

**United States Department of Labor
Employees' Compensation Appeals Board**

HOWARD Y. MIYASHIRO, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kailua, HI, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-984
Issued: December 19, 2005**

Appearances:
Kerstin Miyashiro, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 23, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 2, 2005 denying modification of prior decisions terminating his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; and (2) whether appellant met his burden of proof to establish that he had an employment-related disability for the period August 1989 to April 1993. On appeal, appellant's representative contends that Dr. Frederick Reed's 1989 opinion should be excluded.

FACTUAL HISTORY

This case has been before the Board on prior appeals. By decision dated August 27, 1992, the Board found that the weight of the medical evidence established that appellant's

employment-related disability had ceased as of August 27, 1989.¹ In a decision dated October 24, 1994, the Board found that there was sufficient evidence to require further development of the medical evidence with respect to a shoulder injury as a consequence of authorized surgery in 1986.² Following remand, the Office accepted that appellant sustained a consequential left shoulder impingement injury with disability commencing on April 20, 1993 and authorized surgery, which was performed on May 22, 1995.³ By decision dated December 23, 1999, the Board found that the Office properly terminated appellant's compensation effective March 25, 1996 on the grounds that he had refused an offer of suitable work. The Board also determined that appellant had not established any employment-related disability commencing August 1989 and that his March 8, 1996 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁴ On May 26, 2000 the Board denied appellant's petition for reconsideration.

In a decision dated December 19, 2002, the Board again affirmed that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work and also determined that appellant had not established an employment-related disability from August 1989 to April 1993. The Board noted that an attending orthopedic surgeon, Dr. Steven Kay, had submitted a July 11, 2001 report stating that appellant would have been symptomatic from 1989 to 1993, due to the staple in his shoulder. The Board found that Dr. Kay did not address the issue of disability for work as of August 1989.⁵ Appellant thereafter requested reconsideration and submitted a June 30, 2003 report from Dr. Kay, who stated that the tissue damage noted in appellant's shoulder at the time of his May 1995 surgery had taken many years to accumulate. He opined that "with reasonable medical probability the patient was incapable of performing the usual and customary work of a mail carrier as of August 1989 through April 1993." He reiterated that appellant's left shoulder symptoms were the direct result of the initial surgery in 1986 when the metal staple was placed in the shoulder. Dr. Kay concluded that his opinion had not changed since his July 11, 2001 report and he hoped the current report clarified his opinions with respect to appellant's need for disability from August 1989 to April 1993 on the basis of his work injury.

By decision dated December 18, 2003, the Office determined that the evidence submitted was not sufficient to warrant further merit review of the claim. In a September 7, 2004 decision,

¹ 43 ECAB 1101 (1992).

² Docket No. 93-2383 (issued October 24, 1994).

³ The Office had previously accepted a left shoulder glenoid tear.

⁴ 51 ECAB 253 (1999).

⁵ Docket No. 02-319. The Board notes that, following its December 23, 1999 decision, appellant again requested reconsideration with the Office and submitted additional evidence. In a decision dated August 1, 2000, the Office denied the request on the grounds that it was untimely filed and failed to establish clear evidence of error. Appellant then appealed to the Board and was assigned Docket No. 01-313. Following the Office's Motion to Remand, in an order dated March 19, 2001, the Office's motion was granted. In a May 1, 2001 decision, the Office denied modification of the prior decision. Appellant again requested reconsideration and submitted additional evidence. By decision dated October 30, 2001, the Office again denied modification of the prior decision and appellant filed an appeal with the Board.

the Board found that the Office improperly determined that appellant's reconsideration request was insufficient to warrant merit review and remanded the case for an appropriate merit decision. The Board found that Dr. Kay's June 30, 2003 report was new and relevant evidence on the issue of an employment-related disability from August 1989 to April 1993.⁶ The law and the facts of the Board's prior decisions are incorporated herein by reference.

Subsequent to the Board's remand, in a decision dated March 2, 2005 and finalized March 3, 2005, the Office noted that the Board remanded the case for consideration of Dr. Kay's June 30, 2003 report. The Office found Dr. Kay's opinion was insufficient to warrant modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Federal Employees' Compensation Act⁷ provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered . . . is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁸ To justify such a termination, the Office must show that the work offered was suitable.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

On appeal, appellant contends that the 1989 opinion of Dr. Reed, a Board-certified orthopedic surgeon, who provided an impartial evaluation for the Office, should be excluded. The Office is only required to exclude medical reports in four cases: (1) where the impartial physician is regularly involved in fitness-for-duty examinations for the employing establishment; (2) where a second impartial physician's report is requested before clarification of an initial report; (3) where the Office has had telephone contact with the physician; and (4) where leading questions have been posed to the physician.¹¹ Appellant has presented no probative evidence to establish that Dr. Reed's report should be excluded. As noted in the Board's August 27, 1992 decision, Dr. Reed's opinion was found to constitute the weight of the medical opinion evidence regarding the termination of appellant's compensation benefits effective August 27, 1999.¹²

⁶ Docket No. 04-622.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Joyce M. Doll*, 53 ECAB 790 (2002).

⁹ *Id.*

¹⁰ *Sandra R. Shepherd*, 53 ECAB 735 (2002).

¹¹ *Barbara J. Warren*, 51 ECAB 413 (2000).

¹² 43 ECAB 1101 (1992). Section 8123(a) of the Act states in pertinent part: "If there is 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." 5 U.S.C. § 8123(a).

By decision dated March 25, 1996, the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work and this decision was affirmed by an Office hearing representative in a decision dated October 17, 1996. In decisions dated December 23, 1999 and December 19, 2002, the Board affirmed the Office decisions.¹³ In the June 30, 2003 report, Dr. Kay did not address the suitability of the offered position. This report is therefore insufficient to establish that the offered position was unsuitable.¹⁴ As appellant has not submitted any additional evidence that addresses why either the offered job was unsuitable or why his refusal was justified, the Office properly denied modification of the prior decisions terminating his benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant to establish that he had disability causally related to his accepted injury.¹⁵ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁶

ANALYSIS -- ISSUE 2

Appellant seeks compensation from August 1989 to April 1993 and in this regard submitted the June 30, 2003 report from Dr. Kay. It is appellant's burden of proof to establish disability after August 27, 1989 and the Board finds Dr. Kay's June 30, 2003 report is insufficient.

Medical evidence must be in the form of a reasoned opinion by a qualified physician based upon a complete and accurate factual and medical history of the employee whose claim is being considered. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such

¹³ 51 ECAB 253 (1999) and Docket No. 02-319 respectively.

¹⁴ *Sandra R. Shepherd*, *supra* note 10.

¹⁵ *See John F. Glynn*, 53 ECAB 562 (2002).

¹⁶ *Donna L. Mims*, 53 ECAB 730 (2002).

rationale is present, the medical opinion is of diminished probative value.¹⁷ Mere conclusions are insufficient to establish causal relationship.¹⁸

Dr. Kay opined that “with reasonable medical probability the patient was incapable of performing the usual and customary work of a mail carrier as of August 1989 through April 1993” and reiterated that appellant’s left shoulder symptoms were the direct result of the initial surgery in 1986 when a metal staple was placed in his shoulder. However, Dr. Kay did not show familiarity with appellant’s job duties or work history or explain with specificity why the staple would produce such damage that would cause appellant to be totally disabled during the period in question. The Board finds that his report is insufficient to establish that appellant was totally disabled from his job duties for the August 1989 to April 1993 period as Dr. Kay did not provide a clear opinion on the causal relationship between appellant’s shoulder condition and his claimed disability.¹⁹

CONCLUSION

The Board finds that the Office properly terminated appellant’s compensation benefits on the grounds that he refused an offer of suitable work and that appellant failed to meet his burden of proof to establish that he had any disability for the period August 1989 to April 1993.

¹⁷ *Barbara Johnsen (James C. Johnsen)*, 54 ECAB ____ (Docket No. 03-1738, issued September 30, 2003).

¹⁸ *See Beverly A. Spencer*, 55 ECAB ____ (Docket No. 03-2033, issued May 3, 2004).

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2005 and finalized March 3, 2005 be affirmed.

Issued: December 19, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board