U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVETTE MEDEL-HERNANDEZ and U.S. POSTAL SERVICE, POST OFFICE, West Sacramento, CA

Docket No. 99-1436; Submitted on the Record;
Issued October 18, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she has any ratable permanent impairment of her left upper extremity, causally related to her April 10, 1996 left shoulder strain employment injury; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c) effective July 30, 1998, on the grounds that she refused an offer of suitable work.

The Office accepted that on April 10, 1996 appellant, then a 30-year-old flat sorting machine clerk, sustained shoulder strain.[1] She did not stop work but had her schedule reduced to four hours per day until June 10, 1996 when she was released to return to full duty. The Office thereafter accepted that on December 8, 1996 appellant sustained a recurrence of her April 10, 1996 shoulder strain. Although, the Office advised the intervention nurse on June 25, 1997 that appellant stopped work on December 9, 1996, on December 3, 1997 it advised the referral physician that on December 8, 1996 appellant was again restricted to four hours per day duty.

The Office referred appellant for a second opinion evaluation to Dr. Mark Shelub, a Board-certified physical medicine specialist. By report dated April 17, 1997, Dr. Shelub reviewed appellant's history of injury and her medical records, noted her present left upper extremity complaints, noted that circumferential measurements of her left upper extremity at the biceps and forearm demonstrated increased girth, and diagnosed "cervical spine and scapular strain with chronic myofascial component, with referral of symptomatology into the left upper extremity." He noted that testing ruled out neurologic deficit except for early left-sided median nerve carpal tunnel compression,[2] that there was no cervical spine range of motion loss, and that

[1] The Office annotated the nonfatal summary illegibly as to the accepted condition, but it appears to report that the accepted condition involved appellant's left side, in contrast with the Office's June 25, 1997 referral for nurse intervention which indicated that the accepted condition was right shoulder strain. However, in a later statement of accepted facts the Office advised that the accepted condition was left shoulder strain.

[2] An April 17, 1997 electrodiagnostic evaluation report was also included.

there was no evidence of disuse atrophy, but noted that there was palpatory tenderness over the left-sided paraspinal musculature, trapezial and scapular areas, that right-sided cervical spine lateral bending was provocative of neck pain and that palpation evidenced tenderness over the lateral aspect of the left shoulder. Dr. Shelub opined that appellant's injury residuals included palpatory tenderness over the left shoulder, cervical spine, left scapular and triceps area, which, if continued, would be consistent with a chronic myofascial condition. He noted that objective findings of disability included palpatory tenderness in the left cervical paraspinal, trapezial and scapular musculature, right-sided cervical lateral bending which was provocative of left-sided cervical spine discomfort, palpatory tenderness over the lateral aspect of the left shoulder and the left triceps musculature, and electrodiagnostically demonstrated early left-sided mild median nerve carpal tunnel compression, unrelated to the April 10, 1996 employment injury. Dr. Shelub opined that appellant could return to work for 4 hours per day with restrictions on lifting more than 20 pounds, on repetitive upper extremity overhead activity, on repetitive cervical spine rotatory and lateral bending motions, and on prolonged positioning with regard to the cervical spine and left shoulder.

By report dated April 21, 1997, Dr. Vivien C. Abad, a Board-certified neurologist, reviewed appellant's history of injury, noted her present left upper extremity complaints and opined that appellant had "symptoms and findings consistent with reflex sympathetic dystrophy, Stage I." Dr. Abad opined that this disability was "entirely due to her work injury with brachial plexus injury and resultant reflex sympathetic dystrophy," and she noted: "Subjective factors [for disability were] ... slight to moderate pain in the left arm occurring frequently, increased by lifting and extending her left arm; objective factors for disability are trigger points in her left trapezius, tenderness in the subdeltoid region, swelling in the left upper extremity with diminished pin sensation in the left upper extremity."

The Office thereafter sought a second opinion neurologic evaluation from Dr. Peter Gannon, a Board-certified neurologist. By report dated May 30, 1997, Dr. Gannon reviewed appellant's history and medical records, noted her present symptomatology, examined appellant, and diagnosed "soft tissue strain, due to myofascial injury." He opined that appellant did not have reflex sympathetic dystrophy but noted that she did have injury-related residuals which he identified as "persistent tenderness in the area of original injury, which is provoked with range of motion of the neck, in addition to repeated use of the upper extremity." Dr. Gannon noted that subjective factors of disability were slight pain in the left neck and shoulder occurring frequently, increasing to mild on an infrequent basis and that objective factors of disability were tenderness in the soft tissue structures of the left neck and shoulder, provoked by range of motion. He opined that appellant was capable of returning to her regular duties 8 hours per day with a lifting limit of 20 pounds with the left upper extremity.

By letter dated June 24, 1997, appellant's treating internist, Dr. Robin L. Wong, noted: "The light-duty work offered to [appellant] ... was not acceptable to [her], causing more discomfort to her and symptoms became worse." Thereafter on a July 9, 1997 work capacity evaluation Dr. Wong reiterated appellant's work restrictions, noting that reaching and lifting were limited to not more than 20 pounds, that reaching continuously with the left arm was restricted and that appellant could work for 4 hours per day. She indicated that these restrictions were permanent.

By letter dated July 3, 1997, appellant advised the Office that she returned to work on February 20, 1997 and attempted her regular duties but that it was too painful due to the repetitive motion required.

On July 25, 1997 the Office received a May 12, 1997 report from Dr. Gannon which noted that the only abnormal finding was that of slight swelling of the left arm, consistent with slight dependent edema. Dr. Gannon opined that appellant had disability relative to repetitive use of the left upper extremity and stated: "I feel she has lost her preinjury capacity by 60 percent and that this is entirely due to her work injury."

On July 30, 1997 appellant accepted a July 22, 1997 limited-duty job offer from the employing establishment for four hours per day.

By letter dated October 1, 1997, the Office requested that Dr. Wong provide a rating for appellant's "right" upper extremity impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On December 3, 1997 the Office referred appellant, together with a statement of accepted facts and the relevant medical records, to a Board-certified orthopedic surgeon for a second opinion evaluation as to the presence of any injury residuals, as to whether there was any basis for a schedule award, and as to appellant's work limitations and restrictions.

On December 9, 1997 Dr. Wong stated that appellant was "to remain in her present light-duty position with a 20-pound lifting limitation working 4 hours per day. Her condition is permanent and stationary."

By report dated January 20, 1998, the Office's second opinion specialist, Dr. Charles R. Miller, a Board-certified orthopedic surgeon, reviewed appellant's factual and medical history and the accompanying medical records, and reported his physical examination results, indicating that appellant's test ranges of left shoulder motion were within normal limits and were equal to right sided ranges of motion, including abduction and adduction, forward and backward elevation, internal and external rotation, and extension, that her upper extremity measurements were equal and her upper extremity strength normal, and that there was no evidence of carpal tunnel syndrome, atrophy, tendinitis, bursitis or arthritis, or spasm or deformity. Dr. Miller opined that there was no current objective evidence of any orthopedic abnormality, that appellant did not require further medical diagnosis or treatment, that there were no physical limitations as a result of her employment injury and that appellant was capable of performing an eight-hour workday without orthopedic limitations.[3] Dr. Miller further noted that there was no evidence of permanent injury residuals and he opined that appellant's maximum date of improvement was May 1997.

Upon receipt of Dr. Miller's report the Office determined that a conflict in medical opinion evidence now existed between Drs. Miller, Gannon, Wong and Abad, and it referred appellant, together with a statement of accepted facts, questions to be addressed and the

[3] Dr. Miller did note; however, that appellant was pregnant which might affect her ability to work a full workday.

complete case record, to Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon, for resolution of the conflict.

By report dated March 23, 1998, Dr. Nijjar reviewed appellant's medical and factual history and the medical records of file, noted her present complaints and reported the results of his physical examination, which included equal and normal reflexes and normal sensation, normal power in all muscle groups, normal left upper extremity abduction, extension, internal and external rotation, and limitation in the final 10 degrees of flexion as compared with flexion on the right.[4] Dr. Nijjar diagnosed "[c]ervical strain with sprain of the left shoulder with impingement syndrome, left shoulder, with normal hypertrophy of the left upper extremity," and he opined that appellant's condition was stationary and permanent. Dr. Nijjar noted increased girth in appellant's left upper extremity when comparing left to right, but noted no signs of edema or localized swelling. He noted that subjective factors of disability included mild pain in the shoulder and scapular regions which was worse with repetitive use and was relieved by rest and relaxation, and left upper extremity weakness, and that objective factors of disability included "vague tenderness around the left shoulder, especially around the anterior acromion process, [and] restriction of flexion and abduction by final 10 degrees of abduction."[5] Dr. Nijjar opined that appellant continued to suffer injury residuals in the form of aggravations upon repetitive use which manifested as symptoms of rotator cuff tendinitis or impingement, and he noted that appellant was likely to continue with such repeated exacerbations. He noted that appellant would continue to require lifting limitations, avoiding heavy lifting over 20 pounds, repetitive turning and overhead use of the left shoulder, but opined that this would not preclude her from working 8 hours per day. Dr. Nijjar opined that appellant could return to work full time with a 20-pound lifting limitation and limitation on overhead lifting and repetitive turning of the left upper extremity. On an attached work capacity evaluation Dr. Nijjar indicated that appellant was also restricted to 4 hours per day pushing, pulling and lifting no more than 20 pounds and that she required 5 minute breaks every hour. No copy of the position to be offered to appellant was included for Dr. Nijjar's approval.

On May 21, 1998 Dr. Wong requested approval for a magnetic resonance imaging (MRI) scan, noting that appellant "continues to have pain, weakness and numbness of the left shoulder."

On May 26, 1998 the employing establishment again offered appellant the sedentary limited-duty job she had accepted on July 30, 1997, but for eight hours per day with certain restrictions. Appellant declined the job offer on the date of offer stating that "[b]ecause my doctor ordered on attached page to only work four hours a day because of pain."

On June 13, 1998 the Office medical adviser, Dr. Ellen Pichey, reviewed Dr. Miller's report, noted the finding of no current objective evidence of orthopedic abnormality and noted that, according to the A.M.A., *Guides*, appellant had no impairment due to loss of range of

[4] No comparison with the range of motion represented as "normal" in the A.M.A., *Guides* was made. The Office date stamped this report as received on May 11, 1998.

[5] Abduction was noted to be 160/170 for the affected side versus the opposite side.

motion, no impairment due to loss of strength, and no impairment due to pain or sensory deficit. Dr. Pichey opined that appellant had zero percent permanent impairment for schedule award purposes.

By decision dated June 22, 1998, the Office denied appellant's request for a schedule award, finding that Dr. Pichey had reviewed Dr. Miller's report and correctly determined in accordance with the A.M.A., *Guides* that her total left upper extremity impairment was zero.

By letter dated June 23, 1998, the Office found that the position of flat sorting machine clerk (modified) which was offered to appellant by the employing establishment was suitable to her work capabilities. The Office advised appellant that the offered position was still available, that upon acceptance of the position she would be paid compensation based upon the difference between the pay of the offered position and the pay of her date-of-injury job, that she had 30 days within which to accepted the position or provide an explanation for refusal and that 5 U.S.C. § 8106(c)(2) terminated her entitlement to compensation if she refused an offer of suitable work.

By letter dated July 13, 1998, appellant requested an oral hearing on the Office's denial of her requested schedule award.

By decision dated August 4, 1998, the Office terminated appellant's monetary compensation entitlement effective July 30, 1998 finding that she had refused an offer of suitable work. The Office noted that the impartial medical examiner had opined that appellant could work eight hours per day with certain specified restrictions and that the employing establishment had offered her a sedentary modified position in accordance with those restrictions. It noted that it had informed her of the job's suitability and of the consequences for refusal of the job offer.

By letter dated August 31, 1998, appellant requested an oral hearing on the August 4, 1998 decision. In support of her request, appellant submitted an employee permanent disability questionnaire and the report of an MRI scan of her left shoulder. The June 23, 1998 MRI report found "[m]inimal internal signal change seen within the distal supraspinatus tendon, present in the 'critical zone,' normal variant versus minimal intrasubstance degenerative or inflammatory signal change. Otherwise, normal [MRI] of the left shoulder. There is specifically no MRI abnormality characteristic of rotator cuff tear present." Appellant also resubmitted excerpts from reports from Drs. Shelub, Miller and Gannon already present in the case record.

By undated letter received on October 5, 1998, appellant changed her hearing request to a review of the written record.

Also submitted was a May 19, 1998 report from Dr. Leonora Jui, a Board-certified preventive medicine specialist, which discussed left leg and ankle injuries which caused pain to radiate into her lower back. A report from Dr. Nijjar was also submitted which recommended intra-articular injections and a possible anterior acromioplasty. Dr. Nijjar noted that upon examination appellant had left shoulder abduction to 160 degrees, flexion to 165 degrees and extension to 10 degrees, and that appellant had tenderness over the anterior acromion process.

By decision dated December 8, 1998, the hearing representative affirmed the August 4 and June 22, 1998 decisions finding that Dr. Nijjar's opinion constituted the weight of the medical opinion evidence as to whether appellant had a compensable permanent impairment for schedule award purposes and that appellant had indeed refused an offer of suitable work.

The Board finds that this case is not in posture for decision regarding appellant's entitlement to a schedule award.

A claimant seeking compensation under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[7] Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[8]

The schedule award provision of the Act[9] and its implementing regulation[10] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[11] However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.[12]

In the instant case, the Office medical adviser, Dr. Pichey, based her opinion that appellant had no compensable impairment for schedule award purposes only on the report of Dr. Miller. As Dr. Miller was on one side of a medical opinion conflict regarding permanent impairment and permanent injury residuals, which was resolved by the report of Dr. Nijjar, the Office medical adviser should have based her opinion on permanent impairment on the objective findings included in the thorough and well-rationalized report of Dr. Nijjar. As she did not, her

[6] 5 U.S.C. §§ 8101-8193.

[7] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[8] 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; *see Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

[9] 5 U.S.C § 8101 *et seq.*; *see* 5 U.S.C. § 8107(c).

[10] 20 C.F.R. § 10.304.

[11] 5 U.S.C. § 8107(c)(19).

[12] *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

report is not entitled to special weight. The Board further notes that Dr. Nijjar found that appellant had a 10 degree loss of abduction in her left shoulder. The Board notes that the A.M.A., *Guides*, fourth edition, on page 44 in Figure 41, quantify a 10 degree loss of shoulder abduction as a 1 percent impairment of that upper extremity due to loss of abduction. Therefore, the Board finds that this issue must be remanded to the Office for referral to an appropriate medical examiner to determine whether the medical report found to carry the weight of the medical evidence of record supports any permanent impairment of appellant's left upper extremity in accordance with the A.M.A., *Guides*.

The Board further finds that the Office improperly terminated appellant's compensation entitlement on the basis that she refused an offer of suitable employment.

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses, or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[13] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[14] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[15]

However, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[16]

[13] 5 U.S.C. § 8106(c)(2).

[14] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[15] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[16] 20 C.F.R. § 10.124.

In the Office's procedure manual, Chapter 2.814.5(a)(4) states as follows:[17]

"Reasons which may be considered acceptable for refusing the offered job include (but are not limited to):"

* * *

"(4) The claimant provides evidence that his or her decision was based on the attending physician's advice and that such advice included medical reasoning in support of the opinion."

Under this section the procedure manual specifies following actions which must be undertaken by the Office, if such is the case, to establish that appellant is indeed capable of undertaking the offered position.

In the instant case, appellant specified on the copy of the job offer dated May 26, 1998 that her reasons for declining the job offer were because her doctor ordered that she only work four hours per day because of her pain. Included with this declination was a May 21, 1998 annotation from Dr. Wong that he recommended that appellant work only four hours per day. The record already contained multiple reports from Dr. Wong, the most recent dated May 21, 1998, which noted that appellant continued to have pain, weakness and numbness of the left shoulder, that she was partially disabled and could work four hours a day as her left shoulder was painful, that appellant's myofascial pain condition was best treated by her working only four hours per day and resting her muscles at home, that appellant was to remain in her present light-duty position with a 20-pound lifting limitation working 4 hours per day and indicating that her condition was permanent and stationary.

As this evidence of record supports that appellant continues to have pain, weakness and numbness of the left shoulder as recently as May 21, 1998, as it supports that the four-hour daily work limit recommended by Dr. Wong was due to her continued pain, and as it supports that a four-hour workday would provide the best treatment for her myofascial pain syndrome, allowing her to rest her muscles at home during the remaining time, the Board finds that there is enough medical explanation presented by Dr. Wong to support appellant's refusal of the offered position on the basis of her physician's orders and recommendations. As the medical evidence is sufficient to support appellant's refusal on that basis, and as Dr. Nijjar did not have a copy outlining the duties and physical requirements of the specific position offered to appellant, such that he had actual knowledge of the requirements and opined with that knowledge that appellant could perform that position for eight hours per day, the Board finds that the Office was required to further develop the case in accordance with Chapter 2.814.5(a)(4)(a),(b) and (c) to positively ascertain that appellant is physically capable of performing the offered position.

[17] Federal (FECA) Procedure Manual, Part -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(4)(July 1997).

Consequently, the decision of the Office of Workers' Compensation Programs dated June 22, 1998 is hereby set aside and the case is remanded for further development in accordance with this decision of the Board; the August 4, 1998 decision of the Office is hereby reversed.

Dated, Washington, DC
October 18, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member