U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMILY D. MARKWELL and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Salt Lake City, Utah

Docket No. 97-1984; Submitted on the Record;
Issued June 9, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied modification of its decision terminating appellant's compensation based on her refusal of suitable work.

The Office accepted that appellant sustained a scapular strain, a cervical strain, a contusion of the lumbar muscles and fibrositis as a result of her October 13, 1989 employment injury in which her chair rolled out from under her and she fell backwards onto her back and head. Appellant received continuation of pay from October 16 to November 29, 1989, followed by compensation for temporary total disability.[1]

On March 18, 1994 the employing establishment offered appellant a position as a fiscal accounts clerk, a position the Office found was suitable. Appellant refused the offer, contending that she needed to undergo a stress management program before returning to work. She submitted a report from a social worker to support this contention. On April 19, 1994 the Office found appellant's reason for refusal of the offered position unacceptable and advised her she must accept the position or have her compensation terminated. By decision dated May 12, 1994, the Office terminated appellant's compensation effective that date on the basis that she refused an offer of suitable work. Following a hearing held at appellant's request on March 21, 1995, this decision was affirmed by an Office hearing representative in a decision dated June 1, 1995. Appellant requested reconsideration and submitted additional evidence and the Office, by decision dated May 7, 1996, refused to modify its prior decisions.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work

[1] This compensation was interrupted by a period from December 1990 to February 1991 when appellant returned to work at the employing establishment.

is offered to, procured by, or secured for the employee.[2] To justify termination of compensation, the Office must establish that the work offered was suitable.[3]

The Board finds that the Office improperly denied modification of its decision terminating appellant's compensation based on her refusal of suitable work.

A rehabilitation counselor under contract with the Office sent a description of the position of fiscal accounts clerk, including the physical requirements, to appellant's attending physician, Dr. Robert D. Baer, a Board-certified physiatrist. On March 2, 1994 Dr. Baer signed this position description in the space marked physician's approval. The work tolerance limitations set forth by Dr. Charles Hargadon, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion, would appear to preclude appellant's performance of the offered position, in that Dr. Hargadon indicated appellant could sit two hours during an eight-hour day while the position description indicates that "work is primarily sitting with intermittent standing and walking allowed at the [discretion] [sic] of the employee."[4] His report, however, was dated April 29, 1993, almost 11 months before the position was offered to appellant. Unlike Dr. Baer, Dr. Hargadon did not review the position description with physical requirements of the offered position to form an opinion whether appellant could perform the position. In addition, Dr. Hargadon examined appellant on one occasion, where Dr. Baer, at the time of his March 2, 1994 opinion that appellant could perform the offered position, had treated appellant for almost four years. For these reasons, the opinion of Dr. Hargadon does not outweigh or create a conflict with the opinion of Dr. Baer. The Office properly found that the offered position was suitable.

Upon advising appellant that the offered position was suitable, the Office allotted appellant 30 days to accept the position or provide reasons for refusing it. Appellant's response contended that she needed to undergo a stress management program before returning to work. The only evidence she submitted in support of this contention was the report of a social worker, who is not a "physician" within the definition of the Act[5] and therefore is not competent to render a medical opinion.[6] Appellant's reason for refusing the offered position therefore was properly found to be unacceptable.

[2] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[3] *David P. Camacho*, 40 ECAB 267 (1988).

[4] Although the rehabilitation counselor indicated in an August 19, 1993 memorandum that he called Dr. Hargadon who told him that his sitting restriction was two hours at a time rather than two hours in an eight-hour day, this memorandum of a telephone conversation does not constitute competent medical evidence. *Paul W. Kirby*, 20 ECAB 304 (1969); *Richard B. Eddy*, 16 ECAB 559 (1965).

[5] 5 U.S.C. § 8101(2) defines "physician" to include "surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."

[6] *Debbie J. Hobbs*, 43 ECAB 135 (1991).

Subsequent to the Office's termination of appellant's compensation on May 12, 1994, appellant submitted medical evidence that casts some doubt on the suitability of the offered position. In a report dated May 6, 1994,[7] Dr. Baer stated:

> "[W]hen I approved the job offering that Salt Lake City VA [Veterans Administration] presented to her, I felt that the physical demands outlined in the job would be ideal for [appellant]…. I was unaware that she had a state dependent aversion to the VA itself, even though I was aware that Dr. Ann Wenholdt[8] had told [appellant] that she felt she would do better if she worked elsewhere than the VA."

In a report dated June 2, 1994, Dr. Baer stated:

> "[P]rior to receiving your updated health information, I recommended to [the Office] that you return to work. After receiving current health status information, on May 2, 1994, I reversed my medical evaluation of your situation and recommended to [the Office] that you not be returned to work at this time."

In a report dated November 30, 1994, Dr. David R. Watkins, an attending physiatrist, stated:

> "[I]t is still apparent to me that [appellant] has now, a deep seated psychological affectation as it relates to working in particular for the VA Hospital, at least in Salt Lake City. Intrinsically I believe that her attempting to go back to work there would be fraught with failure, in spite of intense stress and psychological management."

In reports dated June 13 and November 30, 1995, Dr. Watkins stated that appellant needed to undergo a stress management program in order to return to work at the employing establishment. In the November 30, 1995 report, Dr. Watkins stated:

> "[F]rankly, I think that her trying to find employment back into that very situation in Salt Lake City would be a mistake, because I think that there are too many barriers, psychological and emotional, at this point in time for that kind of employment to be even vaguely successful."

These reports are not sufficient to establish that the offered position was not suitable, as they concern a psychiatric or emotional condition but do not contain a diagnosis of a psychiatric or emotional condition and were not prepared by specialists in the appropriate field of medicine.

[7] This report was received by the Office on December 15, 1994.

[8] The case record contains no reports from this doctor.

However, as they raise the uncontradicated possibility that appellant may not psychologically be able to perform the offered position,[9] the Office should have developed the evidence by referring appellant to a specialist in psychiatry or psychology for a reasoned opinion whether appellant has a psychiatric or emotional condition that precludes her performance of the offered position, or whether appellant simply does not want to return to work at the employing establishment. After obtaining such a report, the Office should issue an appropriate decision on the question of whether appellant refused suitable work.[10]

The decision of the Office of Workers' Compensation Programs dated May 7, 1996 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
June 9, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] Even if the condition preventing an employee from performing an offered position is not employment related and was acquired subsequent to the employment injury, the offered job will be considered unsuitable. *Robert Dickerson*, 46 ECAB 1002 (1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[10] As appellant did not provide an acceptable reason for refusing the offered position in the 30 days allotted, the Office is not required to reinstate compensation on the basis that appellant submitted evidence requiring further development of the evidence. *Cheryl D. Hedblum*, 47 ECAB 215 (1995).