

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BENE L. QUIBELL and DEPARTMENT OF THE ARMY,  
ARMY DEPOT, Tooele, UT

*Docket No. 02-2048; Submitted on the Record;  
Issued December 18, 2002*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

This case has previously been before the Board on appeal. In its August 28, 1995 decision, the Board found that the Office had failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she had no continuing disability causally related to her October 5, 1987 and March 2, 1998 employment injuries.<sup>1</sup> The Board also found that appellant failed to establish that she developed an emotional condition as a consequence of her employment injuries. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the August 28, 1995 decision, the Office entered appellant on the periodic rolls on December 20, 1995. Appellant's attending physician, Dr. Steven Jay Anderson, a Board-certified internist, continued to support appellant's total disability for work. The Office referred appellant for a second opinion evaluation with Dr. E. Warren Stadler, a physician Board-certified in physical medicine and rehabilitation, on February 12, 1997. In a February 24, 1997 report, Dr. Stadler found that appellant could work 8 hours a day, that she had no restrictions due to her accepted employment injuries and that due to her vascular claudication of the left upper extremity she could lift only 20 pounds.

The employing establishment offered appellant a light-duty position of procurement clerk conforming with Dr. Stadler's restrictions.

The Office found that there was a conflict of medical opinion evidence and referred appellant for an impartial medical examination with Dr. Leslie Harris, a Board-certified

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<sup>1</sup> Docket No. 93-2390.

orthopedic surgeon, on January 30, 1998. On May 29, 1998 Dr. Harris found that appellant could work 8 hours a day with a 15-pound lifting restriction due to her claudication.

By letter dated February 9, 1999, the Office informed appellant that the offered position of procurement clerk was suitable, allowed her 30 days to accept the position or offer her reasons for refusal and advised her of the penalty provisions of the Federal Employees' Compensation Act.

Appellant refused the position on March 9, 1999 stating that she was physically unable to perform the duties of the position and that she was not qualified due to the knowledge required to perform the position. The employing establishment noted that the position was designed to accommodate an individual without any experience in contracting and that appellant would receive job training to assist her in learning the skills necessary to perform the job. In a letter dated April 20, 1999, the Office informed appellant that her reasons for refusing the position were not acceptable and allowed an additional 15 days for her to accept the position. On May 5, 1999 appellant again refused the offered position. The Office terminated appellant's compensation benefits effective May 7, 1999 on the grounds that she refused an offer of suitable work.

Appellant requested a review of the written record on June 3, 1999. By decision dated February 1, 2001 and finalized February 5, 2001, the hearing representative affirmed the May 7, 1999 termination decision. Appellant requested reconsideration of this decision on January 30, 2002 and, by decision dated May 2, 2002, the Office reviewed appellant's claim on the merits and found that the evidence submitted was insufficient to warrant modification of its prior decisions.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act<sup>3</sup> 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. Section 10.517 of the applicable regulations<sup>4</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, 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. To justify termination of compensation, the Office must show that the work

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> 20 C.F.R. § 10.517(a).

offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup>

Appellant's attending physician, Dr. Anderson, a Board-certified internist, supported her continuing disability for work due to the severe claudication of her left arm and hand as well as degenerative joint disease, musculoskeletal pain and right arm cramping. He stated that there was no way appellant could work as she had severe pain simply at rest. The Office referral physician, Dr. Stadler, noted appellant's history of injury, performed a physical examination and concluded that she was limited by the claudication of her left arm, but that she could work 8 hours a day with a 20-pound lifting restriction. Section 8123(a) of the Act,<sup>6</sup> provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." The Office properly referred appellant to Dr. Harris, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical opinion evidence.

In his May 29, 1998 report, Dr. Harris noted appellant's history of injury, reviewed her medical records and performed a physical examination. He noted that appellant's assertions of pain in the back of the neck, numbness and tingling of both hands, right elbow and shoulder pain as well as upper and lower back pain. He reviewed her medical history including a vein bypass graft in 1990 for left thoracic outlet syndrome. Appellant also had esophageal surgery, colon resection, colonostomy and hysterectomy, right carpal tunnel release and several foot surgeries. Appellant had positive history for headaches, kidney and bladder problems, bowel difficulties, arthritis muscle disorders and skin disorders. Dr. Harris found slight atrophy of the left upper extremity, negative Tinel's signs bilaterally and negative straight leg raising. Dr. Harris diagnosed cervical sprain, right shoulder sprain, history of reflex sympathetic dystrophy left upper extremity, somatoform pain disorder, low back pain and bilateral carpal tunnel syndromes and resulting surgeries. He found that appellant had no physical impairment secondary to the injuries sustained at work and that she did not require further medical treatment for these conditions. Dr. Harris concluded that appellant was physically impaired due to her left upper extremity reflex sympathetic dystrophy and thoracic outlet syndrome. He stated that she demonstrated symptoms of left upper extremity claudication and that she should not lift more than 15 pounds due to this condition. Dr. Harris stated that appellant was most impaired by her psychiatric diagnosis of somatoform pain disorder and concluded that there were no objective findings relative to appellant's neck and right shoulder condition which would substantiate any physical impairment. Dr. Harris indicated that appellant could perform the duties of the offered position, but that she should begin at 4 hours a day and gradually increase to 10 hours 4 days a week.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper

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<sup>5</sup> *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

factual background, must be given special weight.<sup>7</sup> In this case, Dr. Harris based his report on an exhaustive review of the medical records and a detailed physical examination. He found that appellant had ongoing disability due to her condition of left arm claudication and provided restrictions based on this condition. Dr. Harris found that there were no objective physical findings supporting any continuing condition or disability as a result of appellant's employment injuries. As Dr. Harris provided his physical findings in support of his conclusions that appellant could perform the offered position, his report is entitled to the weight of the medical evidence.

Following Dr. Harris' report, appellant submitted additional medical evidence from Dr. Anderson dated March 9, 1999. Dr. Anderson asserted that appellant could not be expected to work eight hours a day due to the severe claudication of her left upper extremity. He addressed Dr. Stadler's findings and concluded that appellant should be considered disabled due to the pain caused by her left arm claudication.

Dr. Anderson did not offer any additional medical reasoning or rationale explaining why he believed that appellant could not perform the light-duty position based on her diagnosed condition of left arm claudication. He reiterated that appellant experienced disabling pain due to this condition and that he believed her pain to be so severe that it interfered with her activities. Dr. Anderson explained appellant's condition by drawing an analogy with the pain he experienced with his own kidney stones. As Dr. Anderson did not offer any objective findings in support of his conclusion that appellant could not perform the duties of the offered position, his report is insufficient to overcome the weight accorded Dr. Harris as the impartial medical specialist nor to create a conflict with his report.<sup>8</sup>

Dr. John R. Dietlein, a Board-certified family practitioner, reviewed Dr. Harris' report on March 8, 1999 and asserted that appellant had additional medical conditions that should be considered in evaluating her physical ability to perform the offered position. Dr. Dietlein diagnosed chronic obstructive pulmonary disease; recurrent arterial and venous thromboses, right cubital tunnel syndrome and chronic depression. He recommended that appellant seek treatment in an accredited pain management center. Dr. Dietlein stated, "Regardless of the structural orthopedic findings, her perception of pain is very real to her and advanced pharmacological (including nonnarcotic medications) and behavioral approaches may benefit her."

This report is also insufficient to overcome the special weight accorded Dr. Harris as the impartial medical examiner or to create a conflict with Dr. Harris' well-reasoned report. Dr. Dietlein did not offer any medical findings or opinion explaining how appellant's additional conditions of chronic obstructive pulmonary disease, recurrent arterial and venous thromboses, right cubital tunnel syndrome and chronic depression would render her disabled from the offered position. The Office's procedure manual requires that there be medical evidence documenting that a condition renders a claimant disabled from the offered job before the Office must consider the condition in reaching a suitable work determination.<sup>9</sup> The procurement clerk position is

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<sup>7</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

<sup>8</sup> *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Employment: Determining Wage-earning Capacity*, Chapter 2.814.4(b) (December 1993).

sedentary allowing appellant to alternate sitting, standing and walking and provides intermittent breaks. The position required frequent handling and fingering. Furthermore, the procurement clerk position required only intermittent infrequent use of automated office equipment with no typing experience or proficiency required. Dr. Dietlein's finding of disability, like Dr. Anderson's, appears to be based on pain rather than objective findings and is not supported by physical findings or medical reasoning.

Following the Office's May 7, 1999 termination decision, appellant submitted additional medical evidence. As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had disability which prevented her from performing the suitable work position at the time of the May 7, 1999 decision.<sup>10</sup> The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>11</sup>

On January 5, 2000 Dr. Dietlein reviewed appellant's medical records and noted that appellant underwent additional surgeries in 1999. On April 5, 1999 appellant had surgery for right cubital tunnel surgery; on July 12, 1999 she underwent a left carpal tunnel release; and on August 23, 1999 she had surgery for her right trigger thumb. Dr. Dietlein stated that appellant's chronic pain and other multiple medical problems continued to make it impossible for her to return to even sedentary work at this time. Dr. Dietlein merely states that, at the time of his report, appellant was disabled without discussing her disability for work on May 7, 1999 the date the Office terminated her compensation benefits. Furthermore, this report does not provide any medical findings or reasoning in support of Dr. Dietlein's conclusion that appellant was incapable of performing the suitable work position. As appellant failed to submit medical evidence addressing her disability to perform the duties of the suitable work position at the time the position was offered and establishing why she was so disabled, she failed to meet her burden of proof and the Office properly denied her claim.

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<sup>10</sup> *George Servetas*, 43 ECAB 424, 430 (1992).

<sup>11</sup> *James Mack*, 43 ECAB 321 (1991).

The May 2, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
December 18, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member