

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERESA BENNETT and DEPARTMENT OF THE AIR FORCE,
MILITARY AIRLIFT COMMAND, McGUIRE AIR FORCE BASE, NJ

*Docket No.00-2403; Submitted on the Record;
Issued January 10, 2002*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for thoracic outlet syndrome; and (2) whether the Office properly denied appellant's request for authorization of brachial plexus surgery.

The Board finds that the Office properly rescinded its acceptance of appellant's claim for thoracic outlet syndrome.

On February 8, 1995 appellant, then a 34-year-old secretary, sustained a fall at work. The Office initially accepted her claim for rotator cuff tendinitis and cervical, lumbar sprain and left knee sprains. The Office later accepted right thoracic outlet syndrome due to the February 8, 1995 employment injury. In June 1996 appellant requested authorization for exploratory surgery of her right brachial plexus with possible rib resection.

By decision dated October 9, 1996, the Office denied appellant's request for brachial plexus surgery on the grounds that the medical evidence did not support the need for such surgery due to an employment-related condition. By decision dated March 18, 1997, an Office hearing representative set aside the Office's October 9, 1996 decision and remanded the case to the Office for further development. She determined that there was a conflict in the medical evidence regarding whether appellant had thoracic outlet syndrome or brachial plexopathy and whether the requested brachial plexus surgery was needed for treatment of an employment-related condition.

By decision dated October 18, 1997, the Office denied appellant's request for brachial plexus surgery and rescinded its acceptance of her claim for thoracic outlet syndrome. The Office based both determinations on the opinion of Dr. Howard Hogshead, the Board-certified orthopedic surgeon, who served as an impartial medical specialist.

By decision dated April 2, 1998, an Office hearing representative set aside the Office's October 18, 1997 decision and remanded the case to the Office for further development. She

determined that it was necessary for Dr. Hogshead to provide a supplemental report in support of his opinion.¹ By decision dated August 12, 1998, the Office denied appellant's request for brachial plexus surgery and rescinded its acceptance of her claim for thoracic outlet syndrome. The Office based both determinations on the opinion, including supplemental reports, of Dr. Hogshead. By decisions dated July 2, 1999 and April 20, 2000, the Office affirmed its August 12, 1998 decision.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set-aside only in the manner provided by the compensation statute.³ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁴ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.⁵

In this case, the Office properly determined that there was a conflict in the medical opinion between Dr. James M. Hunter, an attending Board-certified surgeon and Dr. Ariel F. Abud, a Board-certified neurosurgeon to whom the Office referred appellant, regarding whether appellant had employment-related thoracic outlet syndrome and whether the requested brachial plexus surgery was needed for treatment of an employment-related condition.⁶ To resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Hogshead for an impartial medical examination.⁷

¹ The Office hearing representative indicated that Dr. Hogshead should review electrical diagnostic testing from 1995 and 1996. The record contains the results of electromyogram testing from April 1996, which show a right brachial plexus neuropathy. The record also contains electromyogram and magnetic resonance imaging testing from mid 1995 which shows normal results.

² *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

³ *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

⁴ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

⁵ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

⁶ Dr. Abud stated that appellant did not exhibit any weakness in her upper extremities.

⁷ Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a). The Office initially referred appellant to Dr. Carlos Tandron, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Tandron indicated that he was not in a position to evaluate appellant for thoracic outlet syndrome or brachial plexopathy, therefore, the Office then properly referred appellant to Dr. Hogshead.

The Board finds that the opinion of Dr. Hogshead constitutes sufficient new and different evidence to justify the Office's rescission of its acceptance of appellant's claim for thoracic outlet syndrome.

In situations where there exist 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 upon a proper factual background, must be given special weight.⁸ The Board finds that the weight of the medical evidence, is represented by the thorough, well-rationalized opinion of Dr. Hogshead that appellant did not sustain thoracic outlet syndrome due to her February 8, 1995 employment injury.

In reports dated August 25 and 26, 1997, Dr. Hogshead noted that there was no evidence on physical examination which would support a finding of thoracic outlet syndrome or brachial plexopathy. He indicated that he would advise against surgery. Dr. Hogshead stated: "[M]y diagnosis is myofascial pain syndrome, meaning that she is complaining of muscle and fascial pain for which I have no etiological explanation." He noted that appellant did not exhibit any muscle weakness or spasm in her upper extremities. Dr. Hogshead indicated that x-ray testing did not show any abnormalities of the cervical or right shoulder regions. He stated that appellant's history and physical examination findings were not consistent with a plexopathy, radiculopathy, reflex sympathetic dystrophy or causalgia.

In a report dated June 24, 1998, Dr. Hogshead indicated that the results of June 9, 1998 testing for dermatomal somatosensory evoked response showed completely normal results.⁹ He noted that appellant's reported pain was not due to thoracic outlet syndrome and indicated that she could perform her regular job duties. In an accompanying report dated July 17, 1998, Dr. Hogshead noted the normal diagnostic testing and stated that the requested brachial plexus surgery was not recommended and would not relieve appellant's symptoms. In a report dated August 10, 1998, Dr. Hogshead repeated his opinion that appellant did not have thoracic outlet syndrome and that the brachial plexus surgery was not recommended.¹⁰

The Board finds that the opinion of Dr. Hogshead has reliability, probative value and convincing quality because it is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history.¹¹ Dr. Hogshead provided medical rationale for his opinion by explaining that his findings on examination and testing did not provide any basis to support a diagnosis of

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁹ In a letter dated April 29, 1998, Dr. Hogshead stated that he had reviewed the electrical diagnostic testing from 1995 and 1996 and indicated that the testing showed only limited abnormality. He determined that it would be appropriate to perform new electrical diagnostic testing to evaluate appellant's condition.

¹⁰ He noted that could not say with absolute certainty that appellant's symptoms were not related to the February 8, 1995 injury. However, he also stated: "The relation of her current symptoms to that injury is based purely upon her assertion that she did not have problems before that injury and that her problem has been fairly continuous since that time."

¹¹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

thoracic outlet syndrome. He indicated that appellant's reported pain symptoms could not be explained by any known medical process. Therefore, his opinion as impartial medical examiner is sufficient to meet the Office's burden of proof.

The Board further finds that the Office properly denied appellant's request for authorization of brachial plexus surgery.

Section 8103(a) of the Act states in pertinent part: "The United States shall furnish to an employee, who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which 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 the monthly compensation."¹² In order to be entitled to reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.¹³ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁴

As noted above, the Office properly determined that there was a conflict in the medical opinion regarding whether the requested brachial plexus surgery was needed for treatment of an employment-related condition. Moreover, the Office properly referred appellant to Dr. Hogshead for an impartial medical examination to resolve this conflict. As noted above, when a case is properly referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Hogshead that appellant did not need brachial plexus surgery for an employment-related condition. In reports from 1997 and 1998, Dr. Hogshead repeatedly noted that appellant did not require brachial plexus surgery due to an employment-related condition. He explained this determination by indicating that the medical evidence did not support a finding that appellant had any condition of the cervical, thoracic or right upper extremity regions, which would warrant such surgery. Dr. Hogshead indicated that the findings upon examination and diagnostic testing with respect to these regions were essentially normal.¹⁶

For these reasons, the Office properly denied appellant's request for authorization of brachial plexus surgery.

¹² 5 U.S.C. § 8103.

¹³ *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

¹⁴ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

¹⁵ *See supra* note 9 and accompanying text.

¹⁶ Hogshead noted that appellant's reported pain symptoms were unexplained and that the requested surgery would not provide relief.

The April 20, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 10, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member