

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KAREN L. YAEGER and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, JOHN F. KENNEDY  
INTERNATIONAL AIRPORT, Jamaica, NY

*Docket No. 02-499; Submitted on the Record;  
Issued January 7, 2003*

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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.

Appellant, a 31-year-old secretary, filed a notice of traumatic injury alleging that on December 30, 1998 she sustained a muscle strain in the performance of duty. She stopped work on December 31, 1998 and returned to work for half days on January 4, 8 and 11, 1999. On March 10, 1999 the Office accepted appellant's claim for sprains of the neck, left shoulder and left thoracic region based on the reports of her attending orthopedist, Dr. Ali Araghi, an osteopath. The Office entered appellant on the periodic rolls on April 6, 1999.

A radiologist read a March 17, 1999 computed tomography (CT) scan of the cervical spine as normal. Dr. Uriel T. Davis, a Board-certified neurologist, examined appellant on April 24, 1999 at the request of Dr. Salvatore Pisciotto, an osteopath and appellant's family physician. Dr. Davis noted appellant's history of injury and performed a physical examination. He reported guarding and defensive posturing at the left shoulder with palpatory tenderness of the shoulder musculature on the left and mild wasting of the first interossei muscle as well as decrease in pinprick sensation of the median innervated digits on the left with no Phalen's sign. Dr. Davis diagnosed cervical radiculopathy and stated that the C7-T1 root was implicated. He further diagnosed ulnar neuropathy and cervical strain. Dr. Davis attributed these conditions to appellant's employment injury.

In a note dated April 27, 1999, Dr. Araghi found that appellant had mild left sided trapezial spasm with normal range of motion. He noted that appellant had normal muscle strength in her upper extremities with no gross sensory deficits and symmetric reflexes. Dr. Araghi stated that appellant's left shoulder demonstrated a mildly positive impingement sign and tenderness over the trapezial region and posterior rotator cuff region. He diagnosed left trapezial myostis with mild impingement syndrome left shoulder. Dr. Araghi released her to

return to light-duty work four hours a day on April 29, 1999. Appellant's restrictions included no pushing, lifting or pulling. She returned to light-duty work on May 3, 1999. In a note dated May 7, 1999, Dr. Araghi stated that appellant experienced severe pain and was unable to complete her work. He found that most of her tenderness was medial to the left scapula, in the left trapezial region and also generalized tenderness in the left shoulder region. A May 10, 1999 magnetic resonance imaging (MRI) scan of the left shoulder demonstrated a slight downward sloping of the acrominal process of the scapula creating Grade I impingement, no rotator cuff tendon tear and mild biceps tenosynovitis.

Appellant filed a notice of recurrence of disability on May 10, 1999 alleging that on May 5, 1999 she sustained a recurrence of disability causally related to her December 30, 1998 employment injury. The Office requested additional factual and medical evidence regarding this claim by letter dated June 7, 1999.

The Office referred appellant for a second opinion evaluation with Dr. Alan Miller, a Board-certified orthopedic surgeon, on May 11, 1999. Dr. Miller completed a report on May 18, 1999 and noted appellant's history of moving manuals resulting in pain in her neck and upper back radiating to her left shoulder and arm. His physical evaluation of appellant found tenderness over the paraspinal muscles, restriction of the cervical range of motion, full shoulder strength and reflexes intact. Dr. Miller diagnosed cervical musculoligamentous sprain and thoracic spine musculoligamentous sprain as directly related to her employment injury. He stated that appellant had reached maximum medical improvement, that she had no orthopedic disability from the injuries sustained on December 30, 1998 and that she could return to full-duty work in her date-of-injury position. The Office requested clarification of this report on June 1, 1999. In an addendum dated June 2, 1999, Dr. Miller stated that it was his opinion that appellant had no disability causally related to her December 30, 1998 employment injury which would prevent her from resuming the full duties of her position. He based this conclusion on appellant's normal radiographs, normal CT scan and a clinical examination which revealed no significant residuals from the work injuries.

In a report dated June 9, 1999, Dr. E. Wiseman, a Board-certified physiatrist, found spasm of the paraspinal musculature of the cervical region, painful range of motion in the right shoulder, as well as pain and tenderness in the anterior side of the left shoulder and upper left trapezius.

Dr. Araghi completed a report on June 22, 1999 and reviewed the May 10, 1999 MRI scan. He stated that the shoulder impingement and mild biceps tenosynovitis were the appropriate diagnoses of appellant's December 1998 employment injury. Dr. Araghi further stated that appellant's "firm diagnosis" had to be determined and that she remained totally disabled. The Office entered appellant on the periodic rolls on July 19, 1999.

On July 22, 1999 appellant's physician, Dr. Norman Sveilich, an osteopath and associate of Dr. Araghi, found that an electromyogram (EMG) demonstrated left ulnar neuropathy due to entrapment in Guyon's Canal with mild first interosseous wasting. He stated under the heading of impression; "I am reluctant to make a diagnosis of Guyon's canal entrapment secondary to the absence of Tinel's sign, positive compression, etc. Reflex sympathetic dystrophy."

Dr. Davis reviewed appellant's EMG on August 6, 1999 and diagnosed left ulnar neuropathy due to entrapment at the Guyon's Canal.

The Office referred appellant for an impartial medical examination with Dr. Michael Katz, a Board-certified neurologist, to resolve the conflict of medical opinion between appellant's physicians, who found that she was totally disabled, and the Office's second opinion physician, Dr. Miller, who found that appellant could return to her date-of-injury position without restrictions. In his August 30, 1999 report, Dr. Katz noted appellant's employment injury and medical history. He found no tenderness or muscle spasm in the cervical spine and that motor strength was present and sensation intact. Dr. Katz found appellant had limitation in abduction in the left shoulder and found a positive Tinel's sign at the cubital tunnel and at the Guyon's tunnel. He also noted some atrophy of the thenar muscles. Dr. Katz diagnosed cervical strain resolved, thoracolumbar strain resolved, and mild left shoulder impingement with entrapment of the left ulnar nerve at Guyon's tunnel. He recommended continuing physical therapy and found that there was a causal relationship between appellant's current condition and her employment injury. Dr. Katz stated:

"These findings are attributable to a work accident of December 30, 1998. These are characteristic repetitive stress type entrapment injuries and are consistent with the history of lifting electrical manuals. MRI testing indicated very mild impingement of the left shoulder. I reviewed the study myself, as well as a negative MRI of the cervical spine. This was consistent with my clinical evaluation indicating no disability in the cervical spine. The claimant is capable of return[ing] to work eight hours per day in a limited[-]duty capacity as a secretary."

Dr. Katz stated that the conditions described of impingement would not render one totally disabled. He indicated that appellant could work eight hours a day with restrictions on reaching, reaching above the shoulder, repetitive movements of the wrist and elbow, pushing, pulling, lifting and climbing.

Dr. David M. Dines, a Board-certified orthopedic surgeon, completed a report on October 6, 1999 noting appellant's history of employment injury. He stated that after physical examination: "I am not sure that this is not just a soft tissue overload type process where she must simply get worse before she gets better."

Dr. Sveilich indicated that appellant was totally disabled in a note dated November 22, 1999.

The employing establishment offered appellant a light-duty position on December 14, 1999. This position required pushing, pulling and lifting no more than five pounds, no climbing stairs, reaching and repetitive movements of the wrist and elbow for four hours a day.

Dr. Sveilich continued to support appellant's total disability for work in a note dated December 20, 1999. He stated that appellant basically did not use her left upper extremity and

that she had pain in the base of her neck. Dr. Sveilich diagnosed, “reflex sympathetic dystrophy type of syndrome, not amenable to any treatment for at this time.”

Appellant refused the offered position on December 27, 1999. In a letter dated December 28, 1999, the Office informed appellant that the offered position was within her physical limitations as set by Dr. Katz and that the position was suitable work. The Office advised appellant of the penalty provision of 8106 of the Federal Employees’ Compensation Act<sup>1</sup> and allowed her 30 days to either accept the position or provide a reasonable explanation for her refusal of the position.

On January 24, 2000 Dr. Sveilich noted that appellant received treatment from Dr. Jacob Rozbruch, a Board-certified orthopedic surgeon, who recommended a stellate ganglion block. He diagnosed, “Status post wrist strain with reflex sympathetic dystrophy syndrome.” Dr. Sveilich stated that he reviewed the position offered by the employing establishment with appellant and concluded, “I think it is worthwhile to try and certainly see how she gets along.”

Appellant requested to change physicians on January 24, 2000 from Dr. Sveilich to Dr. Rozbruch. In a letter dated January 25, 2000, appellant stated that she could not perform the duties of the offered position due to her condition of reflex sympathetic dystrophy as diagnosed by Dr. Rozbruch. The Office responded on March 28, 2000 and informed appellant that she had not submitted the medical evidence to support her position. The Office allowed appellant 15 days to accept the limited-duty position offered by the employing establishment. By decision dated May 3, 2000, the Office terminated appellant’s compensation benefits finding that she refused an offer of suitable work.

Appellant, through her attorney requested an oral hearing on May 8, 2000. Appellant submitted medical evidence from Dr. Rozbruch noting her employment injury and diagnosing reflex sympathetic dystrophy and probable thoracic outlet syndrome left side. Dr. Rozbruch provided work restrictions which included no lifting, bending squatting, climbing or kneeling. He further indicated that appellant’s left hand was unusable and that she was totally disabled.

Appellant’s oral hearing was held on September 20, 2000. By decision dated December 14, 2000, the hearing representative affirmed the May 3, 2000 decision finding that appellant refused an offer of suitable work. The hearing representative also noted that appellant had submitted medical evidence from Dr. Rozbruch following the May 3, 2000 decision and found that this evidence was sufficient to create a conflict of medical opinion evidence with the August 30, 1999 report from Dr. Katz. The hearing representative remanded the case with instructions to the Office to reflect that appellant sustained ulnar nerve entrapment of the left wrist as a consequence of her December 30, 1998 work injury and to refer appellant, a statement of accepted facts and a list of specific questions to an impartial medical specialist to resolve the conflict of medical opinion evidence created by Dr. Rozbruch’s report.

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits.

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<sup>1</sup> 5 U.S.C. § 8106.

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

In this case, the Office found that a conflict of medical opinion evidence existed between appellant's attending physicians, Drs. Sveilich and Araghi, osteopaths, who continued to support her disability for work and the Office referral physician, Dr. Miller, a Board-certified orthopedic surgeon, who found that appellant could return to full duty. The Office referred appellant to Dr. Michael Katz, a Board-certified neurologist, for an impartial examination.

In a report dated August 30, 1999, Dr. Katz noted appellant's history of injury, examined appellant and provided work restrictions. He found no tenderness or muscle spasm in the cervical spine and that motor strength was present and sensation intact. Dr. Katz found appellant had limitation in abduction in the left shoulder and found a positive Tinel's sign at the cubital tunnel and at the Guyon's tunnel. He also noted some atrophy of the thenar muscles. Dr. Katz diagnosed cervical strain resolved, thoracolumbar strain resolved, and mild left shoulder impingement with entrapment of the left ulnar nerve at Guyon's tunnel. He recommended continuing physical therapy and found that there was a causal relationship between appellant's current condition and her employment injury. Dr. Katz stated that appellant's conditions were characteristic repetitive stress type entrapment injuries and were consistent with her history of injury. He noted that appellant's cervical MRI was normal and that this finding was consistent with his physical examination of the cervical spine. Dr. Katz found that as appellant had a normal cervical spine on clinical examination and on diagnostic testing there were no objective findings to support disability due to a cervical spine condition. He noted that appellant's left shoulder impingement did not render her totally disabled. Dr. Katz completed a work restriction evaluation and indicated that appellant could work eight hours a day with restrictions.

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>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).

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

factual background, must be given special weight.<sup>6</sup> Dr. Katz's report was based on a proper factual background and included detailed findings on physical examination. He offered his reasons for finding that appellant had no disability due to her cervical spine and offered medical reasons for concluding that her left shoulder condition did not render her totally disabled. Based on his physical examination and review of the diagnostic studies, Dr. Katz concluded that appellant was capable of performing work within the physical restrictions that he provided.

The employing establishment provided appellant with a light-duty position which complied with Dr. Katz' restrictions. Appellant declined this position on December 27, 1999. The Office informed appellant that the position was suitable on December 28, 1999 and allowed her 30 days to accept or refuse the position. In a report dated January 24, 2000, appellant's attending physician, Dr. Sveilich, an osteopath, diagnosed reflex sympathetic dystrophy, reviewed the position description and stated that appellant could return to work in this position.

Appellant responded to the Office on January 25, 2000 and stated that she was unable to perform the duties of the offered position. Appellant stated that she had the additional condition of reflex sympathetic dystrophy as a result of her employment injury and that Dr. Rozbruch had found her totally disabled due to this condition.<sup>7</sup>

By letter dated March 28, 2000, the Office allowed appellant an additional 15 days to accept the offered position. By decision dated May 3, 2000, the Office terminated appellant's compensation benefits.

In regard to the May 3, 2000 decision, the Board finds that there was insufficient rationalized medical opinion evidence supporting appellant's disability to perform the suitable work position. Both the impartial medical examiner and appellant's attending physician agreed that she was capable of returning to work in this position. The record did not contain any medical evidence from Dr. Rozbruch at the time of the May 3, 2000 decision. Although appellant had submitted her understanding of Dr. Rozbruch's conclusions and diagnoses, as appellant is not a physician, her opinion does not constitute medical evidence and is insufficient to establish that the offered position was not suitable work.<sup>8</sup> As the weight of competent medical evidence at the time of the May 3, 2000 Office decision, established that appellant could perform the duties of the offered position, appellant has not offered a justified reason for refusing the offered position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on May 3, 2000 as she refused an offer of suitable work.

The hearing representative finalized the May 3, 2000 termination decision finding that at the time of the Office's decision, the medical evidence established that appellant was capable of performing the duties of the offered position. The hearing representative further remanded

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<sup>6</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.4(b)(4) (December 1993). The Office's procedures require 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>8</sup> *John E. Lemker*, 45 ECAB 258, 264 (1993).

appellant's claim for additional development of the medical evidence to determine if appellant had met her burden of proof in establishing continuing disability due to an additional condition. The Board notes that its jurisdiction is limited to final decisions of the Office.<sup>9</sup> The Board will not therefore address the issue of whether appellant has established continuing disability on or after May 3, 2000. Finally, as the Office met its burden of proof to terminate appellant's compensation on May 3, 2000, it is not required to reinstate appellant's compensation because she subsequently submitted new evidence which was of such a nature to lead the Office to conclude that further inquiry was needed.<sup>10</sup>

The December 14, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
January 7, 2003

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> 20 C.F.R. § 501.2(c).

<sup>10</sup> If evidence is submitted after the Office's decision that necessitates further inquiry such as referral to an impartial medical examiner, compensation need not be reinstated. *Cheryl D. Hedblum*, 47 ECAB 215, 220 (1995).