United States Department of Labor
Employees' Compensation Appeals Board

CAROL G. RICHARDS, Appellant	)	
	)	**Docket No. 03-1534**
and	)	**Issued: February 2, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Chino, CA, Employer	)	

Appearances:
Carol G. Richards, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 6, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 16, 2003, which affirmed decisions terminating appellant's wage loss and medical compensation benefits effective July 2, 2001 and denying appellant's claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues on appeal are: (1) whether the Office met its burden of proof to terminate appellant's compensation effective July 2, 2001 and whether appellant's medical condition on and after July 2, 2001 is causally related to an accepted September 30, 1989 right upper extremity strain with reflex sympathetic dystrophy syndrome; and (2) whether appellant sustained a ratable impairment of the right upper extremity. On appeal appellant contends that she remains totally disabled for work and that she sustained a ratable impairment of her right upper extremity.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated August 22, 1996,[1] the Board affirmed an April 8, 1994 Office decision, which found that appellant had not established that she sustained a head or jaw injury in a September 20, 1989 work incident, accepted for a right arm strain. The record reflects that appellant received wage-loss compensation from April 30, 1993, the day she stopped work and did not return through July 1, 2001. The law and facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

Subsequent to the Board's August's 22, 1996 decision, the Office accepted reflex sympathetic dystrophy syndrome of the right upper extremity. This was based on the May 13, 1996 report of Dr. Steven Nagelberg, an attending Board-certified orthopedic surgeon, and the May 21, 1996 report of Dr. Robert Henry, a Board-certified physiatrist, who diagnosed adhesive capsulitis of the right shoulder and chronic myofascial pain of the shoulder girdle. The Office obtained a January 31, 1997 second opinion from Dr. Lawrence Barnett, a Board-certified orthopedic surgeon, who noted an almost total disuse of the right upper extremity and diagnosed residuals of profound post-traumatic reflex sympathetic dystrophy syndrome.[2]

Dr. Nagelberg submitted periodic reports from March 20, 1997 through August 9, 2000, finding appellant totally disabled for work due to a "100 percent loss to the [right] arm" caused by reflex sympathetic dystrophy syndrome. Dr. Nagelberg noted limited range of motion of all joints of the right upper extremity, right arm and upper back pain and prescribed a transcutaneous electrical nerve stimulator (TENS) unit.

In a March 20, 2000 investigative memorandum, the employing establishment noted that appellant was videotaped on June 29 and 30, July 21 and September 8, 1999 and January 4, 2000. Appellant was observed "using her right upper extremity" in driving her "vehicle, talking on her cell[ular] [tele]phone while driving with one hand and operating the gearshift … carrying packages with her right hand, opening and closing doors, carrying her dog and pulling weeds in the front yard of her residence." The employing establishment obtained additional video footage on July 25, 2000 and submitted still photographs excerpted from the videotapes.

[1] Docket No. 94-1639 (issued August 22, 1996). Appellant filed a petition for reconsideration on September 13, 1996. On July 1, 1997 the Board issued an order denying petition for reconsideration on the grounds that appellant failed to establish any error of fact or law warranting further consideration.

[2] Dr. Nagelberg opined that appellant had a ratable impairment of the right upper extremity for schedule award purposes.

On July 27, 2000 postal inspectors showed Dr. Nagelberg the surveillance video of appellant. Later that day Dr. Nagelberg completed a work-capacity evaluation (Form OWCP-5) releasing appellant to full-time duty with no physical restrictions.[3] On July 31, 2000 the employing establishment requested that Dr. Nagelberg review a proposed letter carrier technician position, which required lifting up to 70 pounds and carrying up to 45 pounds. He approved the position on August 10, 2000. The employing establishment offered the position to appellant on August 11, 2000 instructing her to report for work on August 14, 2000.

Appellant responded on August 22, 2000, asserting that even though Dr. Nagelberg had changed his opinion, Dr. Barnett's finding of total disability remained unaltered. Appellant requested to change physicians,[4] and submitted additional medical evidence.

In an August 15, 2000 report, Dr. Gloria Lee, a chiropractor, diagnosed reflex sympathetic dystrophy syndrome of the right upper extremity and "anxiety brought about by excessive stress." Dr. Lee found appellant to be totally disabled for work. She submitted a September 11, 2000 report reiterating these diagnoses. In an August 16, 2000 letter, Dr. James F. Roy, an attending Board-certified gastroenterologist, found appellant permanently and totally disabled.[5]

By notice dated September 11, 2000, the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence established that the residuals of the September 20, 1989 injuries had ceased, as Dr. Nagelberg had released her to full duty. The Office noted that Dr. Barnett and Dr. Roy, did not provide objective findings supporting continuing residuals or to support that appellant was totally disabled for work. The Office also noted that Dr. Roy, a gastroenterologist, was not a specialist in a field relevant to appellant's injury.

Appellant responded by October 10, 2000 letter, contending that Dr. Nagelberg's opinion was unreliable and that the videotapes showed her carrying only very light objects. She submitted additional evidence.

[3] In an August 3, 2000 affidavit, Dr. Nagelberg stated that on July 27, 2000 he met with two postal inspectors, who showed him surveillance videotape recordings of appellant's activities from June 29, 1999 to July 25, 2000. After viewing the tapes, Dr. Nagelberg stated that appellant "was performing activities contrary to what she represented to [him]," including "extending her right arm and hand while getting a manicure, allowing a disabled gentleman to support himself by holding and pulling on [appellant's] right arm, lifting and carrying packages with her right hand, closing a car door with her right hand and driving hand over hand." Dr. Nagelberg noted that on examination, appellant would hold her right arm in a flexed position, stating that she did not want him to touch it. He concluded that appellant had "misrepresented her medical condition to him." Dr. Nagelberg released appellant to full duty with no restrictions and stated that he no longer wished to treat appellant.

[4] In an August 30, 2000 letter, the Office denied appellant's request to change physicians as appellant was already under the care of a specialist. The Office advised appellant that it had not authorized chiropractic services, noting the Federal Employees Compensation Act's restriction that chiropractic services would be reimbursed "only for treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."

[5] Dr. Roy later modified this opinion in December 4, 2000 and January 23, 2001 reports finding appellant fit for restricted, sedentary work not requiring the use of her right arm.

In a September 19, 2000 report, Dr. Barnett diagnosed residuals of complex regional pain syndrome of the right upper extremity and found appellant disabled for work due to pain, limited right upper extremity motion and functional disuse.[6] Dr. Barnett stated, in an October 23, 2000 letter, that he did not wish to view the surveillance videotapes, as his September 19, 2000 examination was "hands on" and he would not change his findings or diagnosis. Dr. Barnett reiterated on December 5, 2000 and January 22, 2001, that appellant could do no work with her right upper extremity.[7]

The Office referred appellant to Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Yashruti submitted a November 17, 2000 report, reviewing the medical record and surveillance videotapes. He stated an impression of "history of chronic sprain/contusion of the right shoulder," and "history of reflex sympathetic dystrophy." Dr. Yashruti opined that the videotapes did "not support the diagnosis of reflex sympathetic dystrophy," as they documented a full range of right elbow and hand motion, which appellant did not exhibit on physical examination. He commented that the videotapes also contradicted appellant's reports of zero pounds grip strength on the right and five pounds on the left. Dr. Yashruti found that appellant's total disability had ceased by late 1989. In December 13, 2000 and February 5, 2001 supplemental reports, Dr. Yashruti stated that there were no objective findings supporting a diagnosis of reflex sympathetic dystrophy syndrome and that appellant could work 6 hours a day lifting up to 40 pounds, with limited reaching and working above shoulder level.

In a January 9, 2001 letter, the Office advised appellant of the Act's penalty provisions for refusing suitable work. The Office noted that the modified letter carrier position was still available and was within Dr. Yashruti's restrictions.

In a January 19, 2001 report, Dr. William J. Montgomery, an attending orthopedic surgeon, noted that appellant was permanent and stationary by 1996. Dr. Montgomery obtained x-rays showing neuroforaminal narrowing at C5-6, mild degeneration from C4-6 and a reversal of the lordotic curvature suggesting muscle spasm. He diagnosed "right shoulder regional pain syndrome with limited range of motion/adhesive capsulitis," and degenerative changes at C5-6. Dr. Montgomery noted that although appellant stated that she was "unable to lift even the smallest of items" and had an apparent flexion contracture of the right elbow, there was no significant atrophy in the upper extremities. Dr. Montgomery found that appellant was unable to use her right upper extremity "for significant work" due to pain and her cervical spine condition.

In a February 2, 2001 letter, appellant accepted the modified job offer. She reported for duty on February 6, 2001 but was instructed to return home.

In an April 17, 2001 report, Dr. Thomas Dorsey, a Board-certified orthopedic surgeon and second opinion physician, performed a schedule award evaluation. Dr. Dorsey diagnosed a

[6] Appellant underwent a functional capacity evaluation on October 2, 2000 performed by a physical therapist, who noted that appellant exhibited Waddell's signs indicative of symptom magnification and an invalid profile. It does not appear that this evaluation was signed or reviewed by a physician.

[7] Appellant reported for work on December 4, 2000, with a note from Dr. Darlene A. Rimle, an osteopath at an urgent care clinic, holding her off work.

resolved contusion of the right upper extremity and found no ratable impairment according to the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) affecting range of motion, strength or any other aspect of the right upper extremity. He completed schedule award worksheets concerning all joints of the upper extremity, finding no impairment.

The Office found a conflict of medical opinion between Dr. Yashruti, for the government and Dr. Montgomery, for appellant. To resolve this conflict, the Office referred appellant, the medical record and a statement of accepted facts, to Dr. Donald R. Ball, a Board-certified orthopedic surgeon, who submitted an April 20, 2001 report. Dr. Ball examined appellant on March 27, 2001. He characterized appellant's restricted elbow and shoulder motion and diminished grip strength as voluntary behavior limited to medical examinations. He noted that there were no objective findings to account for these deficits, adding that "her arm circumference bilaterally [was] virtually the same suggesting that she has reasonably normal use of both upper extremities," and the surveillance videotapes showed a "normally functioning right upper extremity." He noted that although appellant claimed to wear a TENS unit 24 hours a day, she was not observed to wear it in the footage recorded on July 21, 1999 and January 4, July 25 and August 10, 2000. Dr. Ball opined that appellant could "return to a full normal work program" for 6 hours a day with lifting limited to 40 pounds, as the videotapes did not document heavy lifting and appellant might be "out of condition." Dr. Ball opined that, as appellant's right upper extremity was "normal," without evidence of reflex sympathetic dystrophy syndrome or objective abnormalities, he could not provide a diagnosis. He stated that there were no injury-related residuals or factors of disability and no further treatment was needed.

By notice dated June 1, 2001, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that all residuals of the accepted injury had ceased, based on Dr. Ball's opinion as the weight of the medical evidence.

Appellant responded on June 13 and 20, 2001, contending that she was still totally disabled. Appellant also claimed a schedule award for permanent impairment of the right upper extremity. She submitted a June 11, 2001 report from Dr. Barnett, finding restricted shoulder and wrist motion and diagnosing "[r]esiduals of complex regional pain syndrome." Appellant also submitted a June 12, 2001 slip from Dr. Gregory S. Bales, an attending osteopath, finding that appellant was permanently disabled for work.

By decision dated July 2, 2001, the Office terminated appellant's compensation benefits effective July 1, 2001 on the grounds that the residuals of the accepted condition had ceased. The Office denied appellant's claim for a schedule award on the grounds that Dr. Dorsey found no impairment due to the September 1989 injury.[8]

On July 11, 2001 appellant requested a hearing before an Office hearing representative, which was held on January 9, 2002. Appellant testified that she remained disabled for work and could not perform activities of daily living. Appellant contended that the surveillance videotapes did not show her using her right arm above shoulder level, lifting over five pounds, or letting a

[8] In a July 30, 2001 letter, appellant stated that she reported to work that day but was sent home as her condition was no longer work related.

man lean on her right arm. Appellant submitted July 10 and September 20, 2001 form medical reports from Dr. Barnett, who noted that appellant was able to perform modified work with no use of the right upper extremity.

By decision dated and finalized April 8, 2002, an Office hearing representative affirmed the July 2, 2001 decision.

On February 7 and 14, 2003 appellant requested reconsideration. She contended that Dr. Ball misinterpreted the surveillance videotapes and noted that the employing establishment allegedly declined to order a criminal investigation. She submitted additional evidence.

In a January 21, 2003 report, Dr. Barnett found weakness in the right upper extremity without atrophy and "sensory changes." He diagnosed "[c]omplex regional pain syndrome of the right upper extremity," and that for "all employment purposes, she could be considered a right upper extremity amputee."

By decision dated May 16, 2003, the Office denied modification of the April 8, 2002 decision. The Office found that Dr. Barnett's report was insufficient to outweigh that of Dr. Ball, the impartial medical examiner.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.[9] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[10] The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[11]

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.[12]

ANALYSIS -- ISSUE 1

Appellant received wage-loss compensation for total disability from April 30, 1993 through July 1, 2001, based on the opinions of her attending physicians. Appellant first submitted evidence from Dr. Nagelberg, an attending Board-certified orthopedic surgeon. In reports from May 13, 1996 to April 3, 2000, he diagnosed reflex sympathetic dystrophy

[9] *Raymond W. Behrens*, 50 ECAB 221 (1999).

[10] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

[11] *Raymond W. Behrens*, *supra* note 9.

[12] *Talmadge Miller*, 47 ECAB 673, 679 (1996).

syndrome of the right upper extremity, and found appellant totally disabled for work. However, after Dr. Nagelberg viewed surveillance videotapes on July 27, 2000 demonstrating appellant using her right arm in activities of daily living with no difficulty, he changed his opinion and stated that appellant had misrepresented her physical condition to him. Dr. Nagelberg released appellant to full, unrestricted duty as of July 27, 2000.

Therefore, appellant submitted reports from Dr. Lee, a chiropractor. However, as she did not diagnose a spinal subluxation by x-ray, she is not considered a physician for the purposes of this case and her opinion is of no probative value.[13] Appellant also submitted reports from Dr. Roy, an attending Board-certified gastroenterologist. However, Dr. Roy's reports are of diminished probative value as he did not submit sufficient medical rationale to explain how or why the September 30, 1989 right arm strain with reflex sympathetic dystrophy syndrome would continue to disable appellant for work approximately 11 years after the injury.[14]

Dr. Barnett, a Board-certified orthopedic surgeon, found that appellant remained totally disabled for work due to reflex sympathetic dystrophy syndrome. Dr. Barnett noted in an October 23, 2000 letter, that he did not wish to review the surveillance videotapes as he remained convinced of the accuracy of his clinical assessment. However, Dr. Barnett offered no objective physical findings substantiating his diagnosis of reflex sympathetic dystrophy syndrome nor did he provide medical rationale explaining how or why such syndrome would continue to disable appellant for work, particularly as surveillance videotapes indicated that appellant's right upper extremity was not impaired. Dr. Barnett's opinion is, therefore, of diminished probative value.

Dr. Montgomery, an attending Board-certified orthopedic surgeon, diagnosed adhesive capsulitis of the right shoulder and a cervical spine condition, neither of which was accepted by the Office as employment related. He also diagnosed a complex regional pain syndrome of the right shoulder, but did not indicate which objective findings were indicative of this disorder. Dr. Montgomery noted that appellant's subjective complaints were not supported by objective findings on physical examination. Thus, Dr. Montgomery's medical opinion is deficient in several respects and of medical probative value.

The Office referred appellant to Dr. Yashruti, a Board-certified orthopedic surgeon, for a second opinion examination. He found no objective abnormalities of the right upper extremity. The Office subsequently found a conflict of opinion between Dr. Yashruti and Dr. Montgomery and referred the case to Dr. Ball, a Board-certified orthopedic surgeon.

Dr. Ball submitted a detailed medical report dated April 20, 2001, based on a thorough examination, the complete medical record and the surveillance videos. He opined that appellant showed no objective clinical findings related to the accepted September 30, 1989 injury, that the right upper extremity was "normal," and that no further treatment was required. Dr. Ball noted that on the surveillance videotapes, appellant performed her daily activities without difficulty,

[13] 5 U.S.C. § 8101(2) provides that the term "'physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...." *See also George E. Williams*, 44 ECAB 530 (1993).

[14] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

although she presented for medical examinations with multiple complaints. The Board finds that Dr. Ball's opinion constituted the weight of medical opinion as it was well rationalized and based on a complete and accurate factual and medical history. Thus, following the July 2, 2001 termination decision, the burden of proof shifted to appellant to establish that she continued to be disabled for work due to residuals of the accepted injury.

Appellant submitted medical reports addressing her condition after July 2, 2001 from Dr. Barnett,[15] who found that appellant was unable to perform any work tasks with her right upper extremity. In a January 21, 2003 report, Dr. Barnett found weakness and "sensory changes," diagnosed a complex regional pain syndrome of the right upper extremity and opined that for "employment purposes, [appellant] could be considered a right upper extremity amputee." However, Dr. Barnett did not provide objective physical findings to substantiate his opinion that appellant remained totally disabled for work or that her right arm was entirely useless. Dr. Barnett did not provide sufficient medical rationale explaining how and why the September 30, 1989 injury would continue to cause disability on or after July 2, 2001. The Board has held that medical reports not supported by medical rationale are of limited probative value.[16] Therefore, Dr. Barnett's medical reports are insufficient to overcome the special weight accorded to Dr. Ball's opinion.

Therefore, appellant has not met her burden of proof to establish that her condition on or after July 2, 2001 was causally related to the accepted September 30, 1989 injury. She submitted insufficient rationalized medical evidence substantiating a causal relationship between her ongoing complaints and the employment injury.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provisions of the Act[17] and its implementing regulation[18] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify how the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables and guidelines so that there are uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses. As of February 21, 2001, the Office uses the fifth edition of the A.M.A., *Guides* to

[15] The record indicates that in July 2001 after Dr. Nagelberg refused to treat appellant, she was treated by Dr. Barnett although he previously served as a second opinion physician.

[16] *Lucrecia M. Nielsen*, *supra* note 14.

[17] 5 U.S.C. § 8107.

[18] 20 C.F.R. § 10.404 (1999).

calculate new claims for a schedule award, or to recalculate prior schedule awards pursuant to an appeal, request for reconsideration, or decision of an Office hearing representative.[19]

The standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[20] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides protocols for determining impairments of the upper extremities due to pain, discomfort, loss of sensation, or loss of strength.[21]

ANALYSIS -- ISSUE 2

Appellant has the burden to submit medical evidence demonstrating a permanent impairment of the right upper extremity under the protocols of the A.M.A., *Guides*. The record demonstrates that appellant had no ratable impairment of the right upper extremity at the time she claimed a schedule award in June 2001.

Dr. Nagelberg, an attending Board-certified orthopedic surgeon, opined on July 27, 2000 that appellant had no organic abnormalities of the right upper extremity. Dr. Barnett and Dr. Montgomery, both Board-certified orthopedic surgeons, noted varying degrees of pain and impairment, but neither physician referred to the A.M.A., *Guides* or explained the extent or nature of any impairment in conformance with the A.M.A., *Guides*. Dr. Ball, a Board-certified orthopedic surgeon and impartial medical examiner, found no abnormalities of the right upper extremity after performing a detailed examination on March 27, 2001. Dr. Dorsey, a Board-certified orthopedic surgeon and second opinion physician, performed an examination and schedule award evaluation on April 17, 2001. Dr. Dorsey completed detailed worksheets for each joint of the right upper extremity, finding no impairment due to decreased range of motion, weakness, or any other aspect of functioning. Dr. Dorsey stated that appellant had no ratable factors of impairment.

Appellant has not met her burden of proof in establishing that she sustained a ratable impairment of the right upper extremity. She submitted no probative medical evidence demonstrating any impairment of the scheduled member.

[19] *See* FECA Bulletin No. 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[20] *See Paul A. Toms*, 28 ECAB 403 (1987).

[21] A.M.A., *Guides*, Chapter 16, "The Upper Extremities," at 433-521 (5th ed. 2001).

CONCLUSIONS

The Board finds that appellant has not established that her medical condition on and after July 1, 2001 is causally related to an accepted September 30, 1989 right upper extremity strain with reflex sympathetic dystrophy syndrome.

The Board also finds that the Office properly found that appellant did not sustain a ratable impairment of the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2003 is affirmed.

Issued: February 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member