U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE H. GUNTER and DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Bronx, NY

Docket No. 00-397; Submitted on the Record;
Issued December 26, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

On August 9, 1995 appellant, then a 51-year-old data entry clerk, filed a notice of occupational disease alleging that she developed repetitive stress syndrome in her right wrist in the performance of duty. The Office accepted the claim for right wrist tendinitis. Appellant initially sought treatment with Dr. Michael Contillo, a Board-certified internist, who prescribed a wrist sprint and physical therapy. She was also seen by Dr. Mark R. Burns, a rheumatologist, and Dr. Asok K. Lahiri, a Board-certified neurologist. Appellant has not worked since August 9, 1995.

In a December 30, 1995 report, Dr. Lahiri found "mild weakness of the right APB muscle, with questionable flattening of the right theanar eminence." He stated that there was no gross sensory abnormality, but that appellant described parasthesis when her right index finger and theanar eminences were touched. Dr. Lahiri indicated that appellant had been diagnosed with probable carpal tunnel syndrome but that electrodiagnostic tests, including a needle electromyography performed on November 13, 1995, were negative for carpal tunnel syndrome.

In a March 6, 1996 report, Dr. Burns stated that appellant "has tendinitis of the right wrist. She has considerable relief of symptoms when she is not working, as she avoids repetitive stress on the wrist. Appellant should not be working at this time, due to the continuing problem."

In a May 21, 1996 report, Dr. Burns concluded:

> "[Appellant] has persistent pain along the ulnar aspect of the right wrist that only occurs when she does repetitive motions with the hand at work. This is nonarticular pain and occurs in the area of the ligaments and tendons around the ulnar aspect of the wrist. This had originally started with numbness in the hand.

> A carpal tunnel was initially suspected by other doctors, but neither a median nor ulnar neuropathy was ever demonstrated. Her wrist pain dates from that episode. This problem will not image on any study except maybe for a magnetic resonance imaging (MRI) [scan] and doing one simply to illustrate some soft-tissue edema does not seem necessary. There is no permanent damage to the area, but [appellant] specifically notes that repetitive use of the hand brings it on. This is not a problem that [her] age of 52 would automatically explain. There is no evidence for underlying inflammatory disease."

In a (Form CA-20) attending physician's report dated August 1, 1997, Dr. Burns noted that appellant was complaining of pain in the left hand as well as the right. He diagnosed tendinitis of the left and right hand and opined that appellant would be disabled from work until December 1, 1997.[1] In a December 27, 1996 report, Dr. Burns suggested that appellant return to work on a part-time limited basis. He recommended modifications at work to reduce physical stress on appellant's hands.

The Office subsequently referred appellant for vocation rehabilitation to assist in her return to gainful employment. She underwent a functional capacity evaluation on August 18, 1997 that was characterized by bilateral forearm spasms, pain and decreased bilateral hand strength. It was recommended that appellant complete training on a voice-activated computer system and undergo additional physical therapy.

In a December 10, 1998 report and attached work evaluation form, Dr. Burns noted that he had been treating appellant since February 1996 for right wrist tendinitis related to her factors of her work as a clerk. He indicated that appellant's pain had not subsided following physical therapy and opined that her "disability will be ongoing and most likely permanent." Dr. Burns reported that appellant was limited to eight hours of sitting, four hours of walking, and one hour of intermittent bending, squatting, climbing, kneeling, twisting and standing, with no lifting. He further opined that appellant could lift no more than ten pounds and that she was prohibited from simple grasping, pushing and pulling and fine manipulation with her hands.

The Office subsequently referred appellant for a second opinion evaluation with Dr. John S. Mazella, a Board-certified orthopedic surgeon. In a December 28, 1998 report, he discussed appellant's medical and work histories and noted that appellant wore two wrist splints. Dr. Mazella indicated that appellant's left wrist revealed a dorsal scar and recurrent ganglion cyst that was nontender. He indicated that appellant had full range of motion in the left and right wrists with a negative wrist flexion test for carpal tunnel syndrome and a grip of 4/5. Dr. Mazella diagnosed right wrist tendinitis, resolved, with symptom magnification. He opined that appellant could work eight hours per day with restrictions of no lifting, pushing or pulling in excess of 30 pounds and no repetitive use of the right hand and wrist.

On April 21, 1999 the employing establishment offered appellant a position as a modified automation clerk. Appellant would not have to perform data entry by hand and the job was

[1] On July 7, 1997 appellant had been referred by Dr. Burns to Dr. Roy G. Kulick, an orthopedic surgeon, who injected her right carpal tunnel with cortisone, which resulted in no improvement of her hand symptoms.

sedentary in nature.[2] Appellant was to be provided a headset to answer the telephone and to take inspection applications and other messages. In accordance with her medical restrictions, appellant would use voice-activated software and not a computer keyboard.

In a May 11, 1999 letter, the Office determined that the position of modified office automation clerk that was offered to appellant constituted suitable work. The Office advised appellant that she had 30 days either to accept the job offer or provide an acceptable reason for refusing the job offer or else she risked termination of her compensation.

By letter dated May 20, 1999, appellant notified the employing establishment that she was unable to accept the job offer because her medical condition had deteriorated. She also alleged that she was unable to start work in the offered position because she had been provided with an incorrect bus schedule.

On June 14, 1999 the Office informed appellant that her reasons for refusing the job offer were unacceptable. She was advised that she had 15 days to accept the position or risk having her compensation benefits terminated.

In a decision dated August 12, 1999, the Office terminated appellant's compensation effective August 12, 1999 on the grounds that she refused an offer of suitable work.

The Board finds that the Office properly denied appellant's compensation on the grounds that she refused an offer of suitable work.[3]

Once the Office accepts a claim it has the burden of proving that the employees' disability has ceased or lessened before it may terminate or modify compensation benefits.[4] Section 8106(c)(2) of the Federal Employees' Compensation Act[5] provides that the Office may terminate 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.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation 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

[2] Although the employing establishment noted that appellant had been approved for lifting up to 30 pounds, the offered position does not appear to require any significant lifting since the job is listed as sedentary.

[3] Although appellant submitted additional medical evidence along with his hearing request, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision.

[4] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Betty F. Wade*, 37 ECAB 556 (1986).

[5] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516-517 (1999).

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

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

[8] 20 C.F.R. § 10.516-517 (1999).

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]

In this case, the employing establishment offered appellant a position as a modified automation clerk based on the work restrictions provided by the Office referral physician, who indicated that appellant could perform sedentary work for eight hours per day with no repetitive use of her wrists. The Board notes that these restrictions are essentially the same as those provided by appellant's treating physician. Because the medical record indicates that appellant has the physical capability to perform the job of a modified automation clerk, the Board finds that the Office properly deemed the position to be suitable work.

The Board also finds that Office procedures were properly followed in notifying appellant of the penalties for refusing an offer of suitable work. When appellant refused the job offer, the Office informed appellant that her reasons were unacceptable and gave her an additional 15 days to accept the position or risk having her compensation terminated. Thus, the Office acted within its discretion in finding that appellant refused an offer of suitable work and thereby terminated appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated August 12, 1999 is hereby affirmed.

Dated, Washington, DC
December 26, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

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