

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN D. BACASHIHUA and U.S. POSTAL SERVICE,
DETROIT BULK MAIL CENTER, Allen Park, Mich.

*Docket No. 96-1023; Submitted on the Record;
Issued May 15, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 30, 1994.

On March 15, 1982 appellant, then a 26-year-old postal clerk, filed a claim stating that on March 11, 1982 she was operating the hamper dumper when a hamper dropped on her, striking her in the neck and right shoulder. In a December 22, 1982 decision, the Office rejected appellant's claim on the grounds that she had not established that she was injured at the time, place and in the manner alleged. On April 7, 1983 appellant developed pain in her right side and mid-back while reaching over the side of a hamper to get bundles of magazines. In a July 20, 1983 decision, the Office rejected appellant's claim on the grounds that she had not established that she had compensable disability as a result of the April 7, 1983 employment injury. In a September 18, 1995 decision, an Office hearing representative found that the injuries of March 11, 1982 and April 7, 1983 had occurred as alleged. He therefore set aside the Office's decisions of December 22, 1982 and July 20, 1983 and remanded the cases to the Office for determination of the duration of appellant's periods of disability due to the employment injuries. The Office paid appellant compensation for the periods she did not work through August 31, 1984. The Office accepted appellant's claim for contusions and bruises of the right shoulder, adhesive pericapsulitis and right shoulder torticollis. In a November 5, 1990 memorandum, a senior Office claims examiner indicated that the Office hearing representative had remanded the case for payment of appropriate compensation and concluded that the Office had not met its burden of proof in terminating appellant's compensation. The Office therefore began payment of temporary total disability retroactive to September 1, 1984.

In an April 18, 1994 decision, the Office terminated appellant's compensation effective April 30, 1994 on the grounds that the evidence of record established that appellant's medical condition and disability had ceased. In a July 15, 1984 decision, the Office found that appellant's request for a hearing before an Office hearing representative was untimely. It denied her request for a hearing on the grounds that the medical issues in her case could be addressed

through a request for reconsideration. In a December 28, 1994 decision, the Office denied appellant's request for reconsideration as *prima facie* insufficient to warrant review of the prior decision. Appellant appealed to the Board but withdrew her appeal to submit additional evidence to the Office.¹ In a December 7, 1995 merit decision, the Office denied appellant's request for reconsideration.

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective April 30, 1994.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

Dr. Lydia M. Lasichak, a rheumatologist, initially diagnosed frozen shoulder with torticollis. In a November 14, 1984 report, Dr. Lasichak stated that appellant's frozen shoulder was related to the initial employment injury and had been a chronic problem with exacerbations and remissions since the injury. She noted that appellant had improved with physical therapy and currently had an almost normal range of motion. Dr. Lasichak indicated that appellant's major complaint during the period had been tenosynovitis of the forearm and hand. She concluded that appellant's prognosis was excellent so long as she followed instructions and work restrictions. In an October 14, 1986 deposition, Dr. Lasichak stated that appellant continued to have recurrent problems with her shoulder and her chronic pain syndrome. She indicated that since the employment injury appellant had been at least partially disabled.

In a February 28, 1989 report, Dr. Mary E. Conroy, a Board-certified orthopedic surgeon who was requested by the Office to give a second opinion, stated that appellant might have had a minimal amount of frozen shoulder but had no significant atrophy as would be seen in an established frozen shoulder. She indicated that x-rays showed some osteoarthritis and degenerative disc disease of the cervical spine which she related to aging and not to either of the employment injuries. Dr. Conroy commented that appellant had some limitation of abduction and external rotation which was not disabling. She noted appellant did not have any associated atrophy or substitution maneuvers which would be expected in true adhesive capsulitis. Dr. Conroy stated that she was unable to establish any industrial disability as residuals of the employment injuries nor work any work-related diagnosis. She concluded that appellant could return to her ordinary job but her position had been terminated.

In a June 15, 1992 report, Dr. J.L. Tofaute, a Board-certified orthopedic surgeon, also requested by the Office to give a second opinion, stated that x-rays of the cervical spine showed good overall alignment, good maintenance of the disc space and no evidence of recent or old bone or joint injury or abnormality. He indicated that appellant had a full range of motion in the

¹ Docket No. 95-1384 (Order Dismissing Appeal, September 28, 1995).

² *Jason C. Armstrong*, 40 ECAB 907 (1989)

joints of both arms with some limitation in flexion and internal rotation in the right shoulder. Dr. Tofaute noted that appellant had 160 degrees of abduction in the right shoulder in one test but did not go beyond 100 degrees after that. He reported that inspection of the shoulders, elbows, wrists and hands revealed no evidence of heat, redness, swelling, effusion, deformity or atrophy. Dr. Tofaute stated appellant had no objective evidence of disability from an orthopedic or musculoskeletal standpoint. He indicated that appellant gave a history of probable contusion to the junction of the neck with the upper back and a history of apparent circulatory stasis in the right arm which was most likely positional due to splinting of the arm to the body. Dr. Tofaute concluded no findings revealed any continuing disabling condition or residuals of such conditions which precluded her from returning to work.

Dr. Tofaute's report showed that appellant had no objective orthopedic findings that would form a basis for her symptoms. Dr. Tofaute therefore had a rationalized basis on which to conclude that appellant had no disabling condition that would prevent her from returning to work. Dr. Conroy had reached the same conclusion previously. Dr. Tofaute's report provided a sufficient basis for the Office's decision to terminate appellant's compensation effective April 30, 1994. The Officer therefore met its burden of proof in terminating appellant's compensation.

Subsequent evidence of record, however, has created a conflict in the medical evidence. In a March 27, 1995 deposition, Dr. Lasichak stated that appellant had restricted range of motion of the cervical spine with spasm and triggering on the right side. She noted that the pericervical musculature felt lumpy rather than smooth. Dr. Lasichak indicated that appellant could not abduct her arm more than 60 degrees actively and 90 degrees passively and had severe pain when lowering her arm which indicated that there was impingement in the supraspinatus. She stated that appellant had positive Tinel's and Phalen's signs and had tenderness of the lateral epicondyle in the right elbow. Dr. Lasichak commented that the tenderness of the epicondyle showed appellant had not been using her shoulder and had been depending more on her elbow in moving her arm. Dr. Lasichak reported that x-rays showed narrowing and spur formation at C5-6 and C6-7 which had progressed since x-rays taken in 1988, with some signs of encroachment. She related the degenerative condition of appellant's neck to the employment injuries. Dr. Lasichak indicated that an ultrasound of the shoulder supported her findings of impingement. She related appellant's shoulder condition to her employment injuries. Dr. Lasichak stated that Dr. Tofaute was wrong in concluding that appellant had no objective findings. She further stated that appellant was totally disabled for work and would continue to be disabled. Her deposition, therefore, conflicts with Dr. Tofaute's report on physical findings and on whether appellant continued to be disabled for work. The case must therefore be remanded for further development.

On remand, the Office should prepare a statement of accepted facts and refer appellant, together with the statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should be requested to describe and diagnose appellant's right shoulder condition and give his rationalized opinion on whether appellant has a shoulder condition that is causally related to her employment injuries and whether she is disabled due to an employment-related shoulder condition. After further development as it may find necessary the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated December 7, 1995, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
May 15, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member