U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN HEPBURN-TOOLAN and U.S. POSTAL SERVICE, MORGAN GENERAL MAIL FACILITY, New York, NY

Docket No. 00-1611; Submitted on the Record;
Issued April 18, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on grounds that she refused an offer of suitable work.

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

Appellant, a 30-year-old regular clerk, filed a notice of traumatic injury on November 2, 1989 alleging that she injured her back in the performance of duty. The Office accepted appellant's claim for derangement of the lumbar spine. Appellant claimed recurrences of disability on March 1 and July 8, 1997 and April 9, 1998. The Office accepted these claims on August 24, 1998.

On September 24, 1998 the employing establishment offered appellant a limited-duty position. By letter dated October 22, 1998, the Office informed appellant that the position was suitable and allowed her 30 days to accept the position or offer reasons for refusal. Appellant declined the position on October 1, 1998 and January 11, 1999. By letter dated January 12, 1999, the Office stated that appellant's reasons for refusing the position were not justified and allowed her 15 days to accept the position. By decision dated March 3, 1999, the Office terminated appellant's compensation benefits, finding that appellant had refused an offer of suitable work.

Appellant, through her attorney, requested reconsideration on December 20, 1999. By decision dated March 16, 2000, the Office denied modification of its March 3, 1999 decision.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations[3] provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

In this case, appellant's attending physician, Dr. John M. Olsewski, a Board-certified orthopedic surgeon, completed reports on April 9 and July 2, 1998 stating that appellant was totally disabled "from her previous level of activity." Dr. Olsewski did not provide any physical findings or explain his conclusion.

The Office referred appellant to Dr. Norman Heyman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated June 4, 1998, Dr. Heyman provided a history of injury, review of the medical records and findings on physical examination. He diagnosed acute lumbosacral strain and sprain due to her employment injury. Dr. Heyman stated that appellant could return to work eight hours a day in a sedentary position with restrictions. He completed a work restriction evaluation and indicated that appellant could not twist, push, pull, lift, squat or climb. Dr. Heyman indicated that appellant had restrictions on kneeling of two hours.

On July 17, 1998 Dr. Olsewski stated that appellant was totally disabled until September 1, 1998. On September 24, 1998 Dr. Olsewski stated that appellant could not return to work for three months. In a work restriction evaluation dated October 5, 1998, Dr. Olsewski indicated that appellant could sit, walk and stand for four to six hours each, but that she could not twist, push, pull, lift, squat, kneel or climb. He stated that appellant required frequent changes of position. On December 17, 1998 Dr. Olsewski stated that appellant could not return to her date-of-injury position and recommended a work-hardening program.

As found by the Office, the position offered by the employing establishment complied with the restrictions placed on appellant by Dr. Heyman. Appellant declined the position stating that she could not comply with the restrictions and relying on Dr. Olsewski.

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

[4] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

The Board finds that at the time of the Office's March 3, 1999 decision the weight of the medical opinion evidence rested with the report of Dr. Heyman. He provided a history of injury, review of the medical records and the results of physical examination. Dr. Heyman stated that appellant could not return to her date-of-injury position, but opined that she could work in a sedentary position. Furthermore, Dr. Olsewski's October 5, 1998 work restriction substantially complies with the duties of the offered position. As he did not provide a narrative report explaining why he believed that appellant could not kneel for two hours, the only difference in restrictions, his findings of disability are not sufficient to overcome the weight accorded Dr. Heyman's well-reasoned report. The Office met its burden of proof to terminate appellant's compensation benefits.

Following the Office's March 3, 1999 decision, appellant submitted additional medical evidence from Dr. Olsewski. In a report dated May 24, 1999, he noted appellant's history of injury and provided his findings on physical examination. Dr. Olsewski recommended that appellant consider vocational rehabilitation in a sedentary position with no bending, twisting, or lifting more than five pounds. He reviewed the offered position and stated that appellant could perform the duties other than kneeling. Dr. Olsewski also stated that appellant should take frequent breaks.

The Office found that there was a conflict of medical opinion between appellant's attending physician, Dr. Olsewski, who stated that she could not kneel and the Office referral physician, Dr. Heyman, who found that appellant could kneel for two hours a day intermittently in accordance with the duties of the offered position.[5]

The Office referred appellant for an impartial medical examination with Dr. Lawrence Miller, a Board-certified orthopedic surgeon. In a report dated February 29, 2000, Dr. Miller noted appellant's history of injury and performed a physical examination. He found no muscle spasm or loss of the lumbar lordotic curve. Dr. Miller stated that appellant could stand on her toes and heels and squat, had normal range of motion to the right and left and could bend forward more than 60 degrees. He stated that there was a positive left Miller's test which appellant stated gave her pain down to the left thigh.

Dr. Miller diagnosed a resolved lumbosacral sprain and stated that appellant's subjective complaints were not supported by the objective findings, because it was physiologically impossible for there to be a positive Miller's test and her pain could not be explained on the basis of known physiological mechanisms. Dr. Miller concluded that there was no further causally related orthopedic disability that would preclude appellant from resuming her preaccident level of activities. He recommended no further treatment.

Where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

[5] Section 8123(a) of the Act, provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. §§ 8101-8193, 8123(a).

opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

In this case, Dr. Miller's report is based on a proper factual background; he provided detailed physical findings and offered the opinion that appellant was no longer disabled and had no medical residuals due to her accepted back condition. This report, therefore, establishes that appellant has no work restrictions that would prevent her from accepting the sedentary suitable work position. As the weight of the medical evidence establishes that the position offered appellant was suitable, the Office properly terminated her compensation benefits.

The March 16, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 18, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[6] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).