U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of MARGUERITE PAVLICK and DEPARTMENT OF THE ARMY, TOBYHANNA ARMY DEPOT, Tobyhanna, PA

*Docket No. 01-220; Submitted on the Record;*
*Issued March 20, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective January 5, 1998 for her refusal to perform suitable work.

On November 17, 1988 appellant, then a 40-year-old supply clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that, as a result of key punching, she has sustained pain in her thumb and elbow. The employing establishment controverted the claim. Appellant's claim was accepted for bilateral carpal tunnel syndrome. She stopped work on November 1, 1988 and has not returned. Appropriate wage loss has been paid.

Appellant began her treatment with Dr. Michael Raklewicz, a Board-certified orthopedic surgeon, who diagnosed bilateral carpal tunnel syndrome. She underwent a right carpal tunnel release on January 16, 1989 and a left carpal tunnel release on March 17, 1989. Dr. Raklewicz referred appellant to Dr. Zahid Husain, a Board-certified internist, who examined appellant on May 31, 1989. In his report dated June 2, 1989, Dr. Husain noted:

> "As I see it at this point, she does not have a significant synovitis. She has noticed improvement of the median nerve distribution, and the ulnar nerve distribution perhaps could be due to nerve entrapment higher up; but she informed me that she would be unwilling to go through nerve conduction studies again. It is possible she may have mild rheumatic syndrome and when the labs are back and after I evaluate her again...."

Appellant began treatment with Dr. William H. Kirkpatrick, a Board-certified orthopedic surgeon, on August 10, 1989, when he diagnosed her with probable bilateral cubital tunnel syndrome. Dr. Kirkpatrick referred appellant to Dr. David Cook, a Board-certified neurologist. In a medical report dated November 11, 1989, Dr. Cook ordered more tests and stated that, for the present, he suggested that appellant's problem was one of an overuse phenomena involving

her hands and that she should remain off of work for the time being. In a report dated January 15, 1990, Dr. Cook reviewed appellant's magnetic resonance imaging (MRI) scan of the cervical spine and stated:

> "While she does have evidence of dis[c] herniation at C5-6, such cannot be the cause of her continued complaints of difficulty involving other nerve root distributions in the hand. She has increased sensitivity to touch over the scars in her hands and wrists and she has evidence of diffuse puffiness and swelling involving her hands. I did not demonstrate any definite focal weakness and she has no evidence of any cubital tunnel syndrome. Both electrophysiologically and clinically I do n[o]t think that she requires an ulnar nerve transposition.
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> "Her examination still remains consistent with a carpal tunnel syndrome secondary to an overuse syndrome at work. It appears that she has either not had a sufficient decompression or has developed a secondary complication thereto."

In a report dated February 7, 1990, Dr. Kirkpatrick opined:

> "I feel that she is demonstrating evidence of bilateral cubital tunnel syndrome. She had been evaluated by Dr. Cook who did not feel that she had evidence of cubital tunnel syndrome. His feeling was that she continued to have evidence of carpal tunnel syndrome. However, because of the tenderness over the cubital tunnel, positive Tinel's sign over the cubital tunnel, positive elbow flexion test, complaints of proximal forearm muscle tightness paresthesias in the ulnar two fingers, I feel that she does, indeed, manifest a cubital tunnel syndrome."

By letter dated June 5, 1990, the Office requested a second opinion from Dr. Adel R. Barakat, a Board-certified orthopedic surgeon. In a medical opinion dated July 27, 1990, Dr. Barakat stated his impressions as connective tissue disorder of undetermined etiology affecting the function of both arms and recovered carpal tunnel syndromes bilaterally. His recommendations were:

> "It is my opinion that this patient does not require any additional surgical interference of both upper extremities, even though I am unable to formulate a diagnosis, it is my opinion with reasonable medical certainty that she is not suffering from median or ulnar neuropathy at the level of the wrist or the elbows. There is very little to suggest a cervical radiculopathy or a thoracic outlet syndrome.
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> "I am certainly concerned, from the medical standpoint, because of the feeling of spasm and hypertrophy of the forearm muscles, but I believe that a rheumatologist and a neurologist would be more apt to reach a conclusion in that respect. To be noted is that this has already been done. It is again my opinion that the condition of carpal tunnel syndrome which was the result of her work injury, has resolved itself. In spite of that, she remains with considerable impairment of function of both upper extremities which, at this point in time, does not seem to be related to

the original injury. I would declare this patient totally disabled from any employment."

By letter dated March 29, 1991, the Office proposed terminating appellant's compensation. By decision dated May 15, 1991, benefits were terminated based on the weight of evidence indicating that appellant no longer had a medical condition related to her employment. By letter dated June 11, 1991, appellant requested an oral hearing.

In further support of her claim, appellant submitted an April 8, 1991 report by Dr. Leroy J. Pelicci, a Board-certified psychiatrist and neurologist, who stated with certainty that appellant had carpal and cubital tunnel syndrome bilaterally. He noted that handwork with manipulation and wrist extension, flexion, fine movement and dexterity, would only tend to aggravate the situation. Dr. Pelicci stated that these findings would be directly related to the work-related incident. On July 1, 1991 he reported a normal cervical thermogram.

In a decision dated September 30, 1991, the hearing representative found that there was an unresolved conflict in the medical opinion between Drs. Cook and Barakat ordered that the March 15, 1991 decision be set aside, and the case be remanded for an impartial medical examination followed by a *de novo* decision.

By letter dated November 18, 1991, the Office referred appellant to Dr. William A. Black, a Board-certified neurosurgeon, for an impartial medical examination.

In a medical report dated December 23, 1991, Dr. Black opined:

"[M]y feeling is that this patient has a mixed bag of some undisclosed, progressive somatic symptoms of muscle tightness and thickening, for which I know of no medical reason. The fact that she cannot move her wrist when one lightly touches or compresses the skin of the forearm, seems to me to be on a nonorganic basis as do some of her other symptoms. Yet she has persistence of Tinel's signs and hand weakness that do not appear to be organic."

He stated that he did not feel capable of offering a true diagnosis, nor did he fully understand the case.

The Office next referred appellant to Dr. Leo McCluskey, a Board-certified neurologist, who in his report dated May 4, 1991, stated that Dr. Pellicci's tests do not tend to fit the symptoms typically seen in carpal tunnel syndrome or cubital tunnel syndrome. He concluded:

"[T]he patient's history in conjunction with her physical examination does not support the diagnosis of entrapment neuropathy. The possibility that the patient's primary difficulties lies within muscle and that this may represent a cramp syndrome or a syndrome of continuous muscular activity should be considered. As such, this may be unrelated to the patient's work history. This may explain why the patient did not improve after carpal tunnel surgery and why she has continued to progress."

In a May 11, 1992 report, Dr. McCluskey reviewed additional medical records and noted that there is no evidence in support of cubital tunnel syndrome. He stated that the cause of appellant's complaints was not at all clear at that time.

In a May 31, 1994 report, Dr. Kirkpatrick noted that appellant continued to remain symptomatic, and that she had numbness in both hands as well as stiffness of the wrist and fingers. He opined that he did not feel that he could do much for her until she had seen additional physicians.

Dr. David R. Cooper, a Board-certified orthopedic surgeon, evaluated appellant on behalf of the employing establishment. In a report dated October 27, 1995, Dr. Cooper opined:

> "At this time, based upon a history and physical examination and review of medical records, I find no evidence of any organic pathology on this lady. Assuming she did have carpal tunnel syndrome, then she is fully recovered from that. She has no objective findings of any residuals of that. There was certainly no evidence of any reflex sympathetic dystrophy (RSD). She needs no further medical, surgical, physical therapy or chiropractic care for any work-related condition. She may return to her previous occupation as a supply technician without any restrictions. Her subjective complaints of pain and disability cannot be corroborated by any objective findings. I believe there is a high level of symptom magnification in this lady because she does not want to return to work but is certainly capable of performing more activities than she claims.

In a November 17, 1995 report by Dr. Emmanuel E. Jacob, a Board certified physiatrist, indicated that appellant had tenderness of the carpal ligament, swelling of the hands and digits, and digital motions and wrist motions were limited. He noted that her hand grips were also weak and limited. He noted a positive Tinel's sign in both elbows, along with hypoesthesia of both upper limbs along the ulnar nerve distribution. His impressions were ulnar neuropathy, elbow, residual of bilateral carpal tunnel syndrome, neuropathic pain and probable RSD both hands.

By letter dated October 17, 1995, the Office referred appellant to Dr. Charles T. Newton, a Board-certified psychiatrist and neurologist to resolve the conflict in medical opinions as to the level of impairment. In a report dated October 31, 1995, Dr. Newton stated:

> "The patient suffers from a bilateral carpal tunnel syndrome which was stated to recur as a work injury in 1989 while employed as a clerk at the [employing establishment]. Her current symptomatology is not that of carpal tunnel syndrome and, although it might be secondary to diffuse collagen-vascular disease involving the muscle of the upper and lower extremities, it is not related to her work as far as I can tell. The diagnosis of RSD in my mind is seriously in question and not supported by the bone scan.
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> "Although the patent may be disabled according to her symptomatic complaints, it is not due to primary or secondary effects of carpal tunnel syndrome in my opinion."

In a March 22, 1996 report, Dr. Newton reviewed electromyogram (EMG) and nerve conduction studies. He found that these studies show evidence of a mild chronic right carpal tunnel syndrome. Dr. Newton noted no evidence of active denervation or irritation of the median or ulnar nerves in the upper extremities or evidence of myopathy was seen. In his report of April 18, 1996, he responded to questions from the Office by noting that appellant's current diagnosis was mild chronic right carpal tunnel syndrome and that this was the result of her previous occupational problem. However, Dr. Newton noted that appellant's "current symptomatology dramatically exceeds what would be expected with a mild residual right carpal tunnel syndrome." He answered further questions in his report of April 24, 1996 when he stated:

> "(1) The patient suffers from a mild persistent carpal tunnel syndrome and a syndrome consistent with a collagen vascular disease.
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> (2) I do not believe that the above mentioned illness is related causally to the patient's work-related carpal tunnel syndrome.
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> (3) As regards to the work limitations from her carpal tunnel syndrome, the patient should not be required, should she be able to return to work, to do repetitive heavy lifting or twisting with the wrists."

In a report dated July 9, 1996, Dr. Newton noted that he had not examined appellant since October 1995, but that based on those examinations and review of the "post position" he believes that appellant could perform the same as mentioned before, *i.e.*, avoidance of repetitive twisting, lifting and use of the wrist and forearms as the only limitation. Attached to his report was a description by the employing establishment of the position of supply technician.

By letter dated September 6, 1996, the Office noted that the offered position of supply technician as suitable and gave appellant 30 days to either accept the position or provide reasons for refusing it. By letter dated October 1, 1996, appellant declined the offer. In support thereof, appellant submitted an August 27, 1996 note by Dr. Raymond Joseph, a Board-certified internist, wherein he indicated that appellant was unable to use her hands for any gainful employment. Appellant also submitted a physical capacity evaluation by Dr. Jacob dated September 5, 1996. Finally, appellant submitted a September 10, 1996 medical report by Dr. Vincent DiGiovanni, a neurologist, wherein he indicated that appellant suffered from chronic pain syndrome that appeared to be early sympathic dystrophy and that she was disabled regarding the use of her hands in any working position.

Based on Dr. Newton's opinion, appellant's right to compensation was terminated by order dated October 28, 1996. However, by decision dated May 1, 1997, the hearing representative remanded the case and ordered reinstatement of compensation benefits. The hearing representative had concerns with the opinion of Dr. Newton. Specifically, she noted that Dr. Newton has not provided rationale in support of his opinion that appellant has a collagen vascular disease unrelated to the accepted condition, nor clarified why he has imposed work restrictions for the mild work-related condition he diagnosed. Accordingly, the hearing representative found that there was no clear rationalized medical opinion concerning whether appellant continued to be disabled due to a medical condition related to her employment, what that condition or conditions were, and what physical limitations appellant had as a result.

By letter dated June 24, 1997, Dr. Newton responded to questions from the Office by noting that appellant's collagen vascular disease is not related to her employment-related carpal tunnel syndrome because collagen vascular disease does not come from a work-type injury. He also noted:

> "In response to your first question, 'Since you indicated that this individual's symptomatology dramatically exceeded what would be expected with her mild right carpal tunnel syndrome, please provide your medical rationale as to the reasons for the work limitations imposed', my answer is because of the patient's symptomatology as related to the exam[ination] done in October 1995."

On September 8, 1997 the Office requested that the Office medical adviser review Dr. Newton's reports. In a report dated September 11, 1997, the Office medical adviser noted that the cause of collagen vascular diseases are unknown but that no medical authority has claimed them to be caused by work. He noted "Dr. Newton probably felt no need to elaborate on this noncontroversial point." The Office medical adviser further noted:

> "The restrictions to avoid repetitive wrist and forearm motions are medically reasonable to prevent any exacerbation of the right chronic carpal tunnel syndrome or a recurrence of the left CTS. They are also reasonable for collagen vascular disease complaints.
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> "Dr. Newton did not consider her level of symptoms supportable by her objective findings. He also did not consider her as having RSD since the bone scan (a very sensitive test for chronic RSD changes) was normal. The restrictions are reasonable to prevent a future work-related aggravation of collagen disease. On this second basis the restrictions are preventative in nature."

By letter dated September 9, 1997, the employing establishment offered appellant a position as a supply technician. That position was described by the employing establishment as a primarily sedentary position, wherein the employee may sit comfortably to do all the work. They noted that there may be some walking, standing, bending and carrying of light items. The incumbent would use a computer to monitor supply operations. The position description was modified for appellant as follows:

> "Personal assistance or handling equipment will be provided to the incumbent on an as needed basis. Periods of standing or walking may be regularly interrupted by periods of sitting and vice versa. Reasonable accommodations and protective clothing (if necessary), or ergonomic fully adjustable chair, telephone headset, etc., will be provided as needed. Files and shelves may be arranged for easy accessibility to preclude the need for extended reaching or more than limited stooping and bending. The work may require simple grasping and fine manipulation in handling cards, paper, folders, etc., and in operating keyboard, mouse, staplers and other similar equipment. Duties will not require the repetitive use of the arms and hands, and will not be performed more than five minutes per hour. In addition, [appellant] will not perform the motor vehicle operator duties."

By letter from the Office to appellant dated September 11, 1997, the Office noted that appellant had been offered a position as a supply technician which the Office found within her capabilities. Appellant was given 30 days within which to accept the job offer or explain her reasons for refusing it. The Office noted that, if appellant failed to accept the offered position, and failed to demonstrate that the failure was justified, her compensation would be terminated.

By letter dated September 26, 1997, appellant refused the job offer, contending that she was totally disabled.

By letter dated October 30, 1997, the Office gave appellant a "final admonition" to accept the job. In a November 4, 1997 letter, appellant again responded that she was totally disabled.

In a medical report dated December 12, 1997, Dr. Jacob diagnosed appellant as suffering from bilateral ulnar neuropathy of the elbow, residual carpal tunnel syndrome, herniated cervical disc, chronic cervical radiculopathy, probable RSD and lumbosacral disc syndrome. He noted that appellant had restrictions in that she had permanent restrictions from using her hands for repetitive use.

By letter dated December 17, 1997, the Office notified appellant that her reasons for not accepting the position were unacceptable and she was given another opportunity to accept the job offer. Appellant responded in a letter dated December 29, 1997, but made no statement accepting the job offer.

In a medical note dated December 29, 1997, Dr. Joseph stated that appellant was totally disabled and unable to work at the present time.

By decision dated January 5, 1998, the Office terminated compensation.

By letter dated January 21, 1998, appellant requested review of the written record.

In a medical report dated January 13, 1998, Dr. Joseph diagnosed bilateral carpal tunnel syndrome followed by RSD. He considered her status totally disabled and that she was unable to perform any work duties. Dr. Joseph stated that considering the length of time she has had these problems and the status of the problems, it was unlikely that she would ever recover to the point where she would be able to perform any type of work duties.

By decision dated July 9, 1998, the hearing representative noted that the weight of the medical evidence rested with the opinion of Dr. Newton, who found that appellant was capable of returning to work with restrictions, that the employing establishment offered appellant a position within the restrictions provided by him and that the Office followed proper procedures in terminating appellant's compensation.

By letter dated June 3, 1999, appellant requested review of the decision. In support thereof, appellant submitted further reports from Dr. Jacob dated January 5, February 5 and April 15, 1999. In these reports, Dr. Jacob notes increased pain in the upper limb as well as neuropathic pain due to residual carpal tunnel syndrome as well as ulnar neuropathy.

By decision dated September 13, 1999, the Office denied modification of the prior decision for the reason that the evidence submitted in support of the request for reconsideration is not sufficient to warrant modification of the prior decision.

By letter dated November 4, 1999, appellant requested reconsideration of the September 13, 1999 decision. In support thereof, appellant submitted an article from the Weekly Federal Employees' News Digest, and an EMG dated August 24, 1995 and the results of blood tests.

By decision dated July 26, 2000, the Office denied appellant's request for reconsideration for the reason that the evidence submitted in support of the claim was insufficient to warrant modification of the previous decision. The Office specifically noted that the excerpt from the weekly digest and the RSD pamphlet were of no evidentiary value, that the EMG study did not have an interpretive report included and further that a later EMG study was conducted in March 1996.

The Board finds that the Office properly terminated appellant's compensation for refusing to perform suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] Under section 8106(c)(2) of the Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[2] To justify termination of compensation, the Office must establish that the work offered was suitable.[3]

In evaluating medical evidence, in situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[4]

The position of supply technician was suitable. The Office found that the weight of the evidence rested with Dr. Newton, the impartial medical examiner. The physical requirements of this position were within the work tolerance limitations of Dr. Newton. In his July 9, 1996 report, Dr. Newton found that appellant could perform any position as long as she avoided repetitive twisting, lifting and use of the wrist and forearms. He attached to this report the job description for supply technician with the employing establishment. The job description noted that the position required appellant to use a computer to monitor supply operations. Dr. Newton's opinion is consistent with the objective clinical and diagnostic evidence of record. The employing establishment clearly indicated their willingness to accommodate appellant's

[1] *Beverly J. Duffey*, 48 ECAB 569 (1997).

[2] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation."

[3] *David P. Camacho*, 40 ECAB 267 (1988).

[4] *Gary R. Sieber*, 46 ECAB 1215, 1225 (1994).

limitations. There is no indication that this position would require appellant to exceed her restrictions of no repetitive twisting, lifting or use of wrist and forearms. None of the other physicians of record provided a rationalized opinion as to why appellant could not perform the duties of a supply technician within Dr. Newton's restrictions. The Office followed all proper procedures for notifying appellant of the consequences of her not accepting the job, in fact the Office gave her numerous opportunities to accept the offered position. The Office properly advised appellant that her reasons for not accepting the position were unacceptable. Accordingly, the Office properly terminated entitlement to monetary compensation benefits on the basis that appellant refused an offer of suitable employment.

The decision of the Office of Workers' Compensation Programs dated July 26, 2000 is affirmed.

Dated, Washington, DC
March 20, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member