

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA J. WILLOUGHBY and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, Ill.

*Docket No. 96-341; Submitted on the Record;
Issued January 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation on the grounds that she refused suitable work; and (2) whether appellant's disability on or after September 14, 1995 is causally related to her January 10, 1990 employment injury.

On January 10, 1990 appellant sustained an injury in the performance of duty. The Office accepted her claim for bilateral carpal tunnel syndrome and authorized surgical releases on January 30 and May 9, 1990. Appellant received monetary compensation for periods of disability until July 24, 1990, when she accepted a full-time limited-duty position. The employing establishment updated the position to reflect current medical restrictions, and on August 10, 1990 appellant accepted the updated limited-duty position. On August 24, 1990 the employing establishment offered the updated position for a second time without changes, and appellant again accepted. On that same date, however, she told her employer that there was not enough work for her to do on her eight-hour shift and that she wanted a leave of absence. She moved to Florida and claimed compensation for temporary total disability for the period August 24 to October 21, 1990. In a decision dated December 31, 1990, the Office rejected this claim on the grounds that the medical evidence failed to establish injury-related disability for work.¹

Appellant claimed compensation again in February 1993 because her private sector employment had aggravated her accepted employment injury. The Office paid compensation for a recurrence of disability and issued a schedule award for a 10 percent permanent impairment of the upper extremities. The Office reduced appellant's monetary compensation effective

¹ Although the memorandum attached to the Office's December 31, 1990 decision at one point quoted a Board decision dealing with 5 U.S.C. § 8106(c), the Office did not discuss the applicability of this section and made no finding that appellant had neglected suitable work. Instead, the Office based its decision on the sufficiency of the medical evidence to establish disability causally related to the accepted employment injury.

December 9, 1993 based on her actual earnings as a part-time counter postal clerk in the private sector.

On September 26, 1994 the employing establishment offered appellant a modified position, the effective date of which was October 29, 1994. The position was located in Illinois, and the employing establishment offered to pay relocation expenses. On November 8, 1994 the Office notified appellant that the position was suitable and currently available, and that she had 30 days to either accept the position or to provide an explanation of the reasons for refusing it.

Appellant responded that she could not work the offered position because of her medical limitations. A November 17, 1994 medical examination by her attending orthopedic surgeon, Dr. Marc Richman, supported continuing symptomatology and was positive for carpal tunnel syndrome. Dr. Richman completed a work restriction evaluation that day restricting appellant to four to six hours a day with limitations. In a December 12, 1994 letter to the employing establishment, the Office advised that the modified position offered was a full-time position and that additional medical documentation supported that appellant was capable of working only four to six hours per day with limitations. The Office advised that if the employing establishment wished to pursue a job offer limited to four to six hours a day, it should forward a copy of such a position for a determination of suitability.

On December 15, 1994 the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. John Fraser, a Board-certified orthopedist, for a second opinion on the issue of causal relationship and on the extent and degree of any disability remaining as a result of the accepted employment injury. In a report dated January 19, 1995, Dr. Fraser related a brief history and his findings on examination. He diagnosed status post bilateral carpal tunnel release with no residual nerve damage. "I do think that the patient should be able to return to work eight hours a day," he stated, "as her nerve tests recently failed to reveal any nerve damage or further carpal tunnel involvement. I think the patient's eight-hour a day work schedule should be possible at this time, as almost five years has elapsed."

On March 1, 1995 the Office advised appellant that, in light of Dr. Fraser's report, her reason for refusing the offered position was not justified, that she had 15 days to accept the job, and that if she did not accept the job the Office would terminate her monetary compensation. Appellant responded on March 13, 1995 by asking why the employing establishment was offering a modified position when Dr. Fraser found that she could perform her normal job for eight hours a day without limitations. She stated that she wanted her former job with the employing establishment.

Upon confirming that appellant had not contacted the employing establishment or resumed work, the Office issued a decision dated April 6, 1995 terminating appellant's monetary compensation effective that date on the grounds that she refused an offer of suitable work. The Office found that the weight of the medical evidence rested with the impartial medical specialist, Dr. Fraser.

On October 28, 1995 appellant submitted a claim for compensation as a result of wage loss beginning September 14, 1995. She stated that she started working in a hospital on August 14, 1994 in a full-time position 40 hours a week, but that on September 14, 1995 she had

to give notice that she could not continue because the position involved too much heavy lifting and pushing and pulling heavy carts. She stated that her hands were swelling and hurting and that she developed a lump on her left wrist. Appellant submitted a September 27, 1995 work restriction evaluation form from Dr. Richman supporting that she was limited to four to six hours a day with restrictions.

In a decision dated October 17, 1995, the Office denied appellant's October 28, 1995 claim on the grounds that the evidence failed to demonstrate a causal relationship between her accepted employment injury and the claimed condition or disability on or after September 1992.

The Board finds that the Office improperly terminated appellant's monetary compensation.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."² Office procedures require that specific information be provided to the claimant and his or her representative when referring the claimant for a referee medical examination under section 8123(a):

"Information Sent to Claimant. The [Office] will contact the physician directly and make an appointment for examination, then notify the claimant and representative of the following:

"(1) The existence of a conflict in the medical evidence and the specific nature of the conflict. Notification that the examination is being arranged under the provisions of 5 U.S.C. § 8123 will give the claimant an opportunity to raise any objection to the selected physician prior to the examination."³

When the Office referred appellant to Dr. Fraser, it failed to notify her of the existence of a conflict in medical opinion or of the specific nature of the conflict. Instead, the Office notified appellant only that an appointment was made with Dr. Fraser for a determination of the relationship of her present condition to the accepted injury and of the extent and degree of any disability remaining as a result of the accepted employment injury. The Office also advised her that she could arrange to have a physician of her choosing, and paid by her, present to participate in the examination – a right claimants do not enjoy when they are referred to a referee medical specialist.⁴ Because the Office failed to provide appellant with proper notice, the Board finds that Dr. Fraser cannot be considered a referee medical specialist and that his January 19, 1995 opinion is not entitled to the special weight normally accorded such a physician.⁵ He must

² 5 U.S.C. § 8123(a).

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Referee Examinations* Chapter 3.500.4.c.(1) (October 1990) (original underlining).

⁴ *Esther Velasquez*, 45 ECAB 249 (1993).

⁵ When a case is referred to a referee medical examiner for the purpose of resolving an outstanding conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be

instead be considered a second-opinion referral physician, and as such, his opinion creates a conflict in medical opinion concerning the number of hours per day appellant may work. Dr. Richman, appellant's attending orthopedic surgeon, reported on November 17, 1994 that appellant showed positive signs of carpal tunnel syndrome and could work only four to six hours a day with limitations. Indeed, it was on the basis of this opinion that the Office contacted the employing establishment and advised that the medical evidence supported that appellant was capable of working only four to six hours per day with limitations, and that if the employing establishment wished to pursue a job offer limited to four to six hours a day, it should forward a copy of such a position for a determination of suitability. The employing establishment did not pursue this course, leaving the offer one that required appellant to work a full eight hours per day.

Because a conflict in medical opinion exists concerning the number of hours appellant may work with restrictions, the Board finds that the weight of the medical evidence fails to establish that the position offered to appellant was suitable. For this reason, the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c)(2). The Board will therefore reverse the Office's April 6, 1995 decision terminating monetary compensation.

The Board also finds that the medical evidence fails to establish that appellant's disability on or after September 14, 1995 is causally related to her January 10, 1990 employment injury.

A claimant seeking benefits under the Act⁶ has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁷ including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁸

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between the claimed condition or disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury, and must explain from a medical perspective how the claimed condition or disability is related to the injury.⁹

The only medical evidence submitted to support appellant's October 28, 1995 claim is a work restriction evaluation from Dr. Richman, wherein he indicates that appellant is restricted to working four to six hours a day with limitations. Although this form report may lend some support to appellant's claim that she can no longer perform the full-time job she held until about

accorded special weight; *see Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁸ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

September 14, 1995, it does not provide a well-reasoned medical discussion explaining how appellant's disability on or about that date was causally related to the employment injury she sustained on January 10, 1990. For this reason, the Board finds that the medical evidence is insufficient to establish the critical element of causal relationship. The Board will affirm the Office's October 17, 1995 decision denying this claim.

The October 17, 1995 decision of the Office of Workers' Compensation Programs is affirmed. The April 6, 1995 decision of the Office is reversed.

Dated, Washington, D.C.
January 5, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member