

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD Y. MIYASHIRO and U.S. POSTAL SERVICE,
POST OFFICE, Kailua, HI

*Docket No. 02-319; Submitted on the Record;
Issued December 19, 2002*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; (2) whether appellant has established an employment-related disability for the period August 1989 to April 1993.

The case has been before the Board on prior appeals. In a decision dated August 27, 1992, the Board found that the weight of the medical evidence established that appellant's employment-related disability ended by August 27, 1989.¹ In a decision dated October 24, 1994, the Board found that there was sufficient evidence to require further development of the evidence with respect to a shoulder injury as a consequence of authorized surgery in 1986.² The Board notes that, following the Board's remand, the Office accepted a consequential left shoulder impingement injury with disability as of April 20, 1993.³ By decision dated December 23, 1999, the Board found that the Office had properly terminated appellant's compensation as of March 25, 1996 on the grounds that he refused an offer of suitable work. The Board also determined that appellant had not established an employment-related disability commencing August 1989; and that appellant's March 8, 1996 request for reconsideration was untimely and failed to show clear evidence of error. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

By decision dated August 1, 2000, the Office held that appellant's July 18, 2000 request for reconsideration was untimely and failed to show clear evidence of error. On appeal, the Board granted the Director's motion to remand the case on the grounds that the reconsideration

¹ 43 ECAB 1101 (1992).

² Docket No. 93-2383.

³ The Office had previously accepted a left shoulder glenoid tear.

request was timely.⁴ In a decision dated May 1, 2001, the Office denied modification of its decisions on refusal of suitable work and disability from August 1989 to April 1993. By decision dated October 30, 2001, the Office again denied modification.

The Board finds that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁵ To justify such a termination, the Office must show that the work offered was suitable.⁶ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁷

The Board previously reviewed an October 17, 1996 decision of an Office hearing representative with respect to refusal of suitable work. Appellant has submitted statements dated April 30, 1999 and August 14, 2001 from Mr. Wright, a union legislative director, regarding light-duty jobs, and a memorandum of understanding between the union and the employing establishment dated September 24, 1996. To the extent that appellant is arguing that the offered position in Hawaii was not suitable because there were other positions available closer to appellant's residence in California, this issue had been raised prior to the October 17, 1996 decision. The record contains, for example, a March 21, 1996 letter from the employing establishment explaining that the Long Beach, California district was unable to make a job offer within appellant's physical restrictions. The Board found in its December 23, 1999 decision that the position offered in Hawaii, appellant's former duty station, was suitable and that appellant did not offer adequate reasons for refusing the position. Appellant has not submitted new evidence establishing that the offered position was unsuitable.

The Board further finds that appellant has not established an employment-related disability after the termination of benefits on August 27, 1989.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability that continued after termination of compensation benefits.⁸

⁴ Docket No. 01-313.

⁵ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁶ *John E. Lemker*, 45 ECAB 258 (1993).

⁷ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁸ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

Appellant submitted additional reports from Dr. Stephen Kay, an orthopedic surgeon, dated June 27, 2000 and July 11, 2001. Dr. Kay had previously opined that appellant had left shoulder symptoms from the time of his 1986 surgery, when a staple was used, until the staple was removed by surgery in 1995. In his June 27, 2000 report, Dr. Kay stated that the metallic staple inserted in 1986 created a constant irritation of the left shoulder until it was removed in 1995. In the July 11, 2001 report, Dr. Kay notes that he first treated appellant on April 20, 1993; he stated that, based on findings at the 1995 surgery, appellant would have been symptomatic from 1989 to 1993 due to the staple in his shoulder. The Board notes that the Office has accepted a consequential left shoulder impingement injury. The issue is disability for work as of August 1989; Dr. Kay does not show familiarity with appellant's job duties or work history. Dr. Kay indicates that in 1995 he found significant damage to the intra-articular structures of the left shoulder, but he does not clearly address the issue of disability for work as of August 28, 1989. As the Board discussed in detail in its August 17, 1992 decision, there were many medical reports regarding appellant's left shoulder condition of record. Dr. Kay does not provide a complete medical history or provide a reasoned medical opinion on disability for work from August 1989 to April 1993. It is well established that medical opinions based on an incomplete history or opinions that are speculative in character are of diminished probative value.⁹

Appellant also submitted a report dated May 25, 2001 from Dr. Clyde Ikuta, a family practitioner, stating that appellant was suffering from a left shoulder, neck and back injury between 1989 and 1993. Again, the issue is disability for work as of August 1989, and Dr. Ikuta does not provide a reasoned medical opinion based on a complete factual and medical background.

It is appellant's burden of proof to establish disability after August 27, 1989, and the Board finds that appellant has not met his burden in this case.

⁹ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962).

The decisions of the Office of Workers' Compensation Programs dated October 30 and May 1, 2001 are affirmed.

Dated, Washington, DC
December 19, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member