

while separating letters in the performance of her federal job duties.¹ The Office determined that appellant's claim was more accurately defined as an occupational disease and accepted her claim for supraspinatus tendinitis as well as bilateral rotator cuff syndrome and right shoulder impingement. The Office authorized surgery on appellant's right and left shoulders which appellant's attending physician performed on April 23 and October 8, 2001, respectively.

In a report dated March 12, 2002, appellant's attending physician, Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, noted that although appellant's bilateral upper extremities continued to remain symptomatic she could return to work. He stated that appellant could return to work as a video coding assistant technician on April 1, 2002. Dr. Nolan stated that if the video coding technician position was not available appellant's restrictions included no repetitious use of the upper extremities at or above mid-chest level; no repetitious reaching, grasping, twisting, turning, lifting, carrying, pushing or pulling; and avoidance of cold damp weather.

Appellant accepted a light-duty position as a video coding system technician and returned to work on April 1, 2002 working eight hours a day. Appellant's position required her to read addresses into a headset microphone, to sit or stand as needed for comfort with a 5-minute break every hour and a 30-minute lunch during the 8-hour work shift. The first two weeks consisted of on-the-job training.

Dr. Nolan examined appellant on April 2, 2002 and stated that she had increasing pain in her shoulders during the course of her workday. He stated that appellant's symptoms were aggravated by the air conditioning and cold temperature of her work area as well as repetitive use of her upper extremities, particularly sitting at the computer desk for a long period of time, or doing desk work with the neck in the forward flexed position, using the bilateral upper extremities greater than 30 minutes. Dr. Nolan stated that appellant required interruption of the prolonged sitting activities required by her position and recommended a 5-minute break every 30 minutes to allow her to change positions and decrease her upper extremity symptoms. On April 9, 2002 Dr. Nolan indicated that appellant should not be exposed to temperatures of less than 70 degrees. He completed a report on April 16, 2002 and stated that appellant's work aggravated her shoulder condition due to prolonged positioning with her arm at her side. Dr. Nolan noted appellant's work duties and stated, "This does not require the use of arms; however, this does put the arms in the dependent position which tends to aggravate the symptoms from the axial load from the position of the arm." He concluded that appellant could perform the duties of a video coding technician for four hours a day and should then do sorting or casing of mail for another four hours a day for eight weeks. On April 25, 2002 Dr. Nolan found that appellant had increased shoulder pain aggravated by her return to work including exposure to a cold room and the requirement that appellant keep her arms in one position. He stated that appellant was temporarily totally disabled from April 25 through May 6, 2002.

Appellant filed a notice of recurrence of disability on April 30, 2002 alleging that on April 25, 2002 she sustained a recurrence of total disability due to her accepted employment-related shoulder conditions. Appellant attributed her condition to air conditioning and fans as well as sitting with her arm in a "long position."

¹ Appellant returned to work on April 16, 2000 in a limited-duty position following an employment-related lumbar spine injury. She was performing light-duty work as a Nixie clerk.

In a letter dated October 10, 2000, the Office requested additional factual and medical evidence. Dr. Nolan responded on May 16, 2002 and stated that appellant had developed recurrent shoulder symptoms secondary to tendinitis. He stated, "The dependent posture of the upper extremities throughout the day aggravated her shoulder symptoms." He requested an arthrogram. The Office authorized this test on May 21, 2002. Dr. Nolan provided appellant's work restrictions on June 4, 2002 as the ability to change positions from sitting, standing to walking, as necessary; not repetitious stooping, bending, lifting, carrying, pushing or pulling; intermittent use of the upper extremities to avoid prolonged independent positioning; and avoidance of cold damp environments.

By decision dated June 21, 2002, the Office denied appellant's claim finding that Dr. Nolan had not described a change in the nature and extent of her injury-related condition.

A June 20, 2002 magnetic resonance gadolinium arthrogram of right shoulder demonstrated a re-tear of the supraspinatus tendon. In a form report dated June 25, 2002, Dr. Nolan diagnosed a recurrent right rotator cuff tear. On July 9, 2002 Dr. Nolan stated that appellant's surgical repair had torn out and that the arthrogram demonstrated a re-tear secondary to atrophy of the tendon. He recommended additional surgery.

Appellant requested reconsideration of the Office's June 21, 2002 decision by letter dated July 11, 2002. On August 9, 2002 appellant retracted her request for reconsideration and requested an oral hearing instead.

The Office referred appellant for a second opinion evaluation with Dr. Jerrold Sherman, a Board-certified orthopedic surgeon, on August 1, 2002. In a report dated August 21, 2002, Dr. Sherman noted appellant's history of injury and performed a physical examination. He opined that appellant was capable of performing the duties of a video coding system technician and stated that, although she could not perform her full-duty position, she did not require further medical treatment.

On August 30, 2002 appellant underwent an arthrogram of her left shoulder which demonstrated a complete tear of the supraspinatus tendon with retraction to the level of the mid acromion.

Dr. Nolan reviewed Dr. Sherman's report on September 3, 2002 disagreed with his findings and noted that Dr. Sherman had not mentioned appellant's June 20, 2002 arthrogram findings. Dr. Nolan continued to recommend surgery and to find appellant totally disabled.

By decision dated January 23, 2003, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely.²

On February 18, 2003 Dr. Nolan stated that appellant had a rotator cuff tear on the left which was a new tear. He stated that she had a surgical decompression in an effort to avoid this tear, but that based on the proximity to the decompression the supraspinatus tendon was already

² As this decision was issued more than one year before appellant's appeal to the Board on August 12, 2004, the Board may not review this decision on appeal. 20 C.F.R. § 501.3(d)(2).

in trouble. Dr. Nolan opined that this tear was a direct result of her employment and that a rotator cuff repair was necessary. He also stated that appellant had a significant recurrent tear of her right shoulder rotator cuff repair as a direct result of her federal job duties. Dr. Nolan stated that rotator cuff tear repairs do not always hold and that some patients required a second procedure. He stated that appellant was not capable of working as a video coding technician due to her bilateral shoulder pain and the temperature of her workstation.

The Office referred appellant for an impartial medical examination with Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, on March 5, 2003 due to the conflicting opinions of Drs. Nolan and Sherman. In a report dated April 16, 2003, Dr. Auerbach reviewed the statement of accepted facts, the light-duty job description and appellant's medical history as well as her arthrogram. Appellant's right shoulder examination revealed tenderness to deep palpation, distress on active or passive range of motion with limitation of range of motion in all directions. Appellant also demonstrated a positive cross arm test, a positive Hawkins' sign, positive impingement sign, positive supraspinatus isolation test and positive subscapularis lift-off test. In appellant's left shoulder examination, Dr. Auerbach found tenderness deep anteriorly, a positive cross arm test, a positive Hawkins' sign, positive impingement sign, positive supraspinatus isolation test and positive subscapularis lift-off test. He diagnosed a subsequent postoperative development of re-tear of the supraspinatus tendon with retraction with clinical evidence of right shoulder limitation of range of motion, impingement syndrome and tear of the rotator cuff as well as left shoulder postoperative complete tear of the supraspinatus tendon with retraction; and continued degenerative acromial joint disease.

In response to the Office's queries, Dr. Auerbach stated:

"Whether or not further surgery should be performed on the patient's shoulder is problematic as she has not had a good result on the first surgeries. I doubt orthopedically if further improvement can be had by repeating the surgeries.

"I do not believe that the patient is a further candidate for left shoulder rotator cuff repair or for right shoulder rotator cuff repair."

In regard to appellant's work capacity, Dr. Auerbach stated that appellant was fully capable of performing the duties as described. He noted that appellant "can certainly do the limited duty full time of her video coding system technician but with a degree of pain in both shoulders when doing so."

By decision dated June 2, 2003, the Office denied appellant's claim for total disability from April 25 through June 3, 2003. The Office found that Dr. Auerbach's report was entitled to the weight of the medical opinion evidence and that this report established that appellant was capable of performing the duties of a video coding technician and that she did not require further surgical treatment of either shoulder.

Appellant requested an oral hearing on June 10, 2003. In a report dated June 24, 2003, Dr. Nolan disagreed with Dr. Auerbach's report noting that he did not offer any alternative treatment to the proposed surgery that would prevent appellant from developing arthritis in the humeral articulation on the undersurface of the acromion. He agreed that appellant was capable

of performing work activities as long as she was in a room without a direct draft from the air conditioning. Dr. Nolan also stated that appellant required 30 minutes of weight bearing activity in the form of walking to maintain a reasonable level of body temperature.³

On November 7, 2003 Dr. Nolan performed a surgical exploration of the rotator cuff, left with an open repair of the rotator cuff and repair of biceps tendon.

Appellant and Dr. Nolan testified at the oral hearing on February 26, 2004. By decision dated May 14, 2004, the hearing representative found that appellant had not established a recurrence of disability on April 25, 2002 and affirmed the Office's June 2, 2003 decision.⁴

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁶ Generally, the Office can meet this burden by showing that the employee returned to work, even if that work is light duty rather than the job the employee held when injured, if thereafter the employee earns no less than he or she had before the employment injury. However, a short-lived and unsuccessful attempt to return to duty does not automatically discharge the Office's burden to justify termination of compensation.⁷

The Federal Employees' Compensation Act provides that, 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.⁸ The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁹

³ Appellant filed a notice of recurrence of disability on July 7, 2003 alleging that the employing establishment had no work available for her. She requested a schedule award on September 15, 2003. As the Office has not issued final decisions on these issues, the Board will not consider these claims for the first time on appeal. 20 C.F.R. § 501.2(c).

⁴ Following the hearing representative's May 14, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁵ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁶ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁷ *Cheryl A. Weaver*, 51 ECAB 308, 308-09 (2000); *Janice F. Migut*, 50 ECAB 166, 168-69 (1998).

⁸ 5 U.S.C. §§ 8101-8193, 8123.

⁹ 20 C.F.R. § 10.321.

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.¹⁰

ANALYSIS

In this case, the Office accepted that appellant sustained bilateral shoulder conditions as a result of her federal employment. Appellant underwent surgeries on each of her shoulders and returned to work on April 1, 2002 in a limited-duty position approved by her physician. Appellant's position required her to read addresses into a headset microphone, to sit or stand as needed for comfort with a 5-minute break every hour and a 30-minute lunch during the 8-hour work shift. Appellant stopped work on April 25, 2002 and filed a notice of recurrence of disability. The Office placed the burden of proof for continuing compensation on appellant noting that a recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹¹ The Board finds that this placement of the burden of proof was improper.

Following her return to work on April 1, 2002, appellant sought treatment from Dr. Nolan, appellant's attending physician and a Board-certified orthopedic surgeon, on April 2, 2002. He stated that she had increasing pain in her shoulders during the course of her workday. He stated that appellant's symptoms were aggravated by the air conditioning and cold temperature of her work area as well as sitting at the computer desk for a long period of time, or doing desk work with the neck in the forward flexed position. Dr. Nolan recommended a 5-minute break every 30 minutes rather than every hour as allowed by her position description, to allow her to change positions and decrease her upper extremity symptoms.

Appellant again sought treatment on April 9, 2002 and Dr. Nolan indicated that appellant should not be exposed to temperatures of less than 70 degrees. After examining appellant on April 16, 2002, Dr. Nolan stated that appellant's work aggravated her shoulder condition due to prolonged positioning of her arm at her side. Dr. Nolan concluded that appellant could perform the duties of a video coding technician for four hours a day and should then do sorting or casing of mail for another four hours a day for eight weeks. On April 25, 2002 Dr. Nolan found that appellant had increased shoulder pain aggravated by her return to work including exposure to a cold room and the requirement that appellant keep her arms in one position. He stated that appellant was temporarily totally disabled from April 25 through May 6, 2002. Appellant stopped work on April 25, 2002.

In the present case, the evidence does not establish that appellant's employment-related disability ended by April 1, 2002, the date of her return to work. On April 2, 2002 appellant sought additional medical treatment and received additional work restrictions from her attending physician. Dr. Nolan examined appellant on April 9 and 16, 2002 and increased her work

¹⁰ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

¹¹ 20 C.F.R. § 10.5(x).

restrictions on each occasion, before determining on April 25, 2002 that she was totally disabled due to her accepted employment injuries.

The Board finds that the medical evidence consisting of increasing restrictions beginning the day after appellant's return to work on April 1, 2002, establishes that appellant did not have a successful return to work and that the initial light-duty position did not adequately accommodate appellant's work-related condition and was not sufficiently tailored to her needs to shift the burden of proving a recurrence of disability to appellant.

Furthermore, although appellant continued to attempt to work from April 1 to 25, 2002, the presumption that a lengthy return to work constitutes a successful return to work is rebutted in this case due to the escalating restrictions placed on appellant by her attending physician. The Board finds that appellant should not be penalized for continuing to attempt to work by seeking additional modifications of the light-duty position. If appellant is penalized, this results in the incongruent situation that appellant would be better served by immediately stopping work on April 2, 2002 when she first required medical treatment than continuing to attempt to perform the duties of her light-duty position with doctor-recommended restrictions.

Given the circumstances of this case, the Board finds that the burden of proof was not shifted by appellant's unsuccessful attempt to perform the light-duty position. The burden of proof remained with the Office, which has not yet met its burden of proof to terminate appellant's compensation benefits by showing either that appellant's disability ended or that it was no longer related to her employment injuries.

In a form report dated June 25, 2002, Dr. Nolan diagnosed a recurrent right rotator cuff tear. On July 9, 2002 Dr. Nolan stated that appellant's surgical repair had torn out and that the June 20, 2002 arthrogram demonstrated a retear secondary to atrophy of the tendon. He recommended additional surgery.

Following its initial decision on June 21, 2002, the Office referred appellant for a second opinion evaluation with Dr. Sherman, a Board-certified orthopedic surgeon. On August 21, 2002 Dr. Sherman opined that appellant did not require additional medical treatment and that she could perform the full duties of her limited-duty position of video coding technician.

Dr. Nolan reviewed this report on September 3, 2002 and noted that Dr. Sherman had not mentioned the arthrogram. He continued to find that appellant was totally disabled and to recommend further surgical treatment.

Due to the disagreements between Drs. Nolan and Sherman regarding appellant's need for further medical treatment and her ability to perform the duties of her limited-duty position, the Office properly found a conflict of medical opinion evidence and referred appellant to Dr. Auerbach, a Board-certified orthopedic surgeon, to act as the impartial medical specialist and resolve the conflict of medical opinion evidence.

In his April 16, 2003 report, Dr. Auerbach reviewed the arthrograms, appellant's history of injury, the limited-duty position requirements and performed a physical examination. He found that appellant had objective shoulder impairments in both shoulders including positive cross arm tests, positive Hawkins' signs, positive impingement signs, positive supraspinatus

isolation tests and positive subscapularis lift-off tests. Dr. Auerbach opined that appellant should not undergo additional surgeries. He stated that appellant did not have a good result on her first surgeries, that he doubted that further improvement could be had by repeating the surgeries and concluded that appellant was not a candidate for further rotator cuff repair on either shoulder.

Dr. Auerbach further found that appellant was capable of performing the duties of her light-duty position of video coding technician. However, he stated that appellant would experience a degree of pain in both shoulders performing these duties.

The Board finds that Dr. Auerbach's report is not sufficiently well reasoned to constitute the special weight of the medical opinion evidence. In regard to appellant's need for further medical treatment, he failed to offer any medical reasoning explaining why he felt that appellant should not undergo further surgeries. His bald statement that appellant was not likely to improve by repeating surgeries is not sufficiently well rationalized to entitle it to the special weight accorded an impartial medical specialist's report. Due to these deficiencies, the Board finds that there remains an unresolved conflict of medical opinion evidence on this issue.

Furthermore, in discussing whether appellant could perform the duties of the light-duty position, Dr. Auerbach simply stated that appellant was fully capable of performing the duties as described. He later noted that appellant "can certainly do the limited duty full time of her video coding system technician but with a degree of pain in both shoulders when doing so." These statements also lack supportive medical reasoning explaining why Dr. Auerbach felt that appellant could perform her work duties, why he felt that she would experience pain while performing these duties and why this pain would not constitute a further temporary or permanent aggravation of her underlying condition.

Due to the lack of medical reasoning on the pertinent issues, Dr. Auerbach's report is not sufficient to constitute the special weight of the medical opinion evidence and the record contains an unresolved conflict of medical opinion evidence. Therefore, the Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that appellant's unsuccessful attempt to return to light-duty work was not sufficient to shift the burden of proof to her to establish a recurrence of disability and that as a consequence the Office retains the burden of proof to terminate her compensation benefits. The Board further finds that the report of the impartial medical specialist was not sufficiently rationalized to constitute the weight of the medical opinion evidence and that, therefore, there remains an unresolved conflict of medical opinion evidence preventing the Office from meeting its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2004 is hereby reversed.

Issued: March 7, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member