

FACTUAL HISTORY

On January 20, 1995 appellant, then a 31-year-old transitional automation clerk, filed an occupational disease claim alleging that on January 6, 1995 she first became aware of soreness in her right wrist, elbow and shoulder and realized that her condition was caused by her federal employment.¹ By letter dated March 22, 1995, the Office accepted her claim for tendinitis of the right shoulder and elbow. On July 21, 1995 it authorized right shoulder anterior decompression surgery, which was performed on August 18, 1995.²

In an October 17, 2007 decision, the Office reduced appellant's compensation effective that date under 5 U.S.C. § 8115 to reflect her capacity to earn wages in the constructed position of telemarketer.³ On October 24, 2007 appellant, through counsel, requested an oral hearing before an Office hearing representative. In an August 6, 2008 decision, a hearing representative set aside the October 17, 2007 decision, finding that the Office did not meet its burden of proof in reducing appellant's wage-loss compensation. The Office hearing representative remanded the case to the Office for further development of the medical evidence and reinstatement of her compensation back to October 17, 2007. The Office was instructed to refer appellant, together with a statement of accepted facts, her medical records and a description of the telemarketer position, to a Board-certified physician for an opinion regarding her work capabilities.

On January 13, 2009 the Office referred appellant to Dr. Stephen J. Thomas, Jr., a Board-certified orthopedic surgeon, for a second opinion medical examination. In a January 29, 2009 medical report, Dr. Thomas reviewed her medical record and listed his findings on physical examination. He diagnosed right shoulder impingement syndrome and mild ulnar neuropathy of the right elbow. Dr. Thomas stated that appellant was status post subacromial decompression, three times. He advised that she was not physically capable of returning to work as a transitional distribution clerk as her right arm pain dominated her life. Dr. Thomas further advised that appellant's physical restrictions were directly related to her accepted employment injuries. He stated that he was not provided with descriptions of the identified constructed positions, including the telemarketer position. Dr. Thomas advised that it was doubtful that appellant could return to work in any of the constructed positions.

By letter dated March 2, 2009, the Office advised Dr. Thomas that his report required clarification. It requested that he submit a rationalized medical opinion based on his review of appellant's medical record including the employing establishment's investigative digital video disc (DVD) which showed her physical activities.

¹ On May 31, 1996 the employing establishment terminated appellant's employment due to her failure to follow instructions. Appellant failed to report to work as scheduled and was absent without leave on May 27, 1996.

² In a December 17, 2003 decision, the Office accepted that appellant sustained a recurrence of disability as of October 31, 2001 causally related to her accepted employment injuries. It authorized right shoulder arthroscopic surgery which was performed on February 23, 2004 and May 9, 2005.

³ A vocational rehabilitation counselor also identified the positions of check cashier, hostess and demonstrator as being within appellant's physical limitations, vocational skills and commuting area.

In an April 16, 2009 report, Dr. Thomas reviewed the investigative DVD and advised that appellant could perform her regular work duties and the duties of all of the identified constructed positions based on her ability to lift many objects and move her shoulders well. He stated that pain did not dominate her life and it was not substantiated by the facts of the case.

On May 8, 2009 the Office issued a notice of proposed termination of appellant's monetary compensation benefits based on Dr. Thomas' medical opinion. Appellant was afforded 30 days to respond to this notice.

In reports dated May 22 and June 5, 2009, Dr. Peter S. Kosek, a Board-certified anesthesiologist, addressed the treatment of appellant's right shoulder arthritis.

In a June 17, 2009 decision, the Office terminated appellant's monetary compensation benefits effective June 19, 2009 on the grounds that she no longer had any disability causally related to her accepted employment injuries. The medical evidence appellant submitted was insufficient to overcome the weight accorded to Dr. Thomas' opinion. The Office, however, stated that she remained eligible for further medical treatment of her accepted conditions.

On June 23, 2009 appellant requested an oral hearing before an Office hearing representative.

In reports dated July 17 to November 3, 2009, Dr. Kosek addressed the treatment of appellant's right shoulder arthritis.

In a September 18, 2009 report, Dr. Matthew S. Shapiro, a Board-certified orthopedic surgeon, listed his findings on physical and x-ray examination of appellant's right shoulder. He advised that she was medically stationary and unable to return to her usual and customary work.

Following an October 13, 2009 telephonic hearing, appellant's attorney contended in an October 22, 2009 letter, that Dr. Thomas' April 16, 2009 opinion was deficient as it was not based on a complete and accurate history. The statement of accepted facts provided to him did not contain a description of the duties and physical requirements of appellant's distribution clerk position as required by Chapter 2.809 of the Office's procedures. Counsel requested that an Office hearing representative set aside the June 17, 2009 decision and remand the case to the Office to prepare an amended statement of accepted facts that included a description of appellant's distribution clerk position. He also requested that Dr. Thomas review the job description and provide a medical opinion regarding appellant's work capability.

In a January 28, 2010 decision, an Office hearing representative affirmed the June 17, 2009 decision, finding that Dr. Thomas' opinion constituted the weight of the medical evidence and established that appellant had no continuing employment-related disability. His opinion was

based on a complete and an accurate factual and medical background, review of the case record and comprehensive examination of appellant.⁴

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that, an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁵ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

ANALYSIS

The Office relied on the April 16, 2009 medical opinion of Dr. Thomas, an Office referral physician, in terminating appellant's monetary compensation. The Board finds, however, that Dr. Thomas' opinion is of diminished probative value and is insufficient to represent the weight of the medical evidence. Dr. Thomas initially found that appellant was not physically capable of returning to work as a transitional distribution clerk or in the constructed telemarketer position due to her right arm pain as it dominated her life. In response to the Office's request for clarification of his opinion, he reviewed the statement of accepted facts and the employing establishment's investigative DVD. Dr. Thomas opined that appellant could perform her regular job and the constructed telemarketer position. He advised that the DVD demonstrated her ability to lift many objects and move her shoulders well. Dr. Thomas further advised that pain did not dominate appellant's life and it was not substantiated by the facts of the case.

Medical conclusions based on inaccurate or incomplete histories are of little probative value.⁷ The Office provided Dr. Thomas with appellant's case file and a statement of accepted facts so he could base his opinion on a proper factual and medical history, but the statement of accepted facts included in the record dated December 10, 2008 does not indicate that her claim was accepted for right shoulder adhesive capsulitis as she noted on appeal. It stated in its May 8, 2009 proposed termination of monetary compensation benefits and transcript of the October 13, 2009 hearing that her claim was accepted for right shoulder adhesive capsulitis. Moreover, the statement of accepted facts provided to Dr. Thomas did not describe the physical demands of appellant's date-of-injury position. The Board notes that the term "transitional automation clerk"

⁴ Following the issuance of the Office's January 29, 2010 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c)(1). Appellant can submit this new evidence with a formal, written request for reconsideration to the Office. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

was used by her on her occupational disease claim form and the term “transitional distribution clerk” was used by the Office in the December 10, 2008 statement of accepted facts. It is not clear whether these positions are the same or different positions with different duties. Office procedures indicate that accepted conditions must be included in a statement of accepted facts and further provide that when a second opinion specialist renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is diminished.⁸ Office procedures further indicate that the claims examiner should define the information needed to form a complete frame of reference for the physician who will review the medical evidence such as, a description of the physical requirements of the date-of-injury job which, as in this case, would be relevant to the question of whether appellant may return to regular-duty work.⁹

Dr. Thomas did not have a complete statement of accepted facts for review. His opinion that appellant had no continuing employment-related disability is, therefore, not based on a proper factual history. Since Dr. Thomas rendered his medical opinion based on an incomplete factual statement omitting appellant’s accepted condition and description of her transitional automation clerk position, the probative value of his report is reduced. The Board finds, therefore, that the Office improperly relied on his opinion to establish that appellant had no remaining disability from the accepted employment injuries. The Office failed to meet its burden of proof to terminate her monetary compensation benefits effective June 19, 2009.

CONCLUSION

The Board finds that the Office has not met its burden of proof to justify the termination of appellant’s monetary compensation benefits effective June 19, 2009.

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.3(c) (September 2009); *see also* Chapter 2.809.5.c (September 2009).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 4, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board