U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PEGGY J. SHEELER and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION FACILITY, Everett, WA

*Docket No. 02-1444; Submitted on the Record;*
*Issued November 14, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusing to accept suitable employment.

On December 22, 1998 appellant, then a 44-year-old flat sorter mail clerk, filed a claim for a sprain or strain of the right arm. She attributed her condition to repetitive work as a flat sorter. Appellant stopped working December 23, 1998. In a February 2, 1999 report, Dr. Tobae McDuff, a Board-certified neurologist, stated that she had an abnormal median nerve conduction study, which was consistent with mild right carpal tunnel syndrome. In a February 19, 1999 report, Dr. Richard L. Semon, a Board-certified orthopedic surgeon, indicated that appellant had some numbness of all her fingers. He noted that her primary complaint was elbow pain laterally. He reported that she had negative signs compatible with lateral epicondylitis and negative Tinel's and Phalen's signs of the wrist. He diagnosed very mild carpal tunnel symptomatology on the right and lateral epicondylitis. The Office accepted appellant's claim for a right shoulder sprain and right lateral epicondylitis and began payment of temporary total disability effective February 2, 1999.

The Office referred appellant for an examination to obtain a second opinion. In a March 29, 1999 report, Dr. Robert Price, a Board-certified neurologist and Dr. K. Robert Lang, a Board-certified orthopedic surgeon, indicated that appellant had pain around the elbow with abduction of the right arm. They noted that appellant had a slightly positive Tinel's sign at the cubital tunnel and at the wrist with the median nerve distribution. She reported numbness in the index and long fingers in the Phalen's maneuver. Drs. Price and Lang indicated that appellant had tingling and numbness in the fingers of the right hand. They stated that appellant had marked tenderness over the right ulnar nerve at the elbow and over the right lateral epicondyle. Drs. Price and Lang diagnosed right lateral humeral epicondylitis, mild median neuropathy at the right wrist, a possible right ulnar neuritis and right superior trapezius-supraspinatus tenderness of unknown etiology. They stated that the examination did not present any objective findings to allow a firm diagnosis. Drs. Price and Lang indicated that the clinical findings were most consistent with the diagnoses they had made. They commented that, in the absence of any other

history of injury and the history of pain while working, appellant's condition was attributable to her employment. Drs. Price and Lang stated that appellant's condition would slowly resolve and, therefore, was temporarily disabling. They indicated that appellant should probably not use her right arm temporarily to allow healing. Drs. Price and Lang noted that appellant could work at a position that did not involve any strenuous use of her right arm. The physicians reported that this was appellant's only restriction.

In an April 12, 1999 report, Dr. Shantosh Kumar, a Board-certified physiatrist, stated that appellant's electromyogram and nerve conduction studies were normal with no evidence of cervical radiculopathy, ulnar neuropathy, thoracic outlet syndrome or carpal tunnel syndrome. In a May 11, 1999 report, Dr. Greg Sanders, a Board-certified family practitioner, stated that, after extensive testing, he could not delineate a definitive diagnosis of appellant's right arm. He recommended that appellant be tried at a limited-duty position where she would not perform repetitive work with her right arm. In a separate May 11, 1999 report, Dr. Scott A. Schaaf, an osteopath, stated that appellant had neck pain of unknown etiology, no clinical evidence of lateral epicondylitis, no clinical evidence of carpal tunnel syndrome and a possible cubital tunnel syndrome with ulnar entrapment.

In a June 14, 1999 letter, the employing establishment offered appellant a position as a clerk. The employing establishment indicated that the position would be for eight hours a day and would require her to answer telephones, take messages, take care of loose mail, weight and stamp up postage due letters, work mail in a case left handed and work a flat sorter without loading ledges or pulling tubs.

In a July 12, 1999 work restriction evaluation, Dr. Sanders stated that appellant was limited in reaching, reaching above her shoulder, operating a motor vehicle, repetitive motions of the wrist and elbow, pushing, pulling and lifting. He noted that he could not state the hours appellant could perform each activity. Dr. Sanders stated that appellant's prognosis was indeterminate. He suggested that light duty was possible for her.

In a June 24, 1999 letter, appellant stated that she neither accepted nor declined the offered job. Appellant indicated that her physician did not approve the job as presently written.

In an August 13, 1999 report, Dr. Nancy A. Lellelid, a Board-certified neurologist, noted that appellant had a long term right arm complaint. She commented that appellant's condition could be related to tendinitis but she also needed to consider thoracic outlet syndrome or possibly a cervical disc condition. Dr. Lellelid stated that appellant had no focal findings currently but her symptoms suggested either of the two diagnoses. In a September 21, 1999 report, Dr. Lellelid diagnosed very mild right carpal tunnel syndrome by nerve conduction studies. She noted that appellant, in examination, had negative Tinel's and Phalen's signs which showed the carpal tunnel syndrome apparently was silent on examination. Dr. Lellelid commented that this diagnosis did not explain all of appellant's symptoms. She also diagnosed mild ulnar neuritis or cubital tunnel on the right, which had not been treated. Dr. Lellelid indicated that appellant had an almost fibromyalgia-type picture of her arms bilaterally.

The Office again referred appellant for an examination to obtain a second opinion. In a November 22, 1999 report, Dr. Lang and Dr. Gary, a neurologist, diagnosed bilateral arm and

shoulder pain, subjectively worse on the right, a history of low back pain from prior claims and anxiety and depression following a hysterectomy. The physicians stated that the accepted conditions were reportedly right shoulder strain and right lateral epicondylitis. Drs. Lang and Gary suggested that appellant had a psychogenic overlay which might be impairing her rehabilitation. They noted no improvement in subjective symptoms despite appellant's absence from work since February 2, 1999. Drs. Lang and Gary stated that appellant had no objective evidence of any orthopedic or neurologic dysfunction. They commented that the subjective complaints were at times consistent but at least suggested right lateral epicondylitis, right ulnar neuropathy and bilateral carpal tunnel syndrome, based on bilateral positive Phalen's tests. Drs. Lang and Gary also pointed out that the April 12, 1999 EMG noted normal bilateral ulnar and median nerve function as well as normal bilateral cervical radiculopathy and C5 through T1 myotomes. They commented that the latter findings did not support a diagnosis of cervical radiculopathy, plexopathy, neurogenic thoracic outlet syndrome or neuropathy. Drs. Lang and Gary noted that a cervical magnetic resonance imaging (MRI) scan was reportedly normal although limited by a motion artifact. The physicians stated that appellant's repetitive motions at work were consistent with her subjective complaints and accepted condition for right shoulder strain and right lateral epicondylitis. Drs. Lang and Gary indicated that appellant did not have any objective findings to support diagnoses other than the accepted claims, particularly the right lateral epicondylitis. They commented that appellant did not have any residual permanent impairment. Drs. Lang and Gary concluded that appellant could return to work on a reasonable continuous basis with restriction on repetitive motion, at least of the right elbow, on a permanent basis due to the longevity of her complaints despite prolonged abstinence from work. In an accompanying work restriction evaluation, the physicians indicated that appellant could work eight hours a day in a light-duty position with restrictions on repetitive use of the elbow.

In a January 20, 2000 letter, the employing establishment repeated its offer of the clerk position previously offered on June 14, 1999. In a January 25, 2000 letter, the Office informed appellant that it found the job offered by the employing establishment to be suitable. The Office gave appellant 30 days to accept the position or provide reasons for refusing it. The Office indicated that, if she failed to accept the position, any reasons she offered in support of her position would be considered in determining whether her refusal of the position was justified. The Office warned appellant that, if she refused the position without reasonable cause, her compensation would be terminated.

In a February 15, 2000 report, Dr. Lellelid indicated that she had approved of the employing establishment's job offer but appellant had indicated that she had tried the position previously for one day and had to stop. Appellant related that she did not want to use her right arm at all and was not sure how she could perform the job. Dr. Lellelid noted that appellant still had significant pain in her right elbow and could not extend it fully. She stated that appellant had right carpal tunnel syndrome by electrodiagnosis. Dr. Lellelid suggested that appellant's condition was ligamentous. She stated that she did not concur with the offered job secondary to the fact that a weight restriction was not specified and that use of the left arm alone was not clear.

In a March 9, 2000 report, Dr. Shawn L. Slack, an internist, stated that, on examination, appellant had severe pain with attempted grip over the area of the lateral epicondyle and had profound tenderness in the area. He found mild tenderness over the medial epicondyle and

discomfort over the cubital tunnel. Dr. Slack diagnosed severe lateral epicondylitis, mild cubital tunnel syndrome and mild medial epicondylitis.

The Office sent Dr. Lellelid a revised position description, indicating that appellant could lift up to 10 pounds in performing the specified duties and a restriction of no repetitive use of the right arm. She indicated that the description should be sent to appellant to make the determination on the offered position. Dr. Lellelid stated that she could not give any further input. In an April 28, 2000 report, she indicated that appellant was seen for right arm epicondylitis although she might have some early reflex sympathetic dystrophy. Dr. Lellelid stated that appellant could work four hours a day, was not to use her right arm at work at all and could lift not over 10 pounds. She indicated that appellant could push or pull intermittently with the left arm for two out of the four hours.

The Office again referred appellant for an examination for a second opinion. In a May 5, 2000 report, Dr. Mark Leadbetter, an orthopedic surgeon, noted that appellant had tenderness over the right lateral epicondyle and pain extending from the right shoulder down to the olecranon process upon palpation of the right shoulder. He diagnosed bilateral epicondylitis by history, right greater than left and pain behavior. Dr. Leadbetter stated that throughout the examination appellant experienced facial grimacing and withdrawal during the active range of motion of the right shoulder and with feather palpation of the right shoulder and right elbow. He related appellant's subjective symptoms to pain behavior. Dr. Leadbetter stated that appellant's symptoms were out of proportion to her work injury, particularly as she had no injury. He pointed out that appellant had not worked for a year and a half with no resolution of symptoms and a reported worsening of symptoms. He commented that this history was inconsistent with the nature of appellant's previous activities at the employing establishment. Dr. Leadbetter stated that absence of work for a year and a half should have brought about an abatement of appellant's symptoms, not an increase in symptoms. He indicated that he was unable to give any reasons for appellant's ongoing subjective symptoms with regard to her arms, including both shoulders. Dr. Leadbetter noted that a bone scan showed an increased uptake in the right lateral epicondyle area, which might be consistent with appellant's lateral epicondylitis. He stated, however, that the findings did not correlate with appellant's subjective symptoms. Dr. Leadbetter concluded that appellant could return to her preinjury position. He also stated that appellant could perform the rehabilitation position.

In a May 24, 2000 letter, the Office reissued its modified job offer for appellant, with lifting restrictions of 10 pounds and restrictions against the use of the right arm. In a letter of the same date, the Office proposed to terminate appellant's compensation on the basis of Dr. Leadbetter's report.

In a July 25, 2000 decision, the Office terminated appellant's compensation on the grounds that she was no longer disabled for work due to her accepted job-related conditions. Appellant requested a hearing before an Office hearing representative. In a December 7, 2000 decision, the hearing representative found that, while the medical evidence showed that appellant could perform the offered clerk position, it did not establish that she could return to her former position. He stated that the appropriate course of action was to follow up on the job offer made by the employing establishment and, if appellant refused the position, to terminate compensation.

The hearing representative, therefore, set aside the Office's July 25, 2000 decision and remanded the case for further proceedings.

In a January 12, 2001 letter, the Office noted that the employing establishment had confirmed that the job offered in the May 24, 2000 letter was still available. The Office found that the job was suitable for appellant. The Office again informed appellant of her right to submit reasons for declining the position and warned her that compensation would be terminated if her reasons were found unjustified. In a January 22, 2001 note, appellant indicated that she neither accepted nor rejected the job offer.

In a January 22, 2001 report, Dr. Slack diagnosed right elbow pain secondary to right lateral epicondylitis. He commented that appellant's severe prolonged course was somewhat unusual and the etiology of ongoing epicondylitis with lack of provoking events was unclear. Dr. Slack noted that appellant's job acceptance stated that the job did not meet the job restrictions set forth in Dr. Lellelid's April 28, 2000 report.

In a March 9, 2001 letter, the Office once again reissued the job offer of the clerk position, stating that it was in accordance with Dr. Lellelid's April 28, 2000 report. In a March 13, 2001 letter, the Office once again stated that it found the job suitable for appellant and again set forth her rights to object to the offered position.

In an April 16, 2000 report, Dr. Jiho C. Huang, a Board-certified internist specializing in preventive medicine, stated that appellant had work restrictions of no use of the right arm, lifting of up to 10 pounds with the left arm and no reaching above the shoulder with the left arm. He diagnosed right lateral epicondylitis, right medial epicondylitis, and history of mild to moderate right carpal tunnel syndrome and right shoulder pain of unknown etiology.

In a May 9, 2001 letter, the Office issued a revised job offer with restrictions of no use of the right arm, no lifting over 10 pounds, no reaching above the shoulder with the left arm. In a May 14, 2001 response, appellant indicated that she neither accepted nor rejected the job offer as written. In a May 25, 2001 letter, the Office found the revised offered position suitable for appellant and again informed her of the right to submit reasons for refusing the position.

In a May 31, 2001 report, Dr. Michael G. McNamara stated that appellant had a normal examination of the lateral epicondyle extensor origin. He stated that her right elbow symptoms appeared to be directly related to synovitis with unclear etiology.

In a June 20, 2001 report, Dr. Huang stated that appellant was unable to work at the offered position. He stated that she needed further evaluation. Dr. Huang indicated that appellant had positive EMGs of both wrists and evidence of nerve entrapment of the arm. He stated any repetitive motion of her arms and movements of the wrists may aggravate her condition. Dr. Huang noted that appellant had atrophy of the right arm and swelling of the right lateral epicondyle. He stated that these findings were sufficient to disqualify her from the offered position.

In a June 29, 2001 letter, the Office noted that appellant's complaints affected the right arm, which would not be used in the offered position. The Office, therefore, gave appellant until

July 16, 2001 to accept the offered position. In a July 31, 2001 decision, the Office terminated appellant's compensation.

Appellant requested a written review of the record by an Office hearing representative. In a January 25, 2002 decision, an Office hearing representative found that the job offered to appellant was suitable. He, therefore, affirmed the July 31, 2001 decision of the Office terminating appellant's compensation for refusal to accept suitable employment.[1]

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states:

> "[A] disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[2] 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.[3] However, before a claimant's compensation can be terminated, it must be shown that the job offered to the claimant was suitable. The Office has failed to make that showing here.

Dr. Leadbetter stated that appellant had no objective findings in support of her subjective complaints, particularly in her right elbow and right shoulder. He attributed appellant's subjective symptoms to pain behavior. Yet Dr. Leadbetter noted that a bone scan showed an uptake in the right lateral epicondyle area. He commented that this finding was inconsistent with the fact that appellant's symptoms should have abated in the year and a half she was off work. However, the objective findings of the bone scan contradict Dr. Leadbetter's statement that appellant had no objective findings in support of her symptoms. This internal contradiction reduces the probative value of Dr. Leadbetter's report.

Dr. Huang, in his June 20, 2001 report, stated that appellant had bilateral positive EMG findings in both wrists, nerve entrapment in the arm, atrophy of the right arm and swelling of the right lateral epicondyle. The Office stated that, as these conditions affected appellant's right arm, which was not to be used in the offered position, these findings did not prevent her from performing the offered position. However, the Office's conclusion is a medical conclusion that can only be provided by a physician. The Office did not demonstrate, through medical evidence, that Dr. Huang's report was insufficient to show that the job offered to appellant was unsuitable.

[1] Appellant underwent surgery on April 5, 2002 for release of the right lateral epicondyle. She submitted a claim for compensation for the period April 6 through May 13, 2002. In a May 6, 2002 decision, the Office denied appellant's claim for compensation on the grounds that she was not entitled to compensation due to her refusal to accept suitable work.

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124.

The Board notes that Dr. Huang's and Dr. Leadbetter's reports conflict on the diagnosis of appellant's condition, the extent of her objective findings and on whether appellant could perform the duties of the offered position. In light of the conflict in the medical evidence, the Office has not met its burden of proof in establishing that the clerk position offered to appellant in its May 9, 2001 letter, was suitable for her. The Office, therefore, has not met its burden of proof in terminating appellant's compensation for refusal to accept suitable work.

The decision of the Office of Workers' Compensation Programs dated July 31, 2001 is hereby reversed.

Dated, Washington, DC
November 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member