

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY A. LEMMONS and DEPARTMENT OF THE AIR FORCE,
TACTICAL AIR COMMAND, HILL AIR FORCE BASE, Utah

*Docket No. 97-627; Submitted on the Record;
Issued December 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's left thoracic outlet syndrome.

On August 22, 1994 Dr. James Adams, a Board-certified orthopedic surgeon, diagnosed appellant as having left thoracic outlet syndrome and left carpal tunnel syndrome, and he noted that data entry may predispose to thoracic outlet syndrome due to posture as well as carpal tunnel syndrome due to repetitious use of arms. He further opined: "I think that [appellant's] job as a secretary and sitting in one position for an extended period of time can contribute to thoracic outlet syndrome through possible alteration in posture as the day progresses and also the repetitious nature of her work as a secretary could also aggravate or produce carpal tunnel syndrome."

An August 24, 1994 physical therapy note contained as history that appellant had a new work station and had to do a lot of upper extremity lifting. A September 6, 1994 statement from appellant noted that she worked on a typewriter and a computer, that she had noticed a change in her condition since she changed her work station, and that the set up was not conducive to the best positioning because her typewriter was on the drop leaf of her desk and the computer was on the left corner of the desk putting the keyboard out of comfortable reach. Appellant noted that she had to reach over the typewriter to reach the keyboard of her computer, and that she spent four to five hours a day, five days a week using the typewriter/computer.

On October 7, 1994 the Office accepted that appellant had sustained left carpal tunnel syndrome and left thoracic outlet syndrome in the performance of duty, causally related to factors of her federal employment. It noted that the claim was being accepted without referral to an Office medical adviser.

By report dated October 18, 1994, Dr. Joanna Erzinger, a Board-certified neurologist, noted that appellant noted symptoms while performing data entry and secretarial work in the

course of her federal employment. Dr. Erzinger noted objective testing results suggested thoracic outlet syndrome and she opined that it was very probable that the nature of appellant's work as a data entry/secretarial person using her upper extremities and arms aggravated her symptoms and problems.

On November 3, 1994 the employing establishment industrial hygiene manager noted that appellant's responsibilities included four to five hours of typing and computer work per day and that her work station was found not to be within applicable guidelines. He found that appellant was exposed to repetition along with awkward posture due to improper seat and keyboard height.

On November 7, 1994 Dr. Steven C. Simper, a Board-certified thoracic and vascular surgeon, diagnosed thoracic outlet syndrome and noted that in her job appellant had to do a lot of reaching which aggravated the condition. He noted that physical therapy had failed and he scheduled her for surgery, which was performed by him on November 10, 1994.

Appellant had requested that the Office authorize the proposed surgery, but the Office determined that a consultant should review the record to determine whether surgery should be authorized and it referred appellant's record to an Office medical adviser. One Office medical consultant, Dr. Cherington, reviewed the record but declined to dictate a report without a release from the appellant, so the Office determined that a report would be completed more quickly if Dr. John Litvak, a Board-certified neurosurgeon, did it. A brief statement of accepted facts was composed on November 9, 1994 which did not disclose or discuss appellant's implicated employment factors or whether appellant had repetitive employment exposures to anything, but merely reported that her claim had been accepted for left carpal tunnel syndrome and left thoracic outlet syndrome and that she had seen three physicians. This statement was referred to Dr. Litvak on March 2, 1995.

By report dated January 19, 1995, Dr. Litvak reviewed appellant's records but did not examine her. He noted that appellant complained of symptoms when typing and entering data as a secretary. Dr. Litvak noted: "My bias causes me to shy away from a diagnosis to thoracic outlet syndrome. I am suspicious that another diagnosis should be entertained and one would wonder what a cervical MRI [magnetic resonance imaging] would look like in this patient." He suggested the diagnoses of subclavian steal syndrome or possible vertebral artery compromise or scleroderma. In answer to Office questions Dr. Litvak stated: "I cannot substantiate a diagnosis and therefore cannot imply an injury illness for that matter which may or may not be work related." Dr. Litvak noted no definite history of specific injury on July 10, 1994 except for her normal job activities, and he opined that he was not in favor of surgery in this matter.

By report dated February 8, 1995, Dr. Erzinger noted that appellant's presenting symptoms were suggestive of thoracic outlet syndrome, and opined that they were work related. Dr. Erzinger opined that since appellant did not improve with physical therapy, the only option was surgery.

By report dated February 10, 1995, Dr. Simper noted that appellant had been operated upon for neurogenic thoracic outlet syndrome. He noted as history that appellant had been having progressive problems with pain radiating down to her hand which were markedly

aggravated by her work conditions with typing and with reaching for computers and other items in her workplace. Dr. Simper noted that several other physicians agreed with the diagnosis, that medical therapy had failed, and that a rib resection had caused appellant's thoracic outlet symptoms to resolve.

The Office then determined that a conflict existed between appellant's treating physicians, Drs. Adams, Erzinger and Simper, and the Office medical adviser, and it referred appellant to Dr. Nathaniel M. Nord, a Board-certified neurologist, for an impartial medical opinion to resolve the issue of whether the thoracic outlet syndrome was causally related to work factors and whether surgery performed on November 10, 1994 was necessary, warranted and appropriate. There is no evidence in the record of the statement of accepted facts given to Dr. Nord, upon which he was to base his opinion.

By report dated May 8, 1995, Dr. Nord reviewed appellant's medical history, reported her objective testing results, reviewed the findings of the other examining physicians, and noted that appellant reported that her work station was not ergonomically appropriate, being judged to be deficient with respect to height of computer console and keyboard placements and telephone placements. Dr. Nord reported that appellant experienced remission of symptoms for several weeks after surgery, followed by a gradual recurrence such that the pattern of symptoms became the same as it was prior to surgery. Dr. Nord noted that appellant reported that she was seated for at least six hours out of a nine-hour day, with computer oriented activities involved in three to four of those hours. He also noted that when appellant used the telephone she generally cradled it with her left neck and head as she used her extremities for other activities. Dr. Nord then stated that appellant described "no actions which might be considered repetitive in nature." He concluded that the diagnosis of thoracic outlet syndrome became most likely, on a more probable than not basis, but opined that its relationship to work activities remained unproven in this case, "where there was no definable etiologic cause -- repetitive work process, or injury to the cervical or shoulder girdle regions." Thereafter he concluded that the surgery performed was an appropriate measure for the treatment of disabling, unremitting thoracic outlet syndrome.

By decision dated July 10, 1995, the Office rescinded its acceptance of appellant's claim finding that the thoracic outlet syndrome was not related to appellant's employment factors. The Office found that the impartial medical examiner's report constituted the weight of the medical evidence, and it noted that Dr. Nord's report was the most comprehensive. The Office rescinded the acceptance of thoracic outlet syndrome only, leaving carpal tunnel syndrome as a result of repetitive employment trauma as an accepted condition.

Thereafter appellant requested an oral hearing. In support of her hearing request appellant submitted a July 19, 1995 letter from her supervisor stating that appellant complained of symptoms after a long day of typing, computer input, sitting and answering phones. He noted that bioenvironmental engineering determined that appellant's work station was conducive to poor posturing, and that appellant additionally functioned as chief of protocol which required that she be on the phone a lot while writing or typing information. Appellant also submitted a September 18, 1995 letter from the executive officer who worked next to her which stated that her work station was a direct contributor to her condition as her computer use required that she lean over the top of her typewriter, as she did not have a typist's chair, as she answered in excess

of 100 phone calls a day, and because the phone was located on a credenza behind her requiring that she reach behind her to answer it and cradled it on her left shoulder to take notes.

Also in support, appellant submitted a July 27, 1995 report from Dr. Simper, which stated that he felt appellant's repeat stretching to reach computers, the filing that must be performed, and the position required for typing all placed her at risk of developing thoracic outlet syndrome. In support appellant submitted a July 19, 1995 statement from Dr. Erzinger, who opined that appellant's thoracic outlet syndrome was caused and exacerbated by her work situation. Dr. Erzinger restated her belief in an August 24, 1995 report. Appellant also argued that, although the claims examiner stated that Dr. Nord discussed in detail her working station and duties, that he did no such thing, spending only one half hour with her, and that her other evidence supported multiple problems with her work environment. Appellant claimed that Dr. Nord did not have full knowledge of her work situation. Appellant further submitted a physical therapy report, an industrial hygienist's report, and multiple articles from medical and other professional journals having general application regarding thoracic outlet syndrome.

A hearing was held on January 23, 1996 at which appellant testified. By decision dated April 4, 1996, the hearing representative affirmed the rescission, finding that Dr. Nord provided new evidence having "a thorough knowledge of [appellant's] work station and work duties."

By letter dated May 1, 1996, appellant stated that she did not know where Dr. Nord got the idea that there was no repetitive/reaching motion in her job. She stated that the repetitive nature of her work was included in every piece of written correspondence supporting her claim. Appellant noted that although the hearing representative referred to Dr. Nord's report as being more detailed and comprehensive than the others, it was merely because he reviewed the contents of the other physicians' reports before providing his analysis and opinion in one paragraph. By letter dated June 17, 1996, appellant requested reconsideration of the rescission decision. Appellant alleged that none of her treating physicians were presented with the detailed specific questions that were presented to Dr. Nord on causation and aggravation, that consequently they did not know what needed to be explained, and that none of the physicians, including Dr. Nord, had training or expertise in occupational medicine, such as Dr. Annette G. Burst, a Board-certified occupational medicine specialist, did, which could provide a basis for substantiating the "work-relatedness" of her condition.

In support appellant submitted a June 13, 1996 report from Dr. Burst which noted that engineering had identified many problems in the lay out and mechanical requirements of appellant's work station, that the set up of the desk, chair and keyboard were all inappropriate resulting in awkward postures, that the frequent telephone use resulted in awkward postures, muscle contractions and nerve and arterial compression, and that the etiology of appellant's thoracic outlet syndrome was supported by the included general application literature as being linked to her workplace.

By decision dated August 20, 1996, the Office denied appellant's request for a review of the case on its merits finding that the evidence submitted in support was immaterial and was not sufficient to warrant review of the prior decision. The Office stated that newspaper clippings, medical texts and publication excerpts were of no probative value in establishing causal relation

and that Dr. Nord had completely discussed appellant's work situation and remained the weight of the medical evidence.

The Board finds that this case must be reversed.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. Under such circumstances, the Office must establish either that its original determination was erroneous or that the employment-related disability has ceased. To justify rescission of a prior acceptance, the Office has the burden of establishing through new or different evidence that its prior acceptance was erroneous.¹

The Office failed to meet its burden in this case.

The Office determined that, based upon the report of Dr. Nord, appellant's thoracic outlet syndrome was of nonwork-related etiology. However, the Board cannot determine upon what factual basis Dr. Nord predicated his opinion. There is no copy in the case record of the statement of accepted facts presented to Dr. Nord for him to use to formulate his opinion, and the statement of accepted facts given to Dr. Litvak was incomplete and insufficient for an impartial medical examiner to rely upon in formulating his opinion, as it lacked any factual reference to the implicated employment factors or to the repetitive activities identified by the employing establishment as being performed by appellant. Therefore, the Board cannot now determine upon what Dr. Nord based his opinion that appellant performed no repetitive actions or duties, particularly in light of the entirety of the other evidence of record supporting that appellant performed repetitive typing and computer usage and repetitive telephone answering from behind her chair, and in light of the fact that the Office still accepts that appellant developed carpal tunnel syndrome from repetitive work-related tasks. The Board notes that Dr. Nord's opinion that appellant performed no repetitive tasks is in direct conflict with the Office's acceptance that repetitive work-related usage caused her carpal tunnel syndrome. Further, the Board notes that, although the Office states that Dr. Nord discussed appellant's duties in detail, his report does not demonstrate that contention. Dr. Nord's opinion merely reports, inaccurately according to appellant, what appellant stated to him about her working situation in a one-half hour interview, and is not based upon any substantiated factual background such as the employing establishment's narration of appellant's work-related duties. Accordingly, the Office's appraisal of the thoroughness of Dr. Nord's analysis of appellant's work situation is inaccurate. Further, the Board notes that the evidence from Dr. Burst, who is Board-certified in an appropriate specialty, ties in the information provided from the general publications submitted and relates it specifically to appellant's situation and her development of thoracic outlet syndrome, such that it indeed becomes probative, and the Office was in error in denying merit review.

Consequently, the Office failed to meet its burden of proof to rescind its acceptance of appellant's condition of thoracic outlet syndrome.

¹ See *Daniel E. Phillips*, 41 ECAB 201 (1989); *Roseanna Brennan*, 41 ECAB 92 (1989); *petition for recon. denied*, 41 ECAB 371 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 20 and April 4, 1996 are hereby reversed.

Dated, Washington, D.C.
December 14, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member