U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VANETTA A. GREEN and U.S. POSTAL SERVICE,
MAIL PROCESSING CENTER, Coppell, Tex.

Docket No. 97-601; Submitted on the Record;
Issued September 4, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation because she refused to accept suitable work; and (2) whether the Office abused its discretion in declining to reopen appellant's claim for merit review.

On April 19, 1993 appellant, then a 36-year-old flat sorter operator, filed a notice of occupational disease. The Office accepted her claim for bilateral carpal tunnel syndrome, based on the reports of Dr. Larry W. Blackburn, Board-certified in family practice. Appellant stopped work on December 8, 1993 and underwent release surgery on her left hand on December 12, 1993 and on her right hand on February 21, 1994.

On September 23, 1994 the employing establishment offered appellant a modified job assignment in compliance with the medical restrictions imposed by Dr. Kenneth Driggs, a Board-certified orthopedic surgeon and appellant's treating physician. On October 20, 1994 the Office informed appellant that she had 30 days to accept the job offer or provide reasons for refusing it and that if she failed to accept the job offer or to provide justification for her refusal, her compensation would be terminated.

On November 21, 1994 the Office terminated appellant's compensation, effective December 11, 1994, on the grounds that she had failed to report to work after being offered suitable employment. The Office noted that appellant was advised on October 27, 1994 to provide a medical report in support of her assertion to a claims examiner that her physician found the job offer unsuitable.

Appellant timely requested reconsideration and submitted a medical report from Dr. Eric J. Coligado, Board-certified in physical medicine and rehabilitation, who stated that Dr. Driggs had proscribed repetitive use of appellant's hands and that job duties such as taping torn parcels, stamping letters, putting torn mail in plastic bags, and hand sorting mail required

such use; therefore, these duties were not suitable until appellant had completed physical rehabilitation.

On January 17, 1995 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was immaterial and therefore insufficient to warrant review of the prior decision. The Office found that the only issue was whether appellant had responded to its October 20, 1994 letter by either accepting the job offer or providing reasons for her refusal. The Office concluded that appellant had submitted no evidence that she had responded within the allotted time.

Appellant again requested reconsideration on the grounds that she had responded to the Office's October 20, 1994 letter by going to the District office on October 27, 1994 with an October 25, 1994 letter from Dr. Driggs, which the claims examiner told her was insufficient to show that she could not do the job.[1] Appellant stated she then tried to obtain from Dr. Driggs a letter supporting his statement to her that she could not perform the required duties for more than 30 minutes.

On February 27, 1995 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office noted that none of Dr. Driggs' reports supported appellant's statement and that none of the medical evidence addressed the issue of whether appellant was unable to perform the duties of the offered job in September 1994.

On February 28, 1995 the Office responded to arguments submitted by appellant's union representative in a letter dated February 25, 1995. The Office noted that appellant did not decline the job offer until January 27, 1995 after the issuance of both the November 21, 1994 and January 17, 1995 decisions. The Office concluded that appellant's arguments were insufficient to warrant modification of its prior decision.

Appellant again requested reconsideration, which was denied on June 19, 1995 on the grounds that the evidence submitted -- a copy of a handwritten note from appellant dated October 26, 1994 stating that she could not accept the offered position because her doctor said that if she had to do the job for more than 30 minutes, she could not do it -- was insufficient to warrant review of the prior decision.[2]

On September 18, 1995 appellant requested reconsideration of the June 19, 1995 decision and submitted reports from Dr. Driggs and Dr. Peter B. Polatin, a Board-certified neurologist.

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[1] In a September 27, 1994 report, Dr. Driggs discharged appellant from treatment.

[2] On August 22, 1995 appellant filed a notice of recurrence of disability, claiming that after she returned to work on light duty, she continued to experience pain in her arms and shoulders as well as in her left hand and thumb while stamping and taping torn mail. She added that she had to work four trays of mail per hour and that her supervisor did not consider that she had carpal tunnel syndrome, the same injury as those employees in limited duty had but who were not required to do as much work. On September 13, 1995 the Office informed appellant that while her claim was open for medical benefits, she was not entitled to disability benefits because her compensation had been terminated after she failed to return to work.

On October 3, 1995 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was irrelevant and therefore insufficient to warrant review of its prior decision.

On October 23, 1995 appellant requested reconsideration of the November 21, 1994 decision on the grounds that the Office violated its own procedures and that the medical evidence established her inability to perform the required duties of the position offered. On December 5, 1995 the Office denied appellant's request on the grounds that the medical evidence was insufficient to warrant modification of its prior decision.

On May 16, 1996 appellant requested reconsideration on the grounds that she had received a copy of her file and the October 26, 1994 letter she sent to the Office declining the job offer was not in the record. Appellant also submitted a June 12, 1996 report from Dr. Wayne A. Soignier, a hand surgeon.

On August 28, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was duplicative and therefore insufficient to warrant review of its prior decision. The Office noted that the October 26, 1994 letter had previously been considered.

The Board finds that the Office properly terminated appellant's compensation on the grounds that she had refused suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act[4] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation[7] provides that 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 a showing before entitlement to compensation is terminated.[8] To

[3] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[4] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[5] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[6] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[7] 20 C.F.R. § 10.124(c).

[8] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9]

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 medical evidence.[10]

In this case, Dr. Driggs recommended that appellant return to permanent light-duty work as of July 19, 1994, avoiding all repetitious grasping and lifting activities as well as all jobs requiring the use of vibrating tools or instruments. He stated that appellant was not to type or keyboard and should limit lifting to three to four pounds with each hand. On September 23, 1994 the employing establishment offered appellant a modified job assignment that was mostly sedentary, with lifting limited to two to three pounds and no repetitive motions of the wrist or elbow. The duties consisted of taping torn parcels, stamping letters and flats, putting torn mail in plastic bags, and hand-sorting mail. The Office found that the position complied with the restrictions listed by Dr. Driggs and permitted appellant 30 days to accept the job offer or lose her compensation.

While appellant argued that she did respond to the Office's October 20, 1994 letter by advising the claims examiner that Dr. Driggs stated that she could not perform the duties of the position for more than 30 minutes at a time, the record shows that she was told by the Office that she needed to obtain a medical report from Dr. Driggs to verify her statement.

Subsequently, Dr. Driggs explained that he may have "mentioned in passing" to appellant that she and her supervisor would have to determine the length of time -- 30 or 40 minutes or 1 hour -- that appellant could do specific tasks within his general recommendations that she avoid repetitious grasping, lifting, or typing. He added that because he could not know accurately what appellant was specifically capable of doing, she and her supervisor would have to determine on the job the specific tasks she was capable of doing within his recommendations. Thus, the Board finds that Dr. Driggs' opinion is sufficient to establish that appellant was capable of performing the duties of the offered position.

The December 2, 1994 report from Dr. Coligado asserted that appellant's duties required repetitive use of the hands, but provided no support for this conclusion. The record shows otherwise -- the job description stated that the duties may be interspersed with other assignments within appellant's restrictions, which included no repetitive motions of the wrist or elbow. The employing establishment stated in an August 29, 1995 memorandum that appellant had no production standards or pace to meet in doing her modified job, which did not require excessive use of her arms and wrists. Therefore, the Board finds that the Office properly terminated appellant's compensation because she refused an offer of suitable work.

[9] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[10] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

The Board also finds that the Office properly declined to reopen appellant's claim on the grounds that the evidence submitted in support of reconsideration was duplicative and therefore insufficient to warrant review.[11]

Section 8128(a) of the Act[12] provides for review of an award for or against payment of compensation. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.[13]

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[14] Section 10.138(b)(2) of the implementing regulations provides that any application for review which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[15] Abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions that are contrary to both logic and probable deductions from established facts.[16]

In this case, the October 26, 1994 note was previously of record and considered by the Office in denying appellant's request for reconsideration on June 19, 1995. Appellant stated on June 16, 1995 that she had mailed the 1994 letter to the Office after her physician told her she could not do the job. While the original of the October 26, 1994 letter is not in the file, the issue of whether appellant responded to the Office's October 20, 1994 letter within 30 days was addressed in the February 27, 1995 decision. Thus, the copy of the October 26, 1994 letter submitted by appellant is duplicative and does not constitute new and relevant evidence sufficient to require the Office to reopen appellant's claim.

The June 12, 1996 letter from Dr. Soignier is similarly insufficient. Dr. Soignier stated that appellant had "the ability and desire to do light work" but could not perform repetitive work or lift more than 15 to 20 pounds.[17] However, these restrictions are similar to those imposed by

[11] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed her notice of appeal on November 22, 1996, the Board has jurisdiction of the Office's decisions dated August 28, 1996 and December 5, 1995.

[12] 5 U.S.C. § 8128(a).

[13] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

[14] 20 C.F.R. § 10.138(b)(1).

[15] 20 C.F.R. § 10.138(b)(2).

[16] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[17] On August 30, 1995 the employing establishment informed appellant that her request for permanent light duty could not be granted at this time.

Dr. Driggs in his July 18, 1994 letter. Dr. Soignier failed to address the relevant issue of whether appellant could perform the duties of the offered position.

In support of her October 23, 1995 request for reconsideration of the November 21, 1994 decision terminating her compensation, appellant submitted a July 26, 1995 report from Dr. Polatin, an August 1, 1995 report from Dr. Driggs, an October 17, 1995 report from Dr. Elizabeth Hunter, a physical therapy report, a disability slip, and a witness' statement concerning her October 27, 1994 visit to the Office.

Dr. Polatin stated that appellant was totally disabled from January 5 through March 3, 1995 because she was participating every day in an intensive functional restoration program. Dr. Hunter indicated that appellant was unable to work from October 4 through November 17, 1994 due to severe depression. Dr. Blackburn's disability note stated that appellant was ill due to stress from October 4 through December 14, 1994, which was not work related. The witness merely confirmed that appellant did visit the Office on October 27, 1994 and showed the claims examiner the October 26, 1994 note. And Dr. Driggs simply elaborated on his discussion with appellant regarding her work restrictions.

As the December 5, 1995 decision indicated, none of this evidence addresses the relevant issue of appellant's inability to carry out the tasks outlined in the offered position in September 1994. The Office found the requirements of the modified position to be within the restrictions listed by Dr. Driggs on August 14, 1994 and appellant has produced no evidence contradicting these limitations or supporting her assertion that she was unable to do the job. Therefore, the Board finds that the Office properly declined to modify its prior decision terminating appellant's compensation.[18]

[18] *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (finding that the Office properly declined to reopen a claim because appellant presented no new and relevant evidence).

The August 28, 1996 and December 5, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
September 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member