

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE J. WISBEY and DEPARTMENT OF THE NAVY, NAVAL
SUBMARINE BASE BANGOR, DEFENSE AUTOMATED PRINTING SERVICE,
Silverdale, WA

*Docket No. 98-326; Submitted on the Record;
Issued September 8, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits on the grounds that she no longer had any loss of wage-earning capacity causally related to her employment injury.

On August 29, 1996 appellant, then a 50-year-old automated publishing technician, sustained a left shoulder contusion and adhesive capsulitis when a closing door struck her left shoulder.

By letter dated January 10, 1997, the Office referred appellant, along with copies of pertinent medical records and a statement of accepted facts, to Dr. David L. Green, a Board-certified orthopedic surgeon, for an examination and evaluation as to whether she had any remaining disability or medical condition causally related to her August 29, 1996 employment injury.

In a report dated January 16, 1997, Dr. Green provided a history of appellant's condition, a summary of the medical evidence, findings on examination and diagnosed adhesive capsulitis of the left shoulder. He stated that appellant could return to work in a light-duty capacity with progressive recovery by April 15, 1997 following an exercise program.

On April 6, 1997 Dr. Peter V. Ciani, appellant's Board-certified family practitioner, indicated that appellant could perform light duty for four hours a day but that he did not anticipate a return to regular duty for four to six weeks.

By letter dated May 5, 1997, the Office referred appellant, along with the entire case record and statement of accepted facts, to Dr. Robert C. Winegar, a Board-certified orthopedic surgeon and an impartial medical specialist selected to resolve the conflict in medical opinion evidence between Dr. Ciani and Dr. Green as to whether appellant could return to regular duty.

In a report dated May 29, 1997, Dr. Winegar provided a history of appellant's condition, a summary of the medical evidence, his findings on examination and noted that x-rays were within normal limits. He diagnosed a contusion and adhesive capsulitis of the left shoulder. He indicated that appellant continued to experience residuals from her August 29, 1996 employment injury and that she would have a permanent partial disability including loss of range of motion and pain. He indicated that she was able to return to regular work and his treatment recommendations included manipulation of the left shoulder under general anesthesia.

By letter dated July 1, 1997, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that the weight of the medical evidence of record, as represented by Dr. Winegar's report, established that she no longer had a loss of wage-earning capacity.

By letter dated July 25, 1997, appellant indicated her disagreement with the proposed termination of compensation benefits.

By decision dated August 4, 1997, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence of record established that she no longer had a loss of wage-earning capacity as a result of her August 29, 1996 employment injury.¹

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.²

In this case, appellant sustained a contusion and adhesive capsulitis of the left shoulder in the performance of duty on August 29, 1996 when a door struck her in the shoulder. In January 1997 the Office referred appellant to Dr. Green, a Board-certified orthopedic surgeon, for an evaluation as to whether she had any remaining disability causally related to her employment injury.

In a report dated January 16, 1997, Dr. Green provided a history of appellant's condition, a summary of the medical evidence, findings on examination and diagnosed adhesive capsulitis of the left shoulder. He stated that appellant could return to work in a light-duty capacity with progressive recovery by April 15, 1997 following completion of an exercise program.

¹ Subsequent to the issuance of the Office's August 4, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

² *See Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

On April 6, 1997 Dr. Ciani, appellant's Board-certified family practitioner, indicated that he did not anticipate appellant's return to regular duty for four to six weeks.

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 of the employee, the Secretary shall appoint a third physician who shall make an examination."³

Due to the conflict in the medical evidence between appellant's attending physician and the Office referral physician, the Office properly referred appellant, along with the entire case record and statement of accepted facts, to Dr. Winegar, a Board-certified orthopedic surgeon and an impartial medical specialist, for an examination and evaluation as to whether appellant had any remaining disability or medical condition causally related to her August 29, 1996 employment injury.

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.⁴

In a report dated May 29, 1997, Dr. Winegar provided a history of appellant's condition and a summary of the medical evidence and his findings on examination and diagnosed a contusion and adhesive capsulitis of the left shoulder. He indicated that appellant continued to experience residuals from her August 29, 1996 employment injury and that she would have a permanent partial disability which included loss of range of motion. He indicated that she was able to return to regular work. His treatment recommendations included manipulation of the left shoulder under general anesthesia. However, Dr. Winegar's statements in his report, as to appellant's ability to work, are contradictory. He stated that she had a permanent partial disability due to her employment injury yet also opined that she could perform regular work. He does not explain why he feels that appellant can perform her regular duties despite the permanent partial disability which includes loss of range of motion. Furthermore, he recommended that appellant undergo manipulation of her left shoulder under general anesthesia which indicates that she has not recovered from her employment injury. The Board finds that the opinion of the impartial medical specialist, Dr. Winegar, is not entitled to special weight due to these deficiencies and his report is not sufficient to justify the Office's termination of appellant's compensation benefits. Thus, the Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated August 4, 1997 is reversed.

Dated, Washington, D.C.
September 8, 1999

³ 5 U.S.C. § 8123(a).

⁴ *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member