

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN D. NEIL-HANSON and U.S. POSTAL SERVICE,  
POST OFFICE, Lotus, CA

*Docket No. 99-291; Submitted on the Record;  
Issued September 19, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 16, 1997, on the grounds that she refused suitable work; (2) whether appellant is entitled to a schedule award for the right upper extremity; (3) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124; and (4) whether the Office properly terminated appellant's medical benefits on the grounds that she had no residuals of her employment-related condition.

On September 15, 1992 appellant, then a 45-year-old postmaster, filed a claim for an occupational disease alleging that she sustained bursitis as a result of her federal employment. Appellant stopped work on September 29, 1992 and did not return. The Office accepted appellant's claim for right shoulder tendinitis.

In a work restriction evaluation dated October 11, 1993, Dr. Larry N. Magnussen, a Board-certified orthopedic surgeon, found that appellant could work for eight hours per day with restrictions. The Office initiated vocational rehabilitation efforts. On March 24, 1994 a rehabilitation specialist ceased vocational rehabilitation efforts after noting that appellant had relocated to Idaho from California.<sup>1</sup>

On January 22, 1996 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Clyde E. Hunt, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated February 7, 1996, Dr. Hunt discussed appellant's history of injury, reviewed the medical reports of record and listed findings on physical examination. He opined that appellant had a function disturbance that "was moderate to severe, manifested by significant

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<sup>1</sup> The record indicates that the Office of Personnel Management approved appellant's application for disability retirement effective June 19, 1995.

pain behavior and apparent inconsistent range of motion of her shoulder and even her right hip.” Dr. Hunt diagnosed chronic tendinitis/bursitis of the right shoulder by history and arthritis of multiple joints. He recommended a combined orthopedic and psychiatric evaluation. In an accompanying work restriction evaluation, Dr. Hunt opined that appellant could work for eight hours per day with restrictions of no repetitive work above shoulder height or lifting above the shoulder.

On August 29, 1996 the Office referred appellant to Dr. Hunt and to Dr. Scott P. Hoopes, a Board-certified psychiatrist, for further evaluation. In a report dated September 18, 1996, Dr. Hunt listed findings of chronic inflammation of the shoulder. He diagnosed chronic tendinitis and bursitis of the right shoulder and noted that a rotator cuff tear should be ruled out. Dr. Hunt further found that appellant had degenerative arthritis of the joints of the right hip, knees and thumbs. He recommended further studies of appellant’s right shoulder and noted that her other conditions might prevent her from returning to employment. Dr. Hunt indicated that the restrictions listed in the February 7, 1996 work restriction evaluation remained valid.

In a report dated September 18, 1996, Dr. Hoopes opined that appellant had no psychiatric diagnosis and no need for psychiatric treatment.

In an addendum dated January 10, 1997, Dr. Hunt related that objective tests had “probably ruled out significant internal derangement of her shoulder” and that if appellant “does not want treatment, her claim should be closed with some mild residual permanent impairment of her left shoulder as a result of her February 10, 1992 injury.” He noted that, appellant required “permanent restrictions against more than occasional overhead use of the left arm.”<sup>2</sup>

In a work restriction evaluation dated March 1, 1997, Dr. Richard Fury, Board-certified in family practice and appellant’s attending physician, found that she could work for four hours per day with listed limitations. However, in a report dated March 23, 1997, Dr. Fury found appellant unable to work due to “a collection of permanent and stable conditions.” Dr. Fury diagnosed chronic right shoulder tendinitis with a possible rotator cuff tear and arthritis of the right hip, thumbs and patellofemoral joint.

On June 23, 1997 the employing establishment offered appellant the position of part-time flexible distribution window clerk, modified. The position required lifting up to five pounds with no repetitive work above the shoulders. On July 24, 1997 the employing establishment offered appellant a position as a part-time flexible modified clerk and noted that the position required lifting up to 10 pounds.

By letter dated October 23, 1997, the Office referred appellant to Dr. George Nicola, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion regarding whether she could return to work. The Office requested that Dr. Nicola determine the extent of

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<sup>2</sup> It appears that Dr. Hunt’s reference to appellant’s left rather than right shoulder was a typographical error.

appellant's impairment due to conditions resulting from her employment injury and from any preexisting conditions.<sup>3</sup>

In a report dated December 8, 1997, Dr. Nicola discussed appellant's history of injury, reviewed the medical reports and objective studies of record and listed findings on physical examination. He diagnosed shoulder pain of unknown etiology with apparent "exaggerated symptoms" unsupported by objective studies. Dr. Nicola noted that there was "still the small possibility that [appellant] has an impingement syndrome" but that he could find no objective evidence supporting a diagnosis of shoulder tendinitis or bursitis. He further found "some evidence of functional overlay." Dr. Nicola stated:

"I reviewed the job description offered to [appellant] on June 23, 1997, which included a job offer in Sacramento with very limited lifting to five pounds. No repetitive overhead activity and it sounded like mainly answering the [tele]phone and doing light desk-work. This certainly appears to be acceptable for [appellant] and well within the realm of her current functional status even taking into account her nonwork[-]related conditions, which include thumb arthritis, the hip arthritis and the bilateral knee disease."

By letter dated January 26, 1998, the Office advised appellant that the offered position was suitable and that she had 30 days within which to accept the offered position or provide an explanation of her refusal. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.

In a response dated February 1, 1998, appellant related that she was disabled from employment and had retired on disability. She further requested a schedule award.

In a letter received by the Office on February 23, 1998, appellant noted that the position offered was 575 miles from her home. She again requested a schedule award.

On February 27, 1998 the Office advised appellant that her reasons for rejecting the job offer were not acceptable and gave her 15 days to accept the offer or have her benefits terminated pursuant to 5 U.S.C. § 8106(c).

By decision dated April 28, 1998, the Office terminated appellant's entitlement to wage-loss compensation on the grounds that she refused suitable employment. The Office determined that the July 24, 1997 position offered by the employing establishment was suitable and within the limitations found by Dr. Nicola, the impartial medical examiner. The Office further found that due to appellant's refusal of suitable work she was not entitled to a schedule award.

In a letter dated April 29, 1998, the Office requested that Dr. Nicola provide an opinion regarding whether appellant's right shoulder condition had resolved. The Office noted that Dr. Nicola had indicated that appellant might have some residual impingement syndrome.

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<sup>3</sup> The Office initially determined that the position offered appellant was suitable and that her reasons for refusal were not valid. The Office subsequently noted the existence of a conflict in opinion.

In a report dated May 5, 1998, Dr. Nicola related:

“My diagnosis was right shoulder pain of unknown etiology. I stated that there was a small possibility that [appellant] has an impingement syndrome. I found that her pain was certainly exaggerated and that the only findings which support the diagnosis of tendinitis or shoulder pain is somewhat limited motion. These are subjective findings, which are not born out objectively on my examination. My findings unequivocally verify that her right shoulder tendinitis has resolved, [based] on the fact that there are no objective findings that verify its persistence.”

On May 14, 1998 the Office informed appellant that it proposed to terminate her medical benefits on the grounds that her employment-related condition had ceased.

By letter dated May 26, 1998, appellant indicated her disagreement with the examining physicians and requested a schedule award. On June 12, 1998 the Office informed appellant that it would develop her schedule award claim and requested a medical report in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993).

In a letter postmarked June 8, 1998, appellant requested a hearing on her claim.

By decision dated August 26, 1998, the Office denied appellant’s request for a hearing as untimely under section 8124.

In a report dated June 23, 1998, Dr. J. Gerald McManus, a Board-certified orthopedic surgeon, provided an impairment rating. He noted that appellant had weakness of the right upper extremity and right wrist caused by “pain, apprehension or voluntary restriction.” Dr. McManus further indicated that “[appellant’s] range of motion is likewise limited somewhat by voluntary restriction, stately because of pain.” He stated that, according to the A.M.A., *Guides* appellant had a three percent impairment due to loss of flexion, a three percent impairment due to loss of abduction and a two percent impairment due to loss of internal rotation. However, Dr. McManus further stated:

“Since [appellant] appears to have some voluntary restriction of her shoulder motion I cannot honestly say that the measurements reflect her true range of motion. I do not believe they do. At the same time, she expressed enough pain behavior that I did not feel it would be appropriate to be more active in trying to ascertain passive range. Measurements were made in the supine position.

“I would, therefore, decline to express an opinion that she has any permanent impairment based on today’s examination.”

On October 7, 1995 an Office medical adviser reviewed Dr. McManus’ report and opined that appellant was not entitled to a schedule award, as her limitation of range of motion was voluntary.

By decision dated November 24, 1998, the Office terminated appellant's entitlement to medical benefits on the grounds that the medical evidence established that she had no further residual condition causally related to her accepted employment injury. The Office further found that she was not entitled to a schedule award, as she had no permanent impairment of the right upper extremity.

The Board finds that the Office improperly terminated appellant's compensation effective April 16, 1997 on the grounds that she refused suitable work.

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 or her is not entitled to compensation.<sup>4</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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 requirements of the position.<sup>5</sup> To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>6</sup>

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.<sup>7</sup> In the instant case, the medical evidence is insufficient to establish that appellant had the capacity to perform the position of part-time flexible distribution window clerk offered by the employing establishment on July 24, 1997.

The record contains two job offers from the employing establishment to appellant dated June 23, 1997 and July 24, 1997. The June 23, 1997 job offer required lifting up to 5 pounds and the July 24, 1997 job offer required lifting up to 10 pounds. Dr. Nicola, the impartial medical examiner, indicated that he had reviewed the job offer from the employing establishment dated June 23, 1997 and found that it was within appellant's physical restrictions. He noted that the position required "very limited lifting to five pounds." In its decision terminating benefits under section 8106, the Office indicated that it had found that the July 24, 1997 job offer was suitable and within the restrictions found by Dr. Nicola. However, as the July 24, 1997 job offer required lifting of up to 10 pounds and Dr. Nicola only rendered a finding that appellant could lift up to 5 pounds, his report is insufficient to meet the Office's burden to establish that appellant had the physical capability to perform the position.

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<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>6</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>7</sup> *Carmillo R. DeArcangelis*, 42 ECAB 941 (1991).

Consequently, as the medical evidence does not establish that the position offered appellant was suitable, the Office improperly terminated appellant's compensation on the grounds that she refused an offer of suitable work.<sup>8</sup>

The Board further finds that appellant is not entitled to a schedule award for the right upper extremity.

Under section 8107 of the Act,<sup>9</sup> and section 10.304 of the implementing federal regulations,<sup>10</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 A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>11</sup>

In the instant case, the Office requested that appellant provide a report from her physician addressing the degree of any employment-related impairment. In a report dated June 23, 1998, Dr. McManus, a Board-certified orthopedic surgeon, noted that appellant had weakness and limited movement of her right upper extremity but noted that both could be caused by voluntary restriction. He stated that, he "would, therefore, decline to express an opinion that [appellant] has any permanent partial impairment based on today's examination." The Office medical adviser reviewed Dr. McManus' report and opined that appellant was not entitled to a schedule award as her loss of range of motion of the shoulder appeared voluntary rather than due to the accepted employment injury. Appellant has submitted no evidence supporting that she has a permanent impairment of her right upper extremity and, consequently, has not met her burden of proof to establish that she is entitled to a schedule award.

The Board further finds that the Office properly terminated appellant's medical benefits on the grounds that her employment-related condition had ceased.

To terminate authorization for medical benefits, the Office must establish that appellant no longer has residuals of an employment-related condition requiring medical treatment.<sup>12</sup>

In a report dated March 1, 1997, Dr. Fury, Board-certified in family practice and appellant's attending physician, diagnosed chronic right shoulder tendinitis, a possible rotator

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<sup>8</sup> In view of the Board's disposition of the issue of whether the Office properly terminated appellant's compensation under section 8106, the issue of whether the Office properly denied appellant's request for a hearing under section 8124 is moot.

<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.304.

<sup>11</sup> *James J. Hjort*, 45 ECAB 595 (1994).

<sup>12</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

cuff tear and arthritis of the right hip, thumb and patellofemoral joint. He opined that appellant was disabled due to “a collection of permanent and stable conditions.” However, Dr. Fury did not list any findings on examination or provide any explanation regarding why appellant had continued residuals of her accepted condition of right shoulder tendinitis. Thus, his opinion is of little probative value.<sup>13</sup>

Dr. Hunt, a Board-certified orthopedic surgeon and Office referral physician, found in a report dated August 29, 1996 that, appellant had chronic tendinitis and bursitis of the right shoulder and recommended further objective tests. In a supplemental report dated January 10, 1997, Dr. Hunt opined that appellant did not have any significant internal derangement of the shoulder based on the results of objective studies and that if she did “not want treatment, her claim should be closed with some mild residual permanent impairment.” He did not specifically address whether appellant required further medical treatment due to residuals of her employment-related condition of tendinitis of the right shoulder.

In response to a query from the Office regarding the resolution of appellant’s right shoulder condition, Dr. Nicola, a Board-certified orthopedic surgeon, determined that appellant’s accepted employment injury of right shoulder tendinitis had resolved based on the results of tests and lack of objective findings on examination. In his report dated May 5, 1998, Dr. Nicola noted that he had previously found that appellant had right shoulder pain of uncertain etiology and that “her pain was certainly exaggerated and [that] the only findings which support the diagnosis of tendinitis or shoulder pain [was] somewhat limited motion.” He opined that appellant’s subjective complaints were not supported by objective findings and stated that he could “unequivocally verify that her right shoulder tendinitis has resolved.” Dr. Nicola’s report is well rationalized and based on a prior medical and factual history and thus represents the weight of the medical opinion evidence. Consequently, the Office properly determined that appellant no longer had residuals of her employment-related condition.

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<sup>13</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996) (medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet an employee’s burden of proof).

The decision of the Office of Workers' Compensation Programs dated November 24, 1998 is affirmed, the decision dated August 26, 1998 is set aside and the decision dated April 28, 1998 is hereby reversed.

Dated, Washington, DC  
September 19, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member