

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA L. VANDERPOOL and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 03-1555; Submitted on the Record;
Issued October 29, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of appellant's compensation benefits effective June 4, 2002; and (2) whether the Office properly denied appellant's request for a review of the written record.

On February 25, 2000 appellant then a 44-year-old mail processor, filed a claim alleging that she developed a shoulder and right arm condition as a result of performing repetitive activities in the performance of her duties. The Office accepted the claim for right shoulder acromioclavicular (AC) joint inflammation with cuff tendinitis and authorized arthroscopic surgery of the right shoulder, which appellant underwent in August 2001, she returned to light duty in September 2001.¹

On May 20, 2000 appellant filed a Form CA-2a, notice of recurrence of disability. The Office accepted her claim for recurrence of disability and paid appropriate compensation.²

Appellant submitted several reports from Dr. Jolson dated August 1 to September 21, 2001. His reports of August 10 to September 21, 2001 noted that appellant was progressing well post surgery and could return to sedentary work with no lifting and no repetitive use of the right arm. Thereafter, she returned to work light duty on September 22, 2001.

On December 11, 2001 appellant filed a claim for a schedule award.

¹ In an operative report dated August 1, 2001, Dr. Jolson noted performing right shoulder arthroscopic subacromial decompression with debridement of the undersurface articular tear; subacromial decompression; and arthroscopic Munford and diagnosed appellant with subacromial impingement; undersurface A2 supraspinatus partial cuff tear; and acromioclavicular joint arthritis.

² The record reveals that appellant submitted two Form CA-2a, notice of recurrence of disability claims dated January 16, 2001, however, the Office did not issue a decision with regard to these claims.

On February 12, 2002 the Office referred appellant for a second opinion evaluation by Dr. Richard T. Sheridan, a Board-certified orthopedist. In a report dated March 25, 2002, he indicated that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Sheridan noted upon physical examination that there was no tenderness or spasm in either trapezius muscle; no supraspinous or infraspinous atrophy; full retraction and protraction of the shoulder blades; no deformity in either shoulder blade; there was no evidence of rotator cuff tear, tendinitis, impingement syndrome, sternoclavicular separation, dislocation or arthritis in either shoulder. He noted that the drop test was negative for rotator cuff tear bilaterally, the impingement test is negative bilaterally and appellant had full motion in the shoulders, elbows and wrists. Dr. Sheridan advised that appellant did not continue to suffer residuals from the accepted work-related injury of February 25, 2000 and noted that all accepted conditions of this claim were resolved. He further advised that appellant could perform her preinjury duties as a mail processor and did not require any permanent work restrictions and noted that maximum medical improvement was reached in October 2001.

Thereafter, appellant submitted reports from Dr. Jolson dated February 12 and March 27, 2002, who noted upon physical examination that she had positive findings of slight tenderness over the anterior bursa, with passive rotation 90 degrees and external rotation 45 degrees. He advised that appellant had not reached maximum medical improvement, but anticipated this in May 2002. Dr. Jolson's March 27, 2002 report noted that appellant had improved, but she still experienced an inability to perform repetitive tasks with her shoulder and noted that the second opinion examination aggravated appellant's condition. He advised that appellant could return to work with work restrictions imposed for an additional three months until her reexamination in June.

On April 24, 2002 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Sheridan's March 25, 2002 report established no continuing disability of appellant's employment injury.

Appellant submitted a May 8, 2002 report from Dr. Jolson, who advised that he reviewed Dr. Sheridan's report dated March 25, 2002 and noted that he did not properly examine appellant's shoulder and opined that 90 percent of Dr. Sheridan's physical examination had nothing to do with appellant's shoulder injury. Dr. Jolson indicated that appellant had clinical evidence of rotator cuff tendinitis, had mild discomfort around the resected AC joint and unrestricted activities exacerbated her areas of pain. He advised that appellant did not have an impairment rating on her range of motion and had full unrestricted range of motion of her shoulder, but still experienced painful range of motion. Dr. Jolson did not advise that appellant be released back to work unrestricted as this would most likely cause her to breakdown and have recurrent problems.

By decision dated June 4, 2002, the Office terminated appellant's benefits effective June 4, 2002 on the grounds that the weight of the medical evidence established that she had no continuing disability resulting from her employment injury.

In a letter dated July 17, 2002, appellant requested an appeal of the Office decision. By letter dated July 25, 2002, the Office requested clarification as to the specific appeal rights she wished to exercise. Appellant requested a review of the written record.

In a decision dated August 26, 2002, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

The Board finds that the Office has not met its burden of proof to terminate appellant's benefits effective June 4, 2002.

Once the Office accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴

In this case, the Office accepted that appellant sustained a right shoulder AC joint inflammation with cuff tendinitis on February 25, 2000 and paid appropriate compensation thereafter. The Office terminated her compensation effective June 4, 2002, based on Dr. Sheridan's examination and report. The Board finds that there is a conflict in the medical opinion between Dr. Sheridan, the Office referral physician, and Dr. Jolson, appellant's treating physician, all of whom are Board-certified specialist in their respective fields.

Dr. Sheridan opined that appellant suffered no residuals of the work-related injury and all accepted conditions of this claim were resolved. He indicated that she was fully recovered from her employment-related injury and was capable of returning to her preinjury employment as a mail processor and did not require any permanent work restrictions. By contrast, Dr. Jolson, in reports dated February 12, March 27 and May 8, 2002 noted that appellant still experienced an inability to perform repetitive tasks with her shoulder and had had positive findings upon physical examination of slight tenderness over the anterior bursa, passive rotation 90 degrees, external rotation 45 degrees, minimal tenderness over the AC joint and mild diffuse pain over the coracoacromial arch. In his report of March 27, 2002, he advised that appellant could continue to work light duty with work restrictions imposed for an additional three months until her examination in late June 2002. Dr. Jolson has consistently supported work-related disability related to appellant's shoulder condition, while Dr. Sheridan found that appellant has no work-related residuals of the accepted injury and that she is capable of resuming his preinjury employment.

Section 8123 of the Federal Employees' Compensation Act⁵ provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivian L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ 5 U.S.C. § 8123(a).

examination.⁶ The Board finds that, because the Office relied on Dr. Sheridan's opinion to terminate appellant's compensation without having resolved the existing conflict,⁷ the Office has failed to meet its burden of proof in terminating compensation on the grounds that disability had ceased.⁸

The decision of the Office of Workers' Compensation Programs dated June 4, 2002 is hereby reversed.

Dated, Washington, DC
October 29, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Shirley L. Steib*, 46 ECAB 39 (1994).

⁷ *See Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

⁸ The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.