U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA V. PEREZ and U.S. POSTAL SERVICE,
POST OFFICE, Columbia, SC

Docket No. 99-633; Submitted on the Record;
Issued June 16, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment.

The Board has duly reviewed the case on appeal and finds that the Office met its burden to terminate appellant's compensation benefits.

On November 9, 1982 appellant, then a 30-year-old CFS clerk, sustained an employment-related fracture of the left proximal humerus and contusions of the pelvis and left hip. The accepted conditions were later expanded to include avascular necrosis of the left humeral head and dysthemic disorder. She returned to limited duty on February 25, 1985, worked intermittently thereafter until she stopped work entirely on October 17, 1987, after which she received appropriate compensation.[1] The Office continued to develop the claim and, by decision dated August 14, 1997, terminated appellant's wage-loss compensation, effective August 17, 1997, on the grounds that she refused an offer of suitable work. Following appellant's request for a review of the written record, in a decision dated January 26, 1998 and finalized January 29, 1998, an Office hearing representative affirmed the prior decision. The facts of this case as set forth in the hearing representative's decision are hereby incorporated by reference.

Subsequent to the hearing representative's decision, appellant requested reconsideration and, by decision dated June 18, 1998, the Office denied her request. She again requested

[1] The record indicates that on April 23, 1993 appellant was granted a schedule award for a 30 percent permanent partial loss of use of the left upper extremity. Following her appeal, by decision dated May 12, 1995, Docket No. 93-2261, the Board remanded the case to the Office for further assessment of her degree of impairment. On September 22, 1995 she was granted a schedule award for an additional six percent impairment. The schedule award is not on appeal before the Board.

reconsideration and submitted additional evidence. In an October 28, 1998 decision, the Office denied modification of the prior merit decision. The instant appeal follows.

Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

The implementing regulation[6] 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.[7] To 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.[8]

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.[9] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

In the present case, the record reflects that the modified mark-up clerk position offered to appellant on April 24, 1997 was reviewed by Dr. Edward W. Berg, a Board-certified orthopedic

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

[4] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

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

[6] 20 C.F.R. § 10.124(c).

[7] *See John E. Lemker*, 45 ECAB 258 (1993).

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

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *See Connie Johns*, 44 ECAB 560 (1993).

surgeon, who submitted a report dated November 6, 1995 in which he advised that the position was suitable from an orthopedic standpoint. The record also contains reports dated September 19 and October 7, 1996 in which Dr. Harold C. Morgan, who is Board-certified in psychiatry and neurology, advised that appellant could work in her usual workplace. The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position from both an orthopedic and a psychiatric standpoint.[11]

Office procedures provide that acceptable reasons for refusing an offered job include withdrawal of the offer and medical evidence of inability to perform the position or to travel to the job. In the instant case, at the time appellant refused the job offer on June 25, 1997, she submitted no additional medical evidence. While she later submitted an August 29, 1997 report from Dr. William F. Spillane, a Board-certified anesthesiologist, who diagnosed chronic left shoulder pain secondary to traumatic injury and a September 2, 1997 report from Dr. William K. Robinson, an internist, neither voiced an opinion regarding appellant's ability to work.[12] The Board, therefore, finds appellant's reasons for refusing the offered position unacceptable.

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position,[13] and the record in this case indicates that the Office properly followed the procedural requirements. By letter dated June 18, 1997, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable, and allotted her 30 days to either accept or provide reasons for refusing the position. By letter dated June 25, 1997, appellant stated that her current physical condition prevented her from employment.[14] By letter dated July 24, 1997, the Office advised appellant that the reason given for not accepting the job offer was unacceptable. She was given an additional 15 days in which to accept the job offer. Appellant did not return to work. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was

[11] *See John E. Lemker*, *supra* note 7.

[12] The Board notes that appellant also submitted several unsigned reports prepared by Dave Gehrman, PA-C. A report by a physician's assistant is of no probative medical value as he is not a "physician" as defined by section 8101(2) of the Act; *see John D. Williams*, 37 ECAB 238 (1985).

[13] *See Maggie L. Moore*, *supra* note 8.

[14] Appellant also submitted a medical report from Dr. John Harrelson, a Board-certified orthopedic surgeon, dated March 6, 1990, who advised that she could not work due to her chronic pain syndrome. This report was previously of record and the Board finds its probative value diminished regarding appellant's condition in 1997.

offered a suitable position by the employing establishment and such offer was refused. Thus, under 5 U.S.C. § 8106 her compensation was properly terminated, effective August 17, 1997.[15]

The decisions of the Office of Workers' Compensation Programs dated October 28, June 18 and January 29, 1998 are hereby affirmed.

Dated, Washington, D.C.
June 16, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] The Board notes that subsequent to the October 28, 1998 Office decision appellant submitted evidence to the Office. Likewise, she submitted additional evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).