U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY G. ALLEN and DEPARTMENT OF VETERANS AFFAIRS, INDIANAPOLIS VETERANS HOSPITAL, Indianopolis, Ind.

Docket No. 96-2021; Submitted on the Record;
Issued October 7, 1998

DECISION and ORDER

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

The issues are: (1) whether appellant established that she sustained a recurrence of disability in September 1995 causally related to her March 7, 1970 employment injury; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits for abandonment of suitable work.

In the present case, the Office accepted that appellant, a nursing assistant, sustained a left ankle injury at work on March 7, 1970 which was accepted for swollen left ankle, torn Achilles tendon, Demerol reaction and cellulitis of the left ankle. Appellant worked intermittently from March 8 until September 13, 1970, and stopped work on September 16, 1970. On June 6, 1995 the employing establishment offered appellant a position as a telephone operator, based upon the opinions of her physician, Dr. Frank Throop, and a second opinion physician, Dr. Robert Callon, that she could perform the duties of this position. By letter dated June 20, 1995, the Office advised appellant that the offered position was suitable, advised appellant of the sanctions for refusal of suitable work, and allowed appellant 30 days to reply. On July 13, 1995 appellant refused the position and submitted reports from her physicians, Dr. Jose Tord and Dr. Frank Lloyd, Jr., indicating that she was required to use restroom facilities up to 15 or 20 times a day. On July 21, 1995 the Office verified that the employing establishment was willing to accommodate this restriction. By letter dated July 21, 1995, the Office informed appellant that the job remained suitable. On August 1, 1995 appellant accepted the job offer. Appellant returned to work on August 20, 1995 in the modified telephone operator position, with no loss of wage-earning capacity. Appellant stopped work on August 29, 1995 and returned to work on September 11, 1995. Appellant resigned her position on September 13, 1995. On October 11, 1995 appellant filed a notice of recurrence of disability alleging that she had sustained a recurrence of disability in September 1995 causally related to her 1970 employment injury. By decision dated December 18, 1995, the Office denied appellant's notice of recurrence of disability. The Office also found that appellant had refused suitable employment and therefore pursuant to section 8106(c)(2) her entitlement to compensation ceased effective August 19,

1995. The Office denied modification of the prior decision, after merit review, on March 11, 1996.

The Board finds that appellant has not established that she sustained a recurrence of disability in September 1995 causally related to her March 7, 1970 employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

Appellant filed a notice of recurrence of disability alleging that she stopped work in September 1995 due to swelling in "ankle and knee" and numbness in legs and back caused by sitting. Appellant did not claim that the light-work duties had changed, but rather that her medical condition had worsened. The only medical report appellant submitted which addressed her foot and leg conditions after her return to work was a January 22, 1996 report from Dr. Throop. In this report, Dr. Throop noted that on July 20, 1994 he had reported that appellant should be able to go back to work in a sedentary position. Dr. Throop noted that after appellant returned to a sedentary job she developed swelling and pain in her left leg, which originated in the Achilles tendon area again and also caused swelling of the foot and lower leg. Dr. Throop noted that appellant had a number of other medical problems and was simply unable to handle gainful employment. Dr. Throop's report is not sufficient to establish that appellant's disability after September 1995 was caused by a worsening of the accepted employment injury. While Dr. Throop did report that he believed appellant was in fact disabled from all work, he did not explain whether the disability was in fact due to a worsening of the accepted condition, or to appellant's other nonemployment-related conditions. Dr. Throop noted appellant's swelling of the left foot and leg, but did not indicate whether this symptom was in fact a worsening of the accepted condition, sufficient to cause appellant disability from her sedentary position. Appellant therefore did not submit the probative rationalized medical evidence necessary to establish a recurrence of total disability.

The Board also finds that the Office did not properly determine that appellant had abandoned suitable work.

Office regulations at 20 C.F.R. § 10.124(c), states in pertinent part:

> "Where an employee has been offered suitable employment (or reemployment) by the employing agency (*i.e.*, employment or reemployment which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which preexisted the injury, and within the limitations and restrictions which resulted from the injury), or where an employee

[1] *Mary A. Howard*, 45 ECAB 646 (1994).

> has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. An employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)(2) and paragraph (e) of this section."

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Federal Employees' Compensation Act. In order to ensure regularity and impartiality in adjudicating claims, and secure similar treatment of similar cases, the Office must not only inform each claimant of the provisions of the above statute, but also inform him or her that a specific position offered is suitable; the consequences of refusal of the position; and allow the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted. If a claimant submits evidence or reasons of both, the Office must evaluate the new evidence or reasons submitted and inform the claimant of its decision as to whether the evidence or reasons submitted was accepted or rejected. Claimants should be informed in the latter communication of the final intentions of the Office and given a reasonable period to make the requisite decision if any such further action is required.[2]

In the present case, appellant did accept the suitable work position, but then stopped work effectively abandoning the position. Procedurally, the Board finds that the Office did not evaluate appellant's stated reasons for stopping work pursuant to its own procedural manual. While the Office followed proper procedures in offering the suitable work position to appellant, it did not complete the procedures necessary to establish that appellant had abandoned suitable work. The Office did not advise appellant that the position was still available, that the reasons she provided for abandoning the suitable work position were rejected and did not provide appellant a final opportunity to accept or refuse the position, prior to the termination of her compensation benefits.

The Office's procedure manual provides examples of situations wherein a claimant can be found to have abandoned suitable work, for example, where the claimant voluntarily retires two and a half years after he or she returned to work, and there was no evidence to indicate that he or she retired because of disability or health reasons. The procedure manual also notes that acceptable reasons for abandonment of employment include that a subsequent medical condition prevents the claimant from continuing to perform the job.[3] The evidence of record in the present case indicates that appellant may have stopped work due to medical reasons. Appellant was hospitalized on September 18, 1995 for a small bowel obstruction, partial; and short gut

[2] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995).

syndrome. The Office has not adequately explained whether in fact appellant abandoned suitable work during this hospitalization, and if so why. The Office also did not advise appellant of the continued availability of the suitable work position and did not provide appellant a final opportunity to accept or refuse the position, prior to the termination of her compensation benefits. The Office therefore did not meet its burden of proof to establish that appellant had abandoned suitable work.

The decisions of the Office of Workers' Compensation Programs March 11, 1996 and December 18, 1995 are affirmed regarding the denial of appellant's notice of recurrence of disability and are reversed regarding the termination of compensation benefits due to abandonment of suitable work.

Dated, Washington, D.C.
October 7, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member