involve more than simply asking the
10 claimant to list her symptoms and complaints, which would be purely subjective under
11 WAC 296-20-220(1)(j). They are well-defined clinical tests, relied on by both medical witnesses. If
12 certain specific responses are elicited, the tests can confirm the likely existence of carpal tunnel
13 syndrome. Both Dr. Sanders and Dr. Holmes found positive Tinel's signs. Dr. Holmes found a
14 positive Phalen's test as well. The Department suggested that Ms. Anderson is, by now, familiar
15 with what the expected responses are for confirming carpal tunnel syndrome. Dr. Holmes agreed
16 that her experience with the tests makes them more subjective. However, he continued to believe
17 that Ms. Anderson was suffering from carpal tunnel syndrome on the left and that she had a
18 5 percent impairment, despite the lack of electrodiagnostic confirmation. He said there was "no
19 doubt" the claimant felt something in response to the Tinel's and Phalen's tests. Holmes Dep. at
20 49. By saying she has a 5 percent impairment based on those tests, he implicitly acknowledged
21 that the tests elicited responses that "can be seen, felt, or consistently measured," as required by
22 WAC 296-20-19030.

23 In summary, as of the first terminal date, Ms. Anderson's Tinel's signs and Phalen's tests
24 were normal bilaterally at the wrists and forearms, and she had a 0 percent impairment on the left.
25 She returned to work at various jobs and managed reasonably well, so long as she was able to
26 modify how she performed certain tasks. However, during two bouts of employment in August and
27 September 2008, when she was required to perform repetitive tasks, her symptoms flared. On
28 September 30, 2008, and October 23, 2008, Ms. Anderson had positive Tinel's signs bilaterally and
29 was tender in both wrists, according to Dr. Sanders. On June 6, 2009, she had a mildly positive
30 Tinel's sign bilaterally at the wrists and forearms, a positive Phalen's test bilaterally at the wrists and
31 forearms, and a 5 percent impairment on the left, according to Dr. Holmes.

32 The positive Tinel's signs and Phalen's test have both objective and subjective components
under the definitions set forth at WAC 296-20-220(1)(i) and (j). A doctor performs the tests, which
are only considered positive if the doctor finds the patient's responses reliable and if those

1 responses correlate with the specific pattern associated with carpal tunnel syndrome.
2 Ms. Anderson's findings were consistent over several examinations by two different doctors and
3 neither doctor questioned the reliability of her responses. Both felt the test results were consistent
4 with a carpal tunnel syndrome diagnosis.

5 It is undisputed that the tests were normal as of May 11, 2006. Thereafter, the tests yielded
6 positive results on several occasions. We conclude that the results of those tests are "objective
7 physical or clinical findings," showing that the left-sided carpal tunnel syndrome has worsened, not
8 merely "subjective complaints or symptoms," under the definitions set forth at
9 WAC 296-20-220(1)(i) and (j). The January 2, 2009 Department order is therefore reversed, and
10 the matter remanded to the Department to reopen the claim and take further action as appropriate,
11 based on the law and the facts.

12 **FINDINGS OF FACT**

- 13 1. Peggy S. Anderson filed an Application for Benefits with the Department
14 of Labor and Industries on January 29, 2004, in which she alleged an
15 occupational disease to her left wrist, arising naturally and proximately
16 from her employment with Regency Care Center/Arlington.

17 On September 16, 2004, the Department allowed Ms. Anderson's left
18 carpal tunnel syndrome as an occupational condition or disease. The
19 Department did not determine employer liability for the claim, stating that
20 a further order would be issued establishing chargeable employers and
21 the percentage of liability. After a November 2, 2004 protest, the
22 Department affirmed the September 16, 2004 order on March 22, 2005.

23 On October 19, 2004, the Department determined that the cost of the
24 claim would be charged to the claims experience of Regency Care
25 Center/Arlington at 45 percent liability with the last injurious exposure
26 being February 1, 2003, and that the date of manifestation was
27 January 16, 2004, for compensation purposes because that was the
28 date the disease required medical treatment. After a November 2, 2004
29 protest, the Department affirmed the October 19, 2004 order on
30 March 22, 2005.

31 On May 11, 2006, the Department closed the claim with time loss
32 compensation benefits as paid through December 19, 2005, and no
award for permanent partial disability.

On October 22, 2008, the Department received an application to reopen
Ms. Anderson's claim. On October 29, 2008, the Department denied the
application to reopen. On December 18, 2008, the claimant protested
the October 29, 2008 order. On January 2, 2009, the Department
affirmed the October 29, 2008 order.

On February 27, 2009, the claimant filed a Notice of Appeal with the
Board of Industrial Insurance Appeals from the Department's

1 January 2, 2009 order. On April 3, 2009, the Board granted the appeal
2 under Docket No. 09 11986, and agreed to hear the appeal.

- 3 2. As of January 16, 2004, Peggy S. Anderson suffered from left-sided
4 carpal tunnel syndrome arising naturally and proximately out of her
5 employment with Regency Care Center/Arlington.
- 6 3. As of May 11, 2006, Ms. Anderson's left-sided carpal tunnel syndrome
7 was fixed and stable, and had reached maximum medical improvement.
8 Her Tinel's signs and Phalen's tests were normal bilaterally at the wrists
9 and the forearms. She had no objective clinical findings and no
10 permanent impairment.
- 11 4. On September 30, 2008, and October 23, 2008, Ms. Anderson exhibited
12 positive Tinel's signs bilaterally and was tender in both wrists. On
13 June 6, 2009, Ms. Anderson had a mildly positive Tinel's sign bilaterally
14 at the wrists and forearms, and a positive Phalen's test bilaterally at the
15 wrists and forearms.
- 16 5. Between May 11, 2006, and January 2, 2009, Ms. Anderson's left-sided
17 carpal tunnel syndrome, which arose naturally and proximately out of
18 her employment with Regency Care Center/Arlington, objectively
19 worsened, based on the changes found in her Tinel's signs and Phalen's
20 test.

21 **CONCLUSIONS OF LAW**

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the
23 parties to and the subject matter of this appeal.
- 24 2. Between May 11, 2006, and January 2, 2009, Ms. Anderson's left-sided
25 carpal tunnel syndrome, which arose naturally and proximately out of
26 her employment with Regency Care Center/Arlington, became
27 aggravated within the meaning of RCW 51.32.160.
- 28 3. The January 2, 2009 Department order is incorrect and is reversed. The
29 matter is remanded to the Department to reopen the claim and take
30 further action as appropriate, based on the law and the facts.

31 DATED: November 16, 2010.

32 BOARD OF INDUSTRIAL INSURANCE APPEALS

33 /s/ _____
34 DAVID E. THREEDY Chairperson

35 /s/ _____
36 FRANK E. FENNERTY, JR. Member