U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANIE L. COOLEY and U.S. POSTAL SERVICE, AIRPORT MAIL FACILITY, Detroit, MI

Docket No. 98-1908; Submitted on the Record;
Issued November 30, 2000

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused suitable work; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On July 16, 1976 appellant, then a 42-year-old mailhandler, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on May 24, 1976 she strained her lower back when she suddenly moved to prevent a cart of mail from striking a coworker. Appellant stopped work on July 14, 1976 and returned on August 30, 1976. The Office accepted the claim for acute lumbar strain, which was later expanded to include a herniated disc, chronic radiculopathy and spinal artery thrombosis. Appellant stopped work on September 12, 1976 and appellant did not return to work thereafter. Appellant was paid appropriate compensation for all periods of disability. The Office authorized a laminectomy which was performed on November 30, 1976.

From September 1976 to April 1995, the Office requested that appellant's treating physician provide an opinion regarding appellant's diagnosis and status and comment on appellant's work limitations. In all instances, the physician indicated that appellant was unable to return to gainful employment.

In an April 24, 1995 report, Dr. Edward B. Trachtman, an osteopath and a fitness duty doctor, indicated appellant's low back problems "were historically … related to her work incident." He also noted that he did not feel appellant could return to a work setting at that time, even to a sedentary job.

By letter dated January 10, 1996, the Office requested appellant's treating physician, Dr. Richard Krugel, a Board-certified orthopedic surgeon, to provide an opinion on appellant's present diagnosis and current status.

In a medical report dated February 7, 1996, Dr. Krugel indicated appellant's condition was slightly worse than when he last treated her in 1993. He noted that appellant had permanent disability and would be restricted to only the most sedentary type of work with a sit/stand option. Dr. Krugel opined that appellant's disability was permanent and he had no expectation for improvement and that her condition could deteriorate.

By letter dated February 26, 1996, the Office requested that Dr. Krugel clarify his opinion regarding the relationship of appellant's current condition to her employment injury and the feasibility of appellant returning to employment.

In a letter dated March 6, 1996, Dr. Krugel opined that appellant's current condition was related to her radiculopathy, which was an accepted employment-related injury. He further indicated that appellant "might" be able to perform a sedentary position with a sit/stand option for six to eight hours a day. Dr. Krugel prepared a work capacity evaluation which indicated a lifting restriction of no greater than five pounds with limited standing and climbing.

Appellant submitted various records including treatment notes from Dr. Krugel from March 18 to May 29, 1996. The March 18, 1996 note indicated that appellant was experiencing severe pain in her right hip. The April 17 through May 29, 1996 treatment notes reported appellant's complaints of right knee and hip pain. Right knee examination and testing revealed a large synovial cyst, a Baker's cyst and a meniscal tear for which he recommended surgery.

On May 28, 1996 the Office referred appellant to a vocational rehabilitation program. The rehabilitation specialist indicated that appellant suffered from multiple medical conditions, most of which were not work related and that she had a "guarded" prognosis for returning to work.

On September 26, 1996 the employing establishment offered appellant a full-time position as a modified mailhandler. The duties of appellant included greeting each customer, recommending available services, directing customers to vending machines and special services as well as answering customer questions. The hours of employment were from 8:30 a.m. to 5:00 p.m., Monday through Friday, and the employing establishment indicated that appellant's annual salary was based on an eight-hour workday.

By letter dated September 26, 1996, the Office notified appellant that the position as modified mailhandler was found to be suitable to her work capabilities. The Office indicated that appellant had 30 days to accept the position or provide further explanation for refusing it. The Office advised appellant that, if she did not accept the offered position or did not demonstrate that her refusal to accept was justified, her compensation would be terminated under 5 U.S.C. § 8106(c).

On October 3, 1996 appellant rejected the position and indicated that she was waiting to have surgery on the right knee and noted deteriorating health.

On October 29, 1996 the Office informed appellant that her refusal of the offered position was found to be unjustified, based on the opinion of her treating physician, Dr. Krugel and provided 15 days for her to accept the job.

Appellant submitted a treatment note dated October 28, 1996 from Dr. Krugel, which indicated that appellant had ongoing pain in her right knee radiating down her calf. He recommended a total knee replacement arthroplasty and indicated that this procedure would improve appellant's condition.

On November 20, 1996 the Office terminated disability compensation on the grounds that appellant refused an offer of suitable work, which the medical evidence established she was capable of doing.

Appellant submitted a report from Dr. Adrian Go, an internist, dated December 4, 1996. In a letter dated December 4, 1996, Dr. Go indicated that appellant was not medically suitable for gainful employment because of her medical condition. He noted that appellant suffered from hypertension, chronic pulmonary disease and bronchial asthma. Dr. Go noted that appellant had an episode of congestive heart failure and was heavily medicated.

Appellant's attorney requested a hearing which was held December 11, 1997. The attorney argued: (1) the position offered appellant was not a real position as no true job existed which only required the duties outlined in the job description; (2) the doctor released appellant to six to eight hours which was not a definitive opinion that appellant could work eight hours; and (3) the doctor noted that appellant "might be able to perform" the work described which is not a definitive answer as to her actual capability to perform the job. After the hearing, appellant's attorney submitted a discharge summary dated February 6, 1995, noting appellant underwent a lumbar laminectomy and a November 29, 1996 operative report documenting a right knee arthroplasty.

Thereafter, appellant submitted a report from Dr. Krugel dated December 12, 1996, which indicated that he did not believe appellant was capable of doing a sedentary sit/stand position. He noted appellant was recovering from knee surgery and would be functional in three to six months. Dr. Krugel opined that because of appellant's back condition and recent knee surgery she was completely disabled.

On March 16, 1998 the hearing representative found that the Office was justified in terminating appellant's compensation because she refused an offer of suitable employment. The hearing representative refuted appellant's attorney's arguments and indicated that the employing establishment tailored the offered job to meet the needs of appellant and that it was of no consequence that this was not a position ordinarily offered to other employees.

Appellant's attorney requested reconsideration of the Office's decision of March 16, 1998 and submitted additional medical evidence. The medical evidence included a discharge summary for an admission from February 6 to 10, 1995, in which appellant underwent a total laminectomy of L3 nerve root on the right side. Also submitted was a discharge summary for an admission from November 29 to December 7, 1996 whereby appellant underwent a total knee replacement. Also submitted was an operative report for the knee replacement procedure which indicated a postoperative diagnosis of degenerative joint disease of the right knee.

By decision dated May 1, 1998, the Office denied appellant's reconsideration request, without a merit review, on the grounds that the evidence submitted was of a cumulative nature and not sufficient to warrant review of the prior decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's disability compensation for refusal of suitable employment.

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.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[4]

The implementing regulation[5] 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 a 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.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[7]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[9]

The Board finds that the medical evidence does not establish that appellant was capable of performing the listed requirements of the offered position. The job duties included greeting customers, recommending available services, directing customers to the vending machines and

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

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

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

[4] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[5] 20 C.F.R. § 10.124(c).

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

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

[8] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[9] *Arthur C. Reck*, 47 ECAB 339 (1996).

special services, answering customer questions and performing other administrative duties within restrictions from 8:30 to 5:00 p.m. The medical restrictions included a sedentary position with a sit/stand option, no lifting over five pounds and limited climbing for six to eight hours per day. It is not clear whether the hours of work listed on the job offer are consistent with the "six to eight hours" allowed by Dr. Krugel. Additionally, it is unclear from the record whether appellant's knee condition for which she underwent a total knee replacement was taken into consideration by the Office prior to terminating appellant's disability benefits. There is no indication in the record that the Office sought clarification of these matters prior to terminating compensation for a refusal of suitable work.

In this case, appellant's treating physician, Dr. Krugel, examined appellant on February 7, 1996 and determined that appellant remained permanently disabled and would be restricted to only the most sedentary type of work with a sit/stand option. In a supplemental report dated March 6, 1996, he indicated that appellant's condition was related to her accepted injury of radiculopathy. Dr. Krugel also noted that appellant could perform sedentary work with a sit/stand option and "might be able to work for six to eight hours per day." The employing establishment subsequently offered appellant a position as a modified mailhandler with the hours of 8:30 a.m. to 5:00 p.m., Monday through Friday. Elsewhere on the job offer the employing establishment indicated that the position was based on an eight-hour workday. Thus, it is not clear whether he felt that appellant could work eight hours daily as his report is speculative on this point as Dr. Krugel equivocated on the total hours she could work and prefaced his opinion by saying she "might" be able to work. Also noted is the fact that the job offer did not indicate if the position was temporary or permanent. Appellant's original position as a mailhandler was a permanent position. Subsequently, the position offered appellant is only suitable if it is permanent in nature.[10]

In a subsequent report dated December 12, 1996, Dr. Krugel discussed appellant's history of back and knee surgery and stated, "despite what was filled out several months ago regarding her ability to do jobs, I do not feel that she is capable of doing even a sedentary sit/stand job. She will have difficulty ambulating and getting in and out of her place of employment because of recent knee surgery." Dr. Krugel further indicated that appellant was "completely disabled" because of her back and her recent knee surgery. In his reports, he expressed contradictory and equivocal opinions regarding appellant's ability to work thereby diminishing the probative value of the doctor's earlier reports. Also, at the time the Office terminated compensation, it had certain of Dr. Krugel's treatment notes indicating that appellant had a significant knee condition for which surgery was recommended. Thus, the medical evidence fails to establish that the job offered was suitable and the Office improperly terminated appellant's compensation on the grounds that he refused an offer of suitable work.[11]

[10] *See Maggie Moore, supra* note 7.

[11] *See Patrick A. Santucci,* 40 ECAB 151 (1988).

The Board finds that the modified position offered to appellant was not suitable and outside her physical restrictions. Therefore, the Office improperly applied the penalty provision of section 8106(c)(2).[12]

The May 1 and March 16, 1998 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
November 30, 2000

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[12] The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.