

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHY MARIE ROBINSON and U.S. POSTAL SERVICE,  
POST OFFICE, Pismo Beach, Calif.

*Docket No. 96-1883; Submitted on the Record;  
Issued June 10, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has established a permanent impairment of her left hand which would entitle her to a schedule award; (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits for both her right and left elbow; and (3) whether the Office properly denied appellant's request for a hearing.

On June 28, 1994 appellant, then a 39-year-old city carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on September 15, 1993 she first realized that her right elbow condition was caused by repetitious casing of mail for extended periods of time. The Office accepted appellant's claim for lateral (right) epicondylitis and left thumb osteoarthritis on July 25, 1994 and authorized surgical repair of right tear. Appellant returned to a modified 8 hour work day on December 5, 1994.

On December 5, 1994 appellant filed a claim for a schedule award for permanent impairment of her left thumb.

On January 19, 1995 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that in July 1994 she first realized her left elbow pain was due to her federal employment. On February 22, 1995, the Office accepted appellant's claim for left elbow lateral epicondylitis.

On February 2, 1995 appellant filed a claim for a recurrence of disability commencing on January 10, 1995 causally related to her accepted employment injury of September 1, 1993. The Office accepted appellant's claim for right lateral epicondylitis on March 27, 1995.

In a report dated March 23, 1995, Dr. N. Birrell Smith, appellant's treating Board-certified orthopedic surgeon, stated that "[b]ased essentially on the persistence and severity of the patient's subjective complaints, it would appear that she is unable to return to her previous

occupation.” Dr. Smith noted that the objective evidence was essentially lacking. Dr. Smith also stated he found it “somewhat unusual” that appellant “has such continued severe subjective symptomatology of both elbows” as she had not worked since January and he assumed that her home activities would be less demanding than her work activities. Dr. Smith also noted that he had “no specific explanation for the persistence and severity of her subjective complaints in the face of adequate rest from work activities and conservative management.” Based upon her subjective complaints, Dr. Smith opined that it appears appellant “would have limitations against any type of repetitive reach or grasping.” Regarding appellant’s left hand, Dr. Smith opined that appellant had no permanent disability.

By letter dated April 26, 1995, the Office referred appellant, along with a statement of accepted facts and medical records, to Dr. Kenneth L. Baldwin, a Board-certified orthopedic surgeon, for a second opinion to determine the extent and degree of disability or residual effects from her accepted elbow conditions.

In a report dated June 7, 1995, Dr. Baldwin opined, based upon a statement of accepted facts, a review of the medical evidence, an x-ray interpretation and physical examination, that appellant’s subjective complaints were not supported by the objective evidence. Dr. Baldwin diagnosed a history of lateral epicondylitis left upper extremity and marked psychosocial component to pain behavior. Dr. Baldwin noted:

“multiple inconsistencies in the physical examination such as absence of pain with forced extension of the index and middle fingers against resistance, and marked pain exhibited with superficial palpation over soft tissue structures not associated with lateral epicondylitis. These inconsistencies cast doubt on the credibility of the subjective complaints.”

Dr. Baldwin opined there was no evidence of permanent disability and he could not “document any consistent findings that would preclude her ability to return to her usual and customary work activities.” Dr. Baldwin opined that appellant was capable of performing her usual position given the lack of objective findings.

In a report dated June 22, 1995, Dr. Baldwin addressed appellant’s right elbow condition. He noted chronic right elbow pain, etiology possible mild epicondylitis and marked psychosocial component of pain behavior with multiple nonorganic signs of pain. Dr. Baldwin concluded that appellant’s subjective complaints were again not supported by the objective evidence. Dr. Baldwin opined that appellant no longer suffered from any residual impairment related to her accepted employment injury of right lateral epicondylitis and aggravation of left thumb arthritis. Dr. Baldwin opined that appellant could return to her position of carrier, city or special without any work restrictions or physical limitations. Dr. Baldwin also concluded that future medical care “is not anticipated for any residuals related to” appellant’s accepted employment injury.

On July 27, 1995, the Office issued a notice of proposed termination of compensation for her left elbow lateral epicondylitis. The Office found that the medical evidence, as represented by the opinions of both Dr. Baldwin, the second opinion physician, and Dr. Smith, appellant’s treating physician, established that appellant was no longer suffering any residual disability from her accepted employment injury.

In a letter dated August 17, 1995, Dr. Smith stated that his physical findings regarding appellant's elbows were the same as those reported by Dr. Baldwin. Dr. Smith further stated that he agreed "with Dr. Baldwin that the patient primarily has subjective complaints of pain over both lateral epicondyles with a marked paucity of physical findings."

On August 3, 1995, the Office issued a notice of proposed termination of compensation for appellant's right lateral epicondylitis and aggravation of left thumb arthritis. The Office found that based upon the opinions of both Dr. Baldwin and Dr. Smith that appellant was no longer disabled due to her accepted employment injuries.

On August 29, 1995, the Office issued a decision on appellant's left lateral epicondylitis condition finding that the medical evidence of record established that appellant was no longer disabled due to residuals of her accepted employment injury. The Office found that the weight of medical opinion, as represented by Dr. Baldwin's report, established that appellant was no longer disabled due to her accepted left elbow employment injury. The Office terminated both medical and monetary compensation benefits.

By decision dated September 14, 1995, the Office terminated compensation for appellant's right lateral epicondylitis and aggravation of left thumb. The Office found that Dr. Smith, appellant's treating physician, agreed with Dr. Baldwin, a second opinion physician, that there was no objective evidence to support her subjective complaints. The Office terminated both medical and monetary compensation benefits.

In a letter dated September 21, 1995 appellant requested reconsideration and submitted a report by Dr. Daniel Mikol dated September 13, 1995 in support of her request. Dr. Mikol diagnosed bilateral tennis elbow and listed her functional limitations as:

"the claimant should be limited to lifting/carrying no more than 25 pounds for no more than four to six hours per day. In addition, she should be restricted regarding pushing, pulling, and gross handling with the right upper extremity. She has no restrictions regarding standing, walking, sitting, climbing, stooping, kneeling, balancing, crouching, crawling, reaching, feeling, fingering, or pushing, pulling, and gross handling with the left upper extremity. She does not use an assistive device, nor is one needed. It is possible that her pain might be more adequately treated with analgesic medication such as nonsteroidal anti-inflammatory drugs. In any case, her symptoms are not necessarily permanent, though they are likely to remain use dependent."

In a decision dated October 5, 1995, the Office denied modification of the prior decisions terminating her benefits.

By letter decision dated November 14, 1995, the Office rejected appellant's claim for a schedule award. The Office found the medical evidence, represented by the opinion of Dr. Smith appellant's treating physician, that she has no permanent impairment in her left hand.

In a letter dated January 11, 1996, appellant requested an oral hearing and reconsideration of both her cases.

In a letter dated February 1, 1996 appellant requested a hearing before an Office representative.

By letter dated March 11, 1996, the Office denied appellant's request for an oral hearing as appellant had previously requested reconsideration and thus, was not entitled to a hearing as a matter of right.

The Board finds that appellant is not entitled to a schedule award.

Under section 8107 of the Federal Employees' Compensation Act<sup>1</sup> and section 10.304 of the implementing regulations,<sup>2</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>3</sup>

The medical evidence of record does not establish that appellant is suffering any permanent impairment due to her accepted injury to her left hand. In a report dated March 23, 1995, Dr. Smith, appellant's treating physician, opined that appellant did not suffer from any permanent impairment in her left hand. The record, thus, contains no medical evidence showing that appellant is entitled to received a schedule award as no physician has stated she has any permanent disability in her left hand.

The Board, therefore, concludes that appellant has failed to provide probative, supportable evidence that she is entitled to a schedule award.

The Board further finds that the Office properly denied appellant's hearing request under 5 U.S.C. § 8124.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.304.

<sup>3</sup> See *James J. Hjort*, 45 ECAB 495 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

<sup>4</sup> 5 USC § 8124(b)(1).

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>5</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,<sup>6</sup> when the request is made after the 30-day period for requesting a hearing,<sup>7</sup> and when the request is for a second hearing on the same issue.<sup>8</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>9</sup>

In the present case, appellant's January 6, 1996 hearing request was made after she had requested reconsideration in connection with her claim and, thus, appellant was not entitled to a hearing as a matter of right. On September 21, 1995, appellant had requested reconsideration of her claim. The Office was correct in stating, in its March 11, 1996 decision, that appellant was not entitled to a hearing as a matter of right because she made her hearing request after she had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 11, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that appellant was still disabled due to her accepted employment injuries. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>10</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The Board further finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits for both her right and left elbow.

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

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<sup>5</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>6</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>7</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>8</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>9</sup> *See Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

<sup>10</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

causally related to his or her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>11</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits shifts to appellant.<sup>12</sup>

In the present case, the Office accepted that appellant sustained work-related right and left lateral epicondylitis (elbow) and left thumb osteoarthritis. The Office has the burden of proof to justify termination of compensation for disability resulting from those conditions and it has met that burden.

In a reports dated June 7 and 22, 1995, Dr. Baldwin, the second opinion Board-certified orthopedic surgeon physician, provided a history of appellant's employment injury, the treatment and surgery appellant received as a result of that injury, and his findings on physical examination and upon review of the record. Dr. Baldwin opined, in both reports, that the objective evidence did not support appellant's subjective complaints for her accepted employment injuries. In both reports, Dr. Baldwin concluded that appellant could perform her usual position due to the lack of supporting objective findings and that there was no evidence of permanent disability. Dr. Smith, appellant's treating Board-certified orthopedic surgeon, in his August 17, 1995 letter, agreed that his physical findings were the same as Dr. Baldwin's and that he agreed with Dr. Baldwin's opinion regarding the lack of supporting objective evidence for appellant's subjective complaints.

As Dr. Baldwin's reports were based upon a proper factual background and provided sufficient medical rationale, and as Dr. Smith concurred with Dr. Baldwin's opinion regarding the lack of supporting objective evidence addressing the question of whether appellant had any disability or condition causally related to her two accepted employment injuries, the Board finds that Dr. Baldwin's June 7 and 22, 1995 reports establish, at the time, that appellant ceased to have any disability or condition causally related to her employment injuries, thereby justifying the Office's decisions on August 29, 1995<sup>13</sup> and September 14, 1995<sup>14</sup> terminating her compensation benefits.<sup>15</sup> Thus, the burden of proof shifted to appellant to establish that her disability benefits subsequent to August 29, 1995 and September 1995 continued to be causally related to her employment injuries.<sup>16</sup>

The Board finds that the medical evidence submitted after Dr. Baldwin's examination is insufficient to overcome the opinion of Dr. Baldwin. Appellant submitted the report of Dr. Mikol's opinion, but he failed to provide an opinion as to the cause of appellant's right

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<sup>11</sup> *Pedro Beltran*, 44 ECAB 222 (1992); *Mary E. Jones*, 40 ECAB 1125 (1989).

<sup>12</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

<sup>13</sup> The decision terminating appellant's compensation benefits for appellant's accepted left elbow injury.

<sup>14</sup> The decision terminating appellant's compensation benefits for appellant's accepted right elbow injury.

<sup>15</sup> *See Joe Bowers*, 44 ECAB 423 (1993).

<sup>16</sup> *See Virginia Davis-Banks*, *supra* note 13.

elbow condition. Therefore, this report is insufficient to establish a medical conflict or any continuing employment-related disability.<sup>17</sup>

The decisions of the Office of Workers' Compensation Programs dated March 11, 1996, November 14, 1995, October 5, 1995, September 14, 1995 and August 29, 1995 are affirmed.

Dated, Washington, D.C.  
June 10, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

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<sup>17</sup> See *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).