U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRACI M. McCORMICK and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, Hawaii

Docket No. 96-1149; Submitted on the Record;
Issued July 6, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's monetary compensation effective February 5, 1995, on the grounds that she refused an offer of suitable work; and (2) whether the Office's refusal to reopen appellant's case for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act constituted an abuse of discretion.

On January 30, 1988 appellant, then a 26-year-old letter carrier, filed a traumatic injury claim, alleging that she sustained injuries to her elbow and shoulder when she slipped on a mixture of oil and water while in the performance of duty. Appellant stopped work. The Office accepted appellant's claim for left shoulder acromioclavicular ligament sprain and a contusion of the left elbow. Subsequently, appellant's claim was accepted for left rotator cuff tendinitis. On February 3, 1988 appellant's physician, Dr. James E. Oda, an orthopedic surgeon, released her for limited duty after February 6, 1988. Appellant worked in a limited-duty position with intermittent claims for temporary total disability until she left work in December 1989 on maternity leave. On June 28, 1990 appellant underwent arthroscopic surgery for subacromial decompression of the left shoulder with coracoacromial ligament resection of the left shoulder. On July 25, 1990 appellant advised the employing establishment that she was resigning from her position as she had sold her home and was relocating to the continental United States. She indicated that a transfer was not possible due to her injury. By decision dated September 12, 1991, the Office awarded appellant a schedule award for 81.12 weeks of compensation for the period of June 25, 1991 to January 12, 1993 due to a 26 percent permanent impairment of her left arm. Thereafter, appellant received appropriate compensation for temporary total disability. On June 8, 1993 appellant was referred to John H. Pearson, a rehabilitation, counselor for vocational rehabilitation assistance

Appellant was referred to Dr. Thomas J. Martens, a Board-certified orthopedic surgeon and Office referral physician, for a second opinion examination and report. In a report dated February 5, 1993, Dr. Martens diagnosed a contusion of the left elbow and status post

arthroscopic decompression, left shoulder impingement syndrome. He indicated that appellant could return to work with no overhead work, pushing, pulling or lifting over 20 pounds due to residuals of her employment injury.

By letter dated February 2, 1994, the employing establishment submitted a proposed job offer to the Office for a determination of suitability. The employing establishment indicated that appellant had voluntarily moved from Hawaii, her date-of-injury work site state, to Washington, without medical certification and that it would pay for her move back to Hawaii if placement in Washington could not be found. On February 8, 1994 Dr. Martens approved the proposed modified rehabilitation clerk position offer.

The Office requested that Dr. Eric Smith, appellant's then treating physician, indicate whether the offered position was within appellant's physical capabilities by letters dated February 15 and March 8, 1994. By letter dated February 23, 1994, Dr. Smith responded that he could not approve the proposed position as it required climbing by appellant and would require her to make movements above the shoulder. The proposed position was revised to indicate that climbing would not be required. By letter dated April 28, 1994 and form report dated May 13, 1994, Dr. Smith approved the revised modified rehabilitation clerk position, finding it within appellant's physical capabilities.

By letter dated May 10, 1994, the Office informed appellant that it found the proposed position suitable and informed her of the penalty provision of 5 U.S.C. § 8106(c). The Office allowed appellant 30 days to provide an explanation if she refused the offer. By letter dated May 14, 1994, appellant refused the offer, asserting that she no longer lived in Hawaii, it would be impossible for her husband to move at this time and it would be disruptive for her family. She indicated that her inability to find proper work prior to this offer was due to deficiencies in the Office's rehabilitation program. By letter dated July 13, 1994 and reissued July 19, 1994, the Office provided appellant with 15 days, in which to accept the offered position and found that the reasons provided for her refusal were not justified. The Office advised that if the position was not accepted by July 27, 1994, appellant's compensation would be terminated.

By letter dated July 19, 1994, appellant again asserted that the proposed position was not suitable and cited 20 C.F.R. § 10.123(f) in support of her contention. Specifically, appellant asserted that under this regulation, when an employee is terminated from agency employment rolls, the Office is to encourage the agency to offer suitable reemployment in the location where the former employee resides. Appellant urged that since her family had become reestablished in Vancouver, Washington, the employing establishment should offer her a suitable position in this area. The Office attempted to accommodate appellant's request and appellant was offered a position as a modified mail processor in the Vancouver Post Office. By letter dated August 11, 1994, the Office requested that Dr. Smith review the proposed position and indicate whether it was within appellant's physical restrictions. By letter dated August 23, 1994, Dr. Smith advised the Office that he was unable to determine whether appellant could perform the work required in the mail processor position since appellant was not inclined to return to him for evaluation after he signed off on the position in Hawaii. Appellant was, therefore, referred for a physical capacities evaluation. In a report dated October 5, 1994, Dr. Edward B. Lipp, a Board-certified surgeon and consulting physician, advised that appellant would not be able to perform the duties

proposed in the modified mail processor position due to amount and intensity of required shoulder elevation. On October 25, 1994 the Office authorized Dr. Lipp as appellant's new treating physician.

By letter dated November 14, 1994, the Office advised appellant that the modified mail processor position in Vancouver, Washington had been deemed unsuitable for her work restrictions. The Office reported that the modified rehabilitation clerk position in Hawaii had been approved by Drs. Lipp and Smith and that the physical capacities evaluation had confirmed that the required duties were within her physical capabilities. The Office advised that appellant's earlier refusals of this position were not justified and she had until November 30, 1994 to accept the position. In memoranda of telephone calls dated November 17, 21 and 25, 1994, appellant expressed concerns about the method of relocation and employing establishment's assumption of the costs involved. She also stated that she had forgotten to advise the Office that her husband had been involved in a car accident requiring surgery. The Office advised that appellant that if she wished to refuse the offer, she must put her rationale in writing.

By letter dated December 16, 1994, the Office noted appellant's relocation concerns and requested that someone knowledgeable about relocation in the employing establishment contact appellant immediately. The Office imposed a December 30, 1994 deadline for contact to be made with appellant or the position in Hawaii would be found unsuitable. The Office also requested that appellant provide the employing establishment with a list of relocation questions so that she would have no further basis to suggest that she had unanswered questions concerning the relocation process. On December 20, 1994 the Office received a copy of appellant's questions and the employing establishment's responses.

On December 20, 1994 appellant accepted the proposed position in Hawaii. By letter dated December 20, 1994, the Office confirmed appellant's acceptance of the position and reiterated that the employing establishment would pay relocation expenses per its guidelines after her move. In a memorandum of a telephone call received December 30, 1994, appellant advised the Office that she could not complete the relocation to Hawaii by January 16, 1995, due to an automobile accident involving her son. In a letter dated January 10, 1994, appellant asserted that the modified rehabilitation clerk position was not suitable because she had not heard anything from the employing establishment concerning her relocation, the date for her relocation to be effected was a holiday and it would be disruptive. She submitted a medical report from her family practice treating physician, in support of her contention that the relocation was causing her depression. In a letter dated January 18, 1995, the Office advised appellant that suitability of a position was not determined by how the employing establishment followed through on the relocation process, however, appellant's effective date for the position was extended to January 23, 1995.

On January 24, 1995 the employing establishment advised the Office that appellant had not reported for duty on January 23, 1995.

By decision dated February 9, 1995, the Office terminated appellant's monetary compensation effective February 5, 1995 on the grounds that she refused an offer of suitable work. By decisions dated March 15 and June 8, 1995, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not probative and irrelevant to

the issue of whether she had refused an offer of suitable work. The Office found that the evidence was insufficient to warrant review of the prior decision. In a merit decision dated September 22, 1995, the Office, denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to establish modification of the prior decision. By decision dated February 13, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and, therefore, was insufficient to warrant review.

The Board finds that the Office properly terminated appellant's monetary compensation effective February 5, 1995 on the grounds that she refused an offer of suitable work.[1]

Section 8106(c)(2) of the Act 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."[2] However, to justify such termination, the Office must show that the work offered is suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.[4]

In the present case, the employing establishment in February 1994 offered appellant a modified rehabilitation clerk position on a full-time basis in her former state of employment in Hawaii. The employing establishment attached a description of the duties of the position and in this letter and subsequent discussions with appellant indicated that relocation costs were included with the job offer under its established guidelines published in a 90-page manual on relocation. The position was found to be within appellant's physical capabilities by both Dr. Smith, appellant's then treating physician and Dr. Martens, a Office referral physician. The position was later approved by Dr. Lipp, appellant's new treating physician.

On May 10, 1994 the Office complied with its procedural requirements by advising appellant that the offered position was suitable and currently available to her and that she had 30 days to either accept the position or provide an adequate explanation for her reasons for refusing it. By letter dated July 13, 1994, the Office addressed the reasons appellant provided for refusing the position and explained why they were not adequate. Although not required to consider further reasons for appellant's rejection of the offered position, the Office attempted to find appellant a position in the Washington area in view of a regulatory provision set forth at section

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on February 28, 1996, the only decisions before the Board are the Office's March 15, June 8 and September 22, 1995 and February 13, 1996 decisions. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

[4] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

10.123(f).[5] After suitable work in the Washington area could not be identified, the Office reiterated that the modified rehabilitation clerk position in Hawaii was suitable and provided appellant with 16 days to accept that position. Appellant accepted that position but failed to report for duty as required on January 23, 1995.

The Board finds that the evidence of record demonstrates that appellant is capable of performing the duties of the duties of the clerk position. Two of appellant's treating physicians and an Office referral physician provided reports contemporaneous with the job offer, indicating that appellant could perform the duties involved in this position. Although appellant submitted several reports by Dr. Paul Puziss, a Board-certified orthopedic surgeon and appellant's treating physician, after March 1995, his reports either did not address the issue of whether appellant was capable of performing the proffered position at the time it was deemed suitable or did not explain the basis for his conclusion that she would not have been able to perform the duties. Specifically, his reports dated February 21 and April 10, 1995, addressed appellant's status as of the date of those reports. While he concluded that appellant could not do any lifting or casing of large packages as of the date of these examinations, he did not discuss her physical capabilities at the time of the job offer. Thus, these reports do not establish that the offered position was unsuitable. In his June 12, 1995 report, Dr. Puziss concluded that he had no reason to believe that appellant was any less disabled now that she had been one year and four months ago and criticized the prior surgical procedure she underwent in connection with her left shoulder. He concluded that appellant's arguments as to why she could not perform the offered position were probative. As Dr. Puziss has not offered any explanation for his conclusion that appellant was not capable of performing the offered position at the time of the offer, his report is not sufficient to meet appellant's burden of proof. Thus, the weight of the medical evidence rests with the opinions of Drs. Smith, Lipp and Martens and supports the Office's finding that the appellant was physically capable of performing the modified clerk position.

The Board notes that the position offered by the employing establishment requires that appellant relocate from Vancouver, Washington, to Honolulu, Hawaii.

The Board has previously held that that if an employee moves or relocates, while on agency rolls, from an area in which the employing establishment is located, such a move is an unacceptable reason for refusing to accept an offer of suitable employment.[6] Similarly, the Board has held that where an employee did not submit any evidence to justify a voluntary move from one state to another for personal and financial reasons, the refusal to relocate for an offered position was not justified.[7] In this case, appellant worked in a limited-duty position for some

[5] The Board notes that this regulation indicates that the employing establishment should attempt to find an injured employee suitable work in the location where that employee resides after he or she has been terminated from the agency's employment rolls. The facts of this case appear to be distinguishable from this suggestion in the regulation inasmuch as appellant voluntarily resigned from her former position, without medical documentation, and was not terminated by her employing agency. Thus, it would not appear that, although appellant was not on the agency's rolls, the Office was required to find appellant work in a new location.

[6] *Arquelo Pacheco*, 40 ECAB 277 (1988).

[7] *Richard S. Grumper*, 43 ECAB 811 (1992).

time after her injury and left work due to maternity leave. While she was off work, she voluntarily resigned from her position with the employing establishment and, therefore, was no longer on the agency rolls at the time of her relocation to Washington. The Board notes that the Office's Federal Procedure Manual provides that if an employee has left the agency rolls, a move or relocation from the area, in which the employing establishment is located may give rise to an acceptable reason for refusing a position offered by the agency. The procedure manual states in relevant part:

> "For claimants no longer on the agency's rolls, the following may also be deemed acceptable reasons for refusing the offered job:
>
> > (1) *A medical condition* (either preexisting or subsequent to the injury) of the claimant or a family member arises which contraindicates return to the area of residence at the time of injury."[8]

In the present case, appellant indicated in telephone conversations that her husband and her son had been injured at separate times in automobile accidents and provided these a bases for delaying her relocation to Hawaii. In consideration of the sufficiency of appellant's reasons for failing to relocate to the offered position, the Board must evaluate whether appellant presented sufficient medical evidence to establish that her return or the return of her family members to Hawaii was medically contraindicated. Although appellant provided these reports of family illness in telephone calls, she did not provide these accidents as written reasons when asked to do so by the Office. Moreover, she submitted no medical or factual documentation to establish that the accidents had occurred or to demonstrate that any members of her family were injured in the same. Therefore, appellant has not established that her relocation to Hawaii was medically contraindicated for either herself or any member of her family.[9] The other reasons appellant provided for not wishing to return to Hawaii, including her preference for her current place of residence based on financial and quality-of-life concerns, are not acceptable reasons for failing to report to duty.[10] In addition, appellant's specific relocation costs concerns had been addressed and the Office had attempted to find suitable work in her current place of residence without success. Therefore, the cost of relocation had been properly considered by the Office and is not a basis for finding that the offered position was unsuitable.[11]

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.8(g)(1) (June 1993). The procedure manual also provides other acceptable reasons for refusing an offered position, including some situations in which the offered position is temporary, situations in which the Office has already issued a formal decision determining the claimant's wage-earning capacity and situations in which the offered position is temporary and will result in the loss of health coverage. *Id.* at Chapter 2.813.8(g)(1)-(4).

[9] *Carl N. Curts*, 45 ECAB 374 (1994).

[10] 13 *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.8(g)(4) (June 1993). The procedure manual indicates that unacceptable reasons for refusing an offered job would include, but not be limited to, a claimant's preference for the area in which he or she currently resides, personal dislike of the position offered or the work hours scheduled, potential for promotion and job security.

[11] *Cf. Allen W. Hermes*, 41 ECAB 838 (1990).

For these reasons, the Office properly terminated appellant's compensation benefits effective February 5, 1995.

The Board further finds that the Office properly denied appellant's request for reconsideration.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[12] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[13] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[14]

With her request for reconsideration, appellant resubmitted medical reports by Dr. Puziss that had previously been reviewed by the Office and found either to be irrelevant or insufficient to establish that the position offered to appellant was unsuitable from a physical standpoint. As this evidence had been previously considered by the Office it is duplicative. In the report dated November 7, 1995, Dr. Puziss indicated that appellant could not perform the duties of the clerk position because she was incapable of bending, squatting, lifting, twisting due to her back and could not have kept her arm elevated as necessary to perform computer keying. Dr. Puziss' report is internally inconsistent as he states on one hand that appellant could not perform these functions and, therefore, could not perform the offered deemed suitable and on the other hand, he had noted that there were no specific shoulder activities necessitated by the position. In addition, Dr. Puziss implies that the bulk of the noted restrictions were due to a back condition that was not an accepted injury for appellant. Since Dr. Puziss' report is not rationalized and is not consistent with the contemporaneous medical evidence of record from both appellant's physicians and the Office, the Office properly accorded it little probative value. Moreover, since this report was deficient in the same manner as Dr. Puziss' April 10 and June 12, 1995 reports, it is cumulative and, therefore, is also insufficient to warrant reopening the record for merit review. Appellant has not submitted sufficient evidence to warrant merit review by the Office of her claim.

The decisions of the Office of Workers' Compensation Programs dated February 13, 1996 and September 22, June 8 and March 15, 1995 are hereby affirmed.

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

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[12] 20 C.F.R. § 10.138(b)(2).

[13] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[14] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

George E. Rivers
Member

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Alternate Member

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