

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICIA A. DIAZ and DEPARTMENT OF THE AIR FORCE,
LACKLAND AIR FORCE BASE, Tex.

*Docket No. 96-2414; Submitted on the Record;
Issued May 17, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage loss compensation benefits on the grounds that she refused an offer of suitable work under section 8106(c)(2) of the Federal Employees' Compensation Act; (2) and whether the Office abused its discretion by denying authorization for right knee arthroscopy; and (3) whether appellant has established that she sustained a permanent impairment of her right leg causally related to an accepted August 31, 1989 right knee strain requiring June 27, 1990 meniscectomy, entitling her to a schedule award.

The Office accepted that on August 31, 1989,¹ appellant, then a 34-year-old diagnostic radio technician, sustained a right knee strain requiring a June 27, 1990 lateral meniscectomy, as well as a depressive reaction.² Appellant returned to work full time in September 1990, stopped work on September 22, 1990 and did not return. She received appropriate compensation benefits. Appellant submitted periodic reports from Dr. Patrick H. Wilson, an attending Board-certified orthopedic surgeon, from 1989 through 1993, finding her disabled for work due to right knee pain. He stated in a November 9, 1993 report that appellant might be able to perform light duty but was disabled from her date-of-injury position.

¹ Appellant fell at work on February 25, 1987 and underwent right knee surgery on March 10, 1988 and March 16, 1989.

² In a September 16, 1991 report, Dr. Robert L. Jones, an orthopedist and second opinion physician, found appellant "totally disabled for all work because of her symptoms magnification and functional overlay." In a May 1992 report, Dr. Alfred V. Williams, a second opinion psychiatrist, diagnosed an "[a]dult situational reaction manifested by depressive symptoms" related to the accepted knee injury. In a May 26, 1992 report, Dr. Monty R. McMinn, an attending psychiatrist, diagnosed major depressive illness and severe obesity. He opined that appellant's emotional state was related to the accepted knee injuries. In a May 14, 1993 memorandum, the Office recommended that a "consequential depressive emotional condition" be accepted related to the August 31, 1989 injury as two second opinion physicians "support that a functional overlay as a result of [appellant's] right knee surgery, exists." The Office accepted a depressive reaction.

The Office referred appellant to two second opinion physicians who found her capable of full-time light-duty work. In a February 24, 1992 report, Dr. Peter F. Holmes, an orthopedist, found that appellant could work eight hours per day light duty, noting “pain out of proportion to the examination.” In August 24 and August 31, 1993 reports, Dr. Roberto Rolfini, a rheumatologist, diagnosed residual right knee pain with “[s]ignificant emotional overlay,” and indicated that appellant could work eight hours per day light duty.

To resolve the conflict of medical opinions between Dr. Wilson and Drs. Holmes and Rolfini regarding whether appellant could return to work, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Ty H. Goletz, a Board-certified orthopedic surgeon and impartial medical examiner. In a November 22, 1993 report, Dr. Goletz noted findings on November 16, 1993 examination of subjective pain and tenderness and decreased right knee motion resulting from the August 31, 1989 injury and June 27, 1990 surgery. He noted that appellant was unable to perform her date-of-injury position due to her inability to stand or walk for prolonged periods or move heavy objects. In an attached work restriction evaluation, Dr. Goletz limited lifting, bending and twisting to 1 hour, walking and standing to 30 minutes, proscribed squatting, climbing, kneeling and operating foot controls with the right foot and limited lifting to 20 pounds. He noted that appellant’s interpersonal relations were affected by depression, that appellant could work eight hours per day and had reached maximum medical improvement.

A December 10, 1993 magnetic resonance image (MRI) scan demonstrated a “tiny horizontal tear of the mid horn of the medial meniscus,” normal medial, lateral, collateral, anterior and posterior cruciate ligaments and no bony abnormality.

The Office referred appellant for vocational rehabilitation services and sent appellant February 11 and February 23, 1994 letters regarding this effort. In a March 2, 1994 letter, appellant responded to the Office’s February 23, 1994 letter, asserting that she was medically disabled for work and was “not refusing to seek suitable work.”³

On March 11, 1994 the employing establishment offered appellant a light-duty position, based on Dr. Goletz’s restrictions, as a medical clerk, performing sedentary clerical, keyboarding and administrative duties, monitoring radiation dosimetry badge logs and conducting informational briefings, with no lifting over 20 pounds. Appellant was given until March 25, 1994 to accept or decline the position. The employing establishment advised appellant that her benefits could be terminated if she declined the position and the job was determined to be suitable by the Office.⁴

³ In a March 4, 1994 memorandum, a rehabilitation counselor noted receiving appellant’s March 2, 1994 letter.

⁴ In a March 14, 1994 memorandum, the vocational rehabilitation counselor noted that appellant was unable to drive due to her knee problem, “was recently in an auto[mobile] accident,” asserted that she had no transportation to and from work, would be “bored by medical clerk position” and was a poor typist.

In a March 22, 1994 report, Dr. Wilson reviewed and approved the offered light-duty position description, noting his agreement with Dr. Goletz's restrictions.⁵

In an April 12, 1994 letter, the Office advised appellant that the offered medical clerk position was found to be suitable work and that she had "30 days from the date of this letter to either accept the position or provide an explanation of the reasons for refusing it.... If you fail to accept the position, any explanation or evidence which you provide will be considered prior to determining whether or not your reasons for refusing the job are justified." The Office also advised appellant of the Act's penalty provisions at section 8106(c)(2). The record indicates that appellant did not respond prior to issuance of the May 17, 1994 decision.

By decision dated May 17, 1994, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work under section 8106(c)(2) of the Act, as she did not respond to the March 11, 1994 offer of suitable work or otherwise report for duty as of May 12, 1994. Appellant disagreed with this decision and on June 7, 1994 requested an oral hearing.

In a July 27, 1994 affidavit, appellant stated that Dr. Goletz would modify his November 1993 opinion and restrictions if he knew that since March 11, 1994, she was diagnosed with Cushing's disease, rheumatoid arthritis and bilateral carpal tunnel syndrome. Appellant asserted that the physical requirements of the light-duty position exceeded Dr. Goletz's November 16, 1993 restrictions. She also alleged that periods of difficulty in concentrating would prevent her from properly monitoring radiation dosimetry badges.

In a September 6, 1994 report, Dr. Goletz reviewed the December 6, 1993 MRI scan showing "a horizontal tear of the mid-portion of the medial meniscus.... [P]er hour, she should not do more than eight minutes of standing or walking ... lifting restrictions are 10 to 20 pounds. She is to avoid using a foot pedal on her right side for repetitive activities." Dr. Goletz opined that these restrictions were permanent. He noted that Dr. Wilson stated that appellant "should not be up and walking the long corridors at" the employing establishment. Dr. Goletz concluded that appellant's rheumatoid arthritis, liver problems made it "difficult to separate out her knee problems from the overall rheumatoid arthritis but ... the knee problem did not cause the rheumatoid arthritis."

In an October 4, 1994 report, Dr. Wilson diagnosed bilateral carpal tunnel syndrome with median nerve entrapment, noting that use of a cane aggravated her wrist problem. He opined that appellant could attempt a return to light-duty work following a right knee meniscectomy.

In a January 5, 1995 report, an Office medical adviser noted that a June 5, 1990 MRI scan mentioned no abnormality of the medial meniscus, while the December 10, 1993 MRI scan showed a medial meniscal tear, three-and-a-half years after the August 1989 injury. The adviser stated that the gap in time indicated a lack of causal relationship.

⁵ Dr. Wilson submitted reports through August 1994 holding appellant off work.

In a January 16, 1995 report, Dr. Wilson explained that the accepted August 31, 1989 injury caused the loss of the lateral meniscus, thereby damaging the medial meniscus due to increased weight bearing. Therefore, he concluded that the requested arthroscopy was related to the accepted injury.

By decision dated February 7, 1995, the Office denied authorization of a right knee arthroscopy. Appellant disagreed with this decision and requested that the issue be combined with her previous oral hearing request.

Appellant underwent right knee arthroscopy on February 9, 1995 to repair a minimal posterior horn tear and medial meniscal plica. Arthritic changes were noted. Dr. Wilson submitted periodic progress and physical therapy notes through August 1995 holding appellant off work.

In a May 15, 1995 report, Dr. Patrick M. Palmer, an orthopedic surgeon and second opinion physician, found a normal right knee on examination with no disability, commenting that the three arthroscopic surgeries would likely cause future discomfort with prolonged weight bearing. He recommended an immediate return to work, with restrictions against walking and standing, with full duty as of July 15, 1995.

On October 4, 1995 appellant claimed a schedule award.

An oral hearing was held October 17, 1995 to determine whether the evidence supported continuing work-related disability, whether the Office properly terminated her compensation and properly denied authorization of the right knee arthroscopy. At the hearing, appellant noted that Dr. Goletz's November 16, 1993 work restrictions did not encompass her carpal tunnel syndrome. Dr. Wilson testified that he misinterpreted Dr. Goletz's reports, as he did not feel appellant could climb, kneel or twist for 30 minutes.⁶

In a November 28, 1995 response to the hearing transcript, the employing establishment noted that appellant had not responded directly to the job offer.

In a December 4, 1995 affidavit, appellant asserted that she responded to the March 11, 1994 light-duty job offer by calling the employing establishment's injury

⁶ After the hearing, appellant submitted additional medical evidence largely repetitive of reports previously of record. In an April 4 and August 2, 1994 reports, Dr. Wilson recommended a return to light-duty work then held appellant off work in an October 4, 1994 report due to carpal tunnel syndrome and right knee problems. In an October 5, 1995 deposition, he disagreed with Dr. Goletz's November 16, 1993 assessment that appellant could walk up to 30 minutes a day, noting that from November 1993 to May 1994, carpal tunnel syndrome would have added further work restrictions. Dr. Wilson submitted reports through June February 1996 holding appellant off work due to carpal tunnel syndrome and right knee symptoms. He asserted the carpal tunnel syndrome was caused in part by having to walk with a cane, and was therefore related to the August 1989 injury. Appellant also submitted April and May 1994 narrative and laboratory reports from Dr. Suzanne Gazda, an internist, and Dr. Rodolfo Molina, a rheumatologist, regarding diagnoses of rheumatoid arthritis, bilateral carpal tunnel syndrome and Cushing's disease. These reports do not mention the accepted August 1989 injury and do not relate to conditions accepted by the Office.

compensation manager, Barbara Estes and telling her that the job was not within her medical restrictions. Ms. Estes allegedly instructed appellant to report for work.

By decision dated May 24 and finalized May 30, 1996, the Office hearing representative affirmed the Office's termination of appellant's wage-loss compensation benefits on the grounds that she had refused an offer of suitable work. The Office found that Dr. Wilson's reports contained insufficient medical rationale supporting continuing work-related disability, or that the requested right knee arthroscopy was related to work factors. The Office noted that Dr. Wilson did not diagnose carpal tunnel syndrome until August 2, 1994 nearly four years after appellant stopped work and that the condition thus could not be related to work factors. The Office found that the weight of medical opinion on causal relationship rested with Dr. Goletz and Dr. Palmer. The Office further found that appellant failed to respond to the March 11, 1994 offer of suitable work and was given a reasonable amount of time to comply with the Office's regulations or to submit evidence supporting her refusal of the offered light-duty position.

In an August 2, 1996 letter, the Office requested that Dr. Wilson assess any permanent impairment using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition, (hereinafter, the A.M.A., *Guides*).⁷ The record indicates that Dr. Wilson did not respond prior to the issuance of the September 5, 1996 decision.

By decision dated September 5, 1996, the Office denied appellant's claim for a schedule award on the grounds that she submitted insufficient evidence to establish a permanent impairment related to the August 31, 1989 right knee injury.

The Board finds that the Office did not properly terminate appellant's wage-loss compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work. The Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁸ Section 10.124(e)⁹ of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.¹⁰

⁷ The Office stated that the impairment rating pertained to the August 31, 1989 right knee injury, did not include any preexisting impairment, or "any further impairment [appellant] may have incurred as a result of any other injury or surgical procedure on or after May 17, 1994, including the surgical procedure performed on February 9, 1995."

⁸ *Shirley B. Livingston*, 42 ECAB 855 (1991).

⁹ 20 C.F.R. § 10.124(c).

¹⁰ *Maggie L. Moore*, 42 ECAB 484 (1991).

In this case, the Office based its termination of compensation on appellant's failure to respond to the offered light-duty position, based on restrictions given on November 16, 1993 by Dr. Goletz and approved as suitable work by Dr. Wilson on March 22, 1994. The Office mailed appellant February 11 and February 23, 1994 letters regarding vocational rehabilitation. Appellant responded by March 2, 1994 letter, asserting that she was medically unable to return to work. However, the employing establishment did not offer appellant the light-duty position of medical clerk until March 11, 1994. Thus, appellant's March 2, 1994 letter cannot be considered a response to the March 11, 1994 job offer as it was written and mailed nine days prior to the job offer.

The Office's argument thus presumes that the offered medical clerk position was medically suitable work. However, the Board finds that although the Office consulted Dr. Wilson and Dr. Goletz regarding any limitations related to the accepted right knee condition, the Office did not consult with Dr. McMinn, an attending psychiatrist, Dr. Williams, the second opinion psychiatrist, or any other psychiatrist, regarding any disability or work limitations related to the accepted depressive reaction. Dr. Williams, in an undated report, received on May 13, 1992 noted appellant had the capacity for only four hours of work a day due to her accepted emotional condition. Therefore, the Office undertook insufficient development to determine whether the offered light-duty medical clerk position was suitable work regarding all conditions accepted in the case. As the offered position was therefore not determined definitively to be suitable work, appellant cannot be said to have refused an offer of suitable work.

Consequently, the Office improperly terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work. The case shall be returned to the Office for payment of all appropriate compensation benefits.

Regarding the second issue, the Board finds that the Office did not abuse its discretion by denying authorization for right knee arthroscopy.

Section 8103(a) of the Act¹¹ provides for furnishing to an injured employee "the services, appliances and supplies prescribed by a qualified physician" which the Office under authority delegated by the Secretary of Labor, "considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation." The Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.¹² In order to be entitled to reimbursement of medical expenses by the Office, appellant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation in a case such as this must include supporting rationalized medical evidence.¹³ Appellant has failed to provide such rationalized medical evidence supporting causal relation in this case.

¹¹ 5 U.S.C. § 8103(a).

¹² *William F. Gay*, 38 ECAB 599 (1987).

¹³ *William C. Thomas*, 45 ECAB 591 (1994).

Appellant sustained an accepted August 31, 1989 right knee injury requiring June 27, 1990 lateral meniscectomy. More than three years later, a December 10, 1993 MRI scan demonstrated a tiny tear of the medial meniscus, which Dr. Wilson opined required a right medial meniscectomy. However, in a January 5, 1995 report, an Office medical adviser negated causal relationship as there were no objective findings of medial meniscal pathology until the December 10, 1993 MRI scan, more than three years after the August 1989 injury.

Dr. Wilson did provide some support for causal relationship. In a January 16, 1995 report, he explained that the requested right knee arthroscopy was causally related to the accepted August 31, 1989 injury in that the accepted June 27, 1990 removal of the right lateral meniscus led to increased weight bearing on the medial meniscus, causing an eventual tear of the medial meniscus. However, as the Office found in its decision dated February 7, 1995, denying authorization of a right knee arthroscopy Dr. Wilson's opinion is insufficiently rationalized to establish a causal relationship between the August 31, 1989 injury and its sequelae and a medial meniscal tear.¹⁴ The Board notes that Dr. Wilson did not explain the gap of more than three years between diagnosis of the lateral meniscal tear and the medial meniscal tear and that he did not specifically attribute appellant's right knee symptoms to a medial meniscal tear until October 4, 1994, more than five years after the accepted injury.

Consequently, appellant failed to submit sufficient rationalized medical evidence to establish that the requested right knee arthroscopy was necessitated by the accepted August 31, 1989 right knee injury.

Regarding the third issue, the Board finds that appellant has not established that she sustained a permanent impairment of her right leg causally related to an accepted August 31, 1989 right knee strain requiring June 27, 1990 meniscectomy, entitling her to a schedule award.

Section 8107 of the Act¹⁵ and section 10.304 of the implementing regulations¹⁶ provides that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the percentage of impairment. Therefore, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.¹⁷ Proper use of the A.M.A., *Guides* ensures consistent results and equal justice for all claimants. The A.M.A., *Guides* contains detailed procedures for the objective determination of impairments due to pain, weakness, loss of motion, altered sensation and other pathologies.

In an August 2, 1996 letter, the Office requested that Dr. Wilson provide an assessment of any permanent impairment using the fourth edition of the A.M.A., *Guides*. When Dr. Wilson did not respond, the Office denied appellant's schedule award claim by decision dated

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

¹⁵ 5 U.S.C. § 8107.

¹⁶ 20 C.F.R. § 10.304.

¹⁷ *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

September 5, 1996 on the grounds that she submitted insufficient evidence to establish a permanent impairment related to the August 31, 1989 right knee injury. His reports do not provide sufficiently detailed descriptions regarding loss of motion, weakness, pain, or sensory deficit to allow an evaluation according to the tables and grading schemes set forth in the A.M.A., *Guides*. Also, Dr. Wilson did not refer to specific portions of the A.M.A., *Guides* in his reports. Thus, the Office properly found that there was insufficient evidence on which to base a schedule award for any work-related permanent impairment.

The decision of the Office of Workers' Compensation Programs dated September 5, 1996 regarding denial of the schedule award is affirmed; the portion of the decision dated May 24 and finalized May 30, 1996 affirming the Office's termination of appellant's wage-loss compensation benefits on the grounds that she had refused an offer of suitable work is reversed, and the case returned to the Office for payment of all appropriate retroactive compensation benefits; the portion of the decision dated May 24 and finalized May 30, 1996 affirming the denial of arthroscopic surgery is affirmed.

Dated, Washington, D.C.
May 17, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member