

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA A. MORRIS and U.S. POSTAL SERVICE,  
POST OFFICE, Washington, DC

*Docket No. 02-1798; Submitted on the Record;  
Issued February 3, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

The Office accepted that on December 9, 1992 appellant, then a 44-year-old distribution clerk, sustained bilateral tendinitis and bilateral carpal tunnel syndrome, for which she underwent a right carpal tunnel release on January 7, 1998. Appellant had previously filed several separate claims, which had been accepted for employment-related back injuries.<sup>1</sup>

By reports dated January 26, February 3 and 19, April 23, June 18 and August 24, 1999, appellant's treating physician, Dr. Hampton J. Jackson, Jr., a Board-certified orthopedic surgeon, discussed her ongoing injury-related symptomatology and her inability to work. By report dated September 24, 1999, Dr. Jackson, indicated that appellant continued to suffer from disabling employment-related conditions which prevented her from working and he opined that she should retire.

The Office determined that a second opinion evaluation was required and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. J. Richard Wells, a Board-certified orthopedic surgeon, for a second opinion examination. By report dated December 7, 1999, Dr. Wells indicated that essentially appellant was not suffering from any medical conditions of the lumbar spine and that she was capable of returning to full-time employment activities with limitations. With respect to appellant's carpal tunnel problems, Dr. Wells indicated that she did have positive electromyogram (EMG) and nerve conduction study (NCV) findings, which indicated that she had bilateral carpal tunnel

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<sup>1</sup> In 1976, appellant was hit in the back with a cash drawer; in 1977, 1978 she developed low back pain from lifting mail trays; in 1992 she was restricted to working 4 hours a day and lifting no more than 10 pounds but she developed back pain and on August 17, 1992 she stopped work completely. This is appellant's fifth appeal before the Board. See ECAB Docket Nos. 97-907; 00-360; 00-2063; 02-1799.

syndrome with the right only, having a subsequent release. Dr. Wells found on the date of examination that appellant had only mild signs with Phalen's and Tinel's tests, both of which were subjective. Dr. Wells noted that appellant did not even mention numbness, tingling or pins and needles in her hands as a problem. Based on this finding, he noted that appellant did not have any overwhelming symptoms relating to carpal tunnel syndrome and that her physical examination revealed only mild signs, which were subjective. Dr. Wells indicated that appellant could return to full-time gainful employment with unlimited sitting, standing, walking and climbing, 1 hour a day of intermittent reaching, a limit of 45 to 60 minutes of keyboarding a day and a 50-pound lifting limit.

By reports dated January 28, February 18 and March 17, 2000, Dr. Jackson disagreed with Dr. Wells' conclusions and opined that appellant's work injuries were superimposed on age-related spinal degeneration and that for this reason she was still suffering from and was disabled due to employment-related conditions. He continued to recommend left carpal tunnel surgery.

The Office then determined that a conflict in medical opinion evidence existed between Dr. Jackson and Dr. Wells and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. James E. Callan, a Board-certified orthopedic surgeon.

By report dated March 21, 2000, Dr. Callan reviewed appellant's factual and medical history, indicated his findings upon physical examination and noted that she moved freely from the waiting room chair to the examination table, walking without a limp, but when examined demonstrated limited ranges of motion in extension of the neck and forward flexion of the back because of complaints of pain. He noted that she had excellent lateral bending and rotation and extension, without specific areas of marked tenderness or spasm, but indicated that appellant had apparent decreased sensation of the entire left side of her body involving both upper and lower extremities. Dr. Callan noted that this was evidence of malingering or an apparent functional overlay because her pain pattern did not follow any specific dermatomal distribution. With respect to appellant's hands, Dr. Callan indicated that she had a negative Tinel's and Phalen's on the left with diminished sensation in nondermatomal distribution. He stated that appellant showed no evidence of a carpal tunnel syndrome and opined that carpal tunnel syndrome would be a work-related injury because appellant's work involved multiple types of jobs rather than a single repetitive job such as typing. Dr. Callan opined that, after thorough examination, appellant showed no evidence of significant objective abnormality regarding her back or wrists, that multiple diagnostic study results were consistent primarily with arthritic changes and showed no definitive neurologic abnormality and that she was fully capable of returning to any job for which she was qualified with no restrictions other than to follow generally accepted principles for avoiding back problems by lifting, pushing and pulling carefully and by changing positions on a regular basis. Dr. Callan opined that appellant definitely had the functional capacity to maintain a job as a distribution clerk and he indicated that a left carpal tunnel release was not necessary due to the absence of objective or subjective findings on physical examination. He opined that she was no longer suffering a work-related medical problem, recommended no specific work activity restrictions, except for no lifting over 50 pounds and indicated that she could return to full duty.

On February 9, 2000 the employing establishment had offered appellant the limited-duty position of modified distribution clerk. This position required cleaning and checking carriers of accountable items, answering the telephone, filing change of address cards, rubber stamping return/nixie mail, 3579s, writing second notices for accountable mail and parcels and assisting in close-out procedures of the office including retrieving the flag and locking the doors. The job offer was noted to be within the medical limitations indicated by Dr. Wells at that time, as it allowed appellant to intermittently sit, stand, reach, push and pull, lift and walk for 4 hours a day and to lift no more than 21 pounds for 4 hours a day.

On February 11, 2000 appellant rejected the job offer and noted that her rejection was based upon medical advice.

A July 7, 2000 report from Dr. Jackson indicated that appellant was “not fit for any gainful employment.” On July 21, 2000 he recommended that appellant not attempt to return to work.

By letter dated July 24, 2000, the Office advised appellant that it had found the position of modified distribution clerk suitable to her work capabilities and it advised her of the provisions of 5 U.S.C. § 8106(c) and the consequences of refusing the job offer. Appellant was given 30 days within which to accept the offered job or to provide reasons for her refusal.

In response, on August 24, 2000 appellant claimed that she felt she was too disabled to perform the duties of the offered position due to deterioration of her medical condition. An August 23, 2000 report from Dr. Jackson reiterated his opinion that appellant was not fit for gainful employment.

On August 24, 2000 the Office confirmed with the employing establishment that the position was still available.

A September 1, 2000 report from Dr. Jackson indicated that appellant’s impairment made it difficult for her to use her hands with even simple tasks such as writing and, therefore, concluded that she was not fit for returning to work.

Appellant elected to take disability retirement effective August 28, 2000.

By letter dated October 30, 2000, the Office advised appellant that the job offered her was found to be suitable to her disabled condition, that it remained available, that her reason for refusal was insufficient as the weight of the medical evidence of record established that she could physically perform the duties of the offered position and that she had an additional 15 days within which to accept it before her compensation benefits were terminated under 5 U.S.C. § 8106(c).

In response, by letter dated November 2, 2000, appellant replied that she would be accepting the Office of Personnel Management (OPM) disability retirement benefits and that she would no longer accept benefits from the Office under the Federal Employees’ Compensation Act.

By decision dated November 16, 2000, the Office terminated appellant's compensation benefits based upon her refusal of suitable work under 5 U.S.C. § 8106(c). The Office found that the weight of the medical evidence of record was carried by the well rationalized report of Dr. Callan, which established that appellant could work full-time in the offered position of modified distribution clerk and that she had refused such position without an acceptable justification, such that she was no longer entitled to compensation benefits in accordance with 5 U.S.C. § 8106(c).

On November 15, 2000 appellant requested reconsideration. In support, she submitted further medical reports from Dr. Jackson dated February 26, May 14 and July 16, 1999, which support that she remained totally disabled.

By letter dated February 21, 2001, appellant, through her representative, requested reconsideration and noted that Dr. Callan had reexamined appellant (under a false name)<sup>2</sup> on December 28, 2000 and stated that she had symptoms consistent with S1 radiculopathy due to an occupationally-related L5-S1 herniated disc, that she continued to suffer residuals of her employment 1976, 1987 and 1992 injuries, that her herniated disc might require surgery and that she might also require a left carpal tunnel release. Appellant noted that Dr. Jackson found that her condition had worsened over the preceding several years and that she was presently totally disabled for any gainful employment.

Dr. Gary C. Dennis, a Board-certified neurosurgeon, indicated in a July 10, 2000 report, that appellant complained of work injuries from August 1976 and August 17, 1992, which resulted in lumbar stenosis with radiculopathy, that she suffered from carpal tunnel syndrome and that she stated she was partially disabled due to her carpal tunnel syndrome and partially disabled due to her back, which required surgical intervention. He noted as objective findings that appellant's back was minimally tender in the lumbosacral region and that her extremity examination revealed a right Phalen's sign, status post right carpal tunnel surgery. Dr. Dennis concluded that appellant had lumbar stenosis with radiculopathy due to work-related injuries of August 1976 and August 17, 1992 and carpal tunnel syndrome, status post right carpal tunnel release and he recommended that she continue on disability, have an electromyogram (EMG) of the lower extremities and consider a lumbar laminectomy.

By decision dated March 5, 2001, the Office denied modification of the November 16, 2000 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the impartial medical report of Dr. Callan constituted the weight of the medical evidence of record and that appellant refused an offer of suitable work.

Appellant again requested reconsideration and in support she submitted a January 19, 2001 report from Dr. Jackson opined that appellant was not fit for any gainful employment, that she had worsened since he had been treating her and that her work injuries had not resolved. Additional progress reports from Dr. Jackson dated June 26 and 29, 2001 and February 18, 2000 were also provided. He noted that appellant showed significant weakness of her hands and inability to write or use her right hand repeatedly.

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<sup>2</sup> The patient examined was identified as *Patricia Ann Harrison-Matthews*.

A July 10, 2000 report from Dr. Dennis was also submitted which found lumbar stenosis with radiculopathy from her work injuries and carpal tunnel syndrome, status post release on the right.

By decision dated June 27, 2001, the Office denied modification of the March 5, 2001 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the report dated December 28, 2000 from Dr. Callan was not on letterhead and was not appropriately signed and, therefore, was of reduced probative value.

By letter dated August 3, 2001, appellant requested reconsideration claiming that a subsequent December 27, 2000 report from Dr. Wells contradicted his earlier report and found that she was still disabled and required surgery, such that there was now no conflict in medical opinion and Dr. Callan's report was irrelevant. In support, she submitted further medical evidence.

Appellant submitted a December 27, 2000 report from Dr. Wells in which she used a false name which noted that she had some tenderness of the lumbar spine, that forward flexion and extension was somewhat restricted due to guarding, that she had a positive femoral stretch sign on the right and that she had a herniated disc at L3-4.<sup>3</sup> Dr. Wells opined that appellant might need epidural blocks or a discectomy if her condition did not improve.

A subsequently submitted December 28, 2000 report from Dr. Callan noted appellant's<sup>4</sup> subjective complaints of an S1 radiculopathy, which she characterized as not serious enough to warrant surgical intervention, noted that no other nonoperative treatment was indicated other than a self-administered exercise program and noted: "I see no objective reason why [appellant] has been unable to work since 1992." Dr. Callan suggested that appellant might require a left carpal tunnel release, which would be at her discretion.

Dr. Jackson noted on April 20, 2001 that appellant was not fit for gainful employment and noted weakness to pinch, grasp and hook in her upper extremities.

By decision dated February 25, 2002, the Office denied modification of the June 27, 2001 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the reports from Drs. Callan and Wells, which were obtained improperly by appellant using a false name, were of diminished probative value as appearance of impropriety existed due to her use of a false name and that the integrity of the report was compromised and its validity impaired, such that they would not be reviewed.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or

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<sup>3</sup> Appellant again used the false name *Matthews* and *Harrison-Matthews*.

<sup>4</sup> Using the false name "*Harrison-Matthews*."

secured for him is not entitled to compensation.<sup>5</sup> 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.<sup>6</sup>

The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.<sup>7</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.<sup>8</sup>

In this case, the Office established that appellant was only partially disabled and was capable of full-time employment, through the properly obtained and well-rationalized impartial medical report from Dr. Callan.

Although appellant's treating physician, Dr. Jackson, continued to state that she was not fit for any gainful employment, the Office second opinion specialist, Dr. Wells found that appellant was not suffering from any medical conditions of the lumbar spine and that she was capable of returning to full-time employment activities with limitations.

The Act at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

In this case the Office properly found a conflict in medical opinion evidence between Drs. Jackson and Wells on whether appellant remained disabled and/or had residuals of her accepted employment injuries, it appropriately referred appellant, together with the salient information, to Dr. Callan, for an impartial medical examination to resolve the conflict. Dr. Callan indicated that appellant definitely had the functional capacity to maintain a job as a distribution clerk and he indicated that a left carpal tunnel release was not necessary due to the absence of objective or subjective findings on physical examination.

The Board has frequently explained that, when 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.<sup>9</sup>

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<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> 20 C.F.R. § 10.124.

<sup>7</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>8</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>9</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

As Dr. Callan's impartial medical evaluation report was based upon a proper factual and medical background and was well rationalized, it was entitled to that special weight and resolved the existing conflict in medical evidence, establishing that appellant could perform full-time duty with a lifting limit of 50 pounds.

The Board has explained that additional reports from an appellant's treating physician, who had been on one side of a conflict which was resolved by an impartial medical specialist, were insufficient to overcome the weight accorded the impartial medical specialist's report or to create a new conflict with it.<sup>10</sup> Therefore, further reports from Dr. Jackson, merely restated his previous opinion and, therefore, were insufficient to overcome the special weight accorded Dr. Callan's report or to create another conflict. Consequently Dr. Callan's properly obtained impartial medical report constitutes the weight of medical evidence and established that appellant could perform the offered limited-duty work.

Further, the Board notes that the brief reports from Dr. Dennis were based solely on a history of injury as provided by appellant, contained no substantive objective evidence of disability due to carpal tunnel syndrome or due to any back condition, lacked any rationale or basis for his conclusions and recommendations and were, therefore, of diminished probative value. As Dr. Dennis' reports lacked an accurate factual and medical history and lacked any medical rationale or identification of objective findings of disability, they are of significantly diminished probative value and are insufficient to overcome the weight accorded to the impartial medical examiner's report or to create a new conflict with it.<sup>11</sup>

Thereafter and on appeal appellant's representative urged that Dr. Wells and Dr. Callan reversed themselves in subsequent reports, which negated their findings. However, the Board notes that the subsequent report from Dr. Wells and Dr. Callan were obtained under false pretenses using a false name at her representative's instigation and, therefore, are found to be of diminished probative value. They were not based on a complete and accurate factual and medical background, they were made without the benefit of prior medical reports and because they lacked reference to, discussion about or explanation of the conflicting findings and conclusions or the presence of absence of progression of any condition, with the earlier reports made after examination by Dr. Wells on December 27, 1999 and Dr. Callan on December 28, 2000. The Board has held that medical opinions, which are based on an incomplete or inaccurate factual background, are entitled to little probative value in establishing a claim.<sup>12</sup>

Accordingly, the December 27, 1999 and December 28, 2000 reports are insufficient to overcome the special weight accorded Dr. Callan's properly obtained March 24, 2000 impartial medical examination report.

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<sup>10</sup> *Virginia Davis-Banks*, 44 ECAB 389 (1993).

<sup>11</sup> See *Michael E. Smith*, 50 ECAB 313 (1999); *Dennis M. Mascarenas*, 49 ECAB 215 (1997); *Earl David Seal*, 49 ECAB 152 (1997); *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>12</sup> *Daniel J. Overfield*, 42 ECAB 718 (1991).

Based on Dr. Callan's March 24, 2000 work restrictions and Dr. Wells' December 7, 1999 restrictions, the Office had determined that the offered position of modified distribution clerk was suitable to appellant's partially disabled condition and had appropriately advised appellant. It reviewed her reasons for refusal, found them insufficient and so advised her, but she still refused the offered position. Therefore, the Office properly terminated appellant's compensation entitlement for refusal of suitable work under 5 U.S.C. § 8106(c).

As appellant has not provided an acceptable reason to justify her refusal to accept the offered suitable work, the Office properly terminated her compensation entitlement.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 25, 2002 and June 27, 2001 are hereby affirmed.

Dated, Washington, DC  
February 3, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member