U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINNIE PENDERMON and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, West Roxbury, Mass.

Docket No. 96-391; Submitted on the Record;
Issued January 6, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof in terminating appellant's compensation benefits effective November 13, 1994, based on her refusal to accept a part-time job offered to her in September 1994.

The Board has duly reviewed the record in the present case and finds that the Office met its burden of proof in terminating appellant's compensation benefits effective November 13, 1994, based on her refusal to accept a part-time job offered to her in September 1994.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[4] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[5]

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[1] *David W. Green*, 43 ECAB 883 (1992).

[2] 5 U.S.C. § 8106(c)(2).

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

[4] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[5] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Appellant, a nursing assistant, sustained a back injury from assisting a patient on April 21, 1980. She stopped work on the date of injury. The Office initially accepted appellant's claim for a low back strain, and later amended the acceptance to include lumbar disc disease. She was also diagnosed with a herniated disc, based on a myelogram in 1981. Appellant's attending physician, Dr. Hyman Glick, a Board-certified orthopedic surgeon, provided work restrictions between 1983 and 1991 indicating appellant's ability to perform part-time work which was sedentary in nature. Appellant returned to work between four and five hours per day as an electronics assembler private industry for two years from 1987 until February 1989. She was subsequently employed for one and a half years as a home health aid, working four hours per day. Appellant stopped work in December 1991. In March 1992 Dr. Glick stated in a work restriction evaluation form, that appellant could work only one hour per day.

Dr. Louis Meeks, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on February 11, 1994. Dr. Meeks diagnosed a lumbosacral sprain and a history of chronic arthrogenic low back pain. He stated that while appellant could not return to her prior nurse's assistant job, she was capable of performing light duty which required her to sit for two hours at a time, with breaks, and a 10-pound lifting restriction. Dr. Meeks noted that appellant could work six hours per day, with rest intervals and changing positions after 15 minutes of sitting or standing. He restricted appellant from performing any bending, climbing, squatting, kneeling or twisting.

In August 1994 the employing establishment offered appellant a modified clerk position in nursing service for four hours per day, from 7:30 a.m until 11:30 a.m., within the restrictions provided by Dr. Meeks. The Office advised appellant b.y letter dated September 13, 1994 that it found the position suitable and advised her that a refusal to accept the position would result in termination of wage-loss benefits. Appellant advised the Office that she was unable to perform the job on account of limited use of her right hand, for which she underwent surgery on February 25, 1994, and her inability to work more than three days per week. She submitted an October 3, 1994 report from Dr. Glick, who noted that due to her chronic degenerative cervical and lumbar disc disease, she was unable to lift, bend, reach, push or pull. He stated that appellant was able to sit for about one hour at a time and to perform sedentary tasks. Dr. Glick stated that while she could perform some aspects of part-time clerical work, she could not be expected to walk a lot, stand, bend or reach.

The Office reviewed appellant's reasons for refusing employment and advised her that the reasons were not acceptable. By decision dated November 1, 1994, the Office terminated appellant's wage-loss compensation benefits effective November 13, 1994. Appellant requested a hearing and submitted no new evidence at the hearing held on July 27, 1995. Instead, following the hearing, she submitted a statement from her attorney who maintained that there was a conflict in the medical evidence between Drs. Glick and Meeks, to require an examination by a third party.

The Board finds that Dr. Glick's report does not establish an inability to perform the sedentary position offered appellant. Whether an Office referral physician's opinion creates a conflict with an attending physician's opinion, to require a further opinion from an impartial

medical specialist,[6] depends on the probative value or weight of the respective opinions.[7] The weight of such evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[8] In his report, Dr. Glick indicated that appellant could sit for no more than one hour per day, but did not explain why she was unable to perform the job offered to her which allowed for frequent breaks in sitting and standing every 15 minutes, in accordance with the restrictions provided by Dr. Meeks. Dr. Glick indicated that appellant could not stand for a long period of time, walk a lot, bend or reach. However, the position description limited appellant from walking intermittently for three hours at a time, and no bending, pulling or pushing. In addition, Dr. Glick did not explain his change from one-hour sitting at a time in March 1992 from the prior recommendation for part-time work. He did not address appellant's two periods of employment between 1986 and 1991 and explain with rationale his position for less hours than he previously recommended. Accordingly, his report is insufficient to create a conflict with the opinion of Dr. Meeks, whose opinion represents the weight of the medical evidence, and establishes an ability to perform the job which appellant was offered.

The decision of the Office of Workers' Compensation Programs dated October 10, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 6, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[6] Section 8123(a) of the Act provides in part: "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." 5 U.S.C. § 8123(a).

[7] *Melvina Jackson*, 38 ECAB 443 (1987).

[8] *Id.*; *see also Anna C. Leanza*, 48 ECAB ___ (Docket No. 95-2598, issued October 1, 1996).