

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA J. CANNON and DEPARTMENT OF VETERANS AFFAIRS,
SALT LAKE CITY VETERANS ADMINISTRATION HOSPITAL, Salt Lake City, UT

*Docket No. 99-1718; Submitted on the Record;
Issued January 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation entitlement under 5 U.S.C. § 8106(c)(2) effective March 28, 1996, on the grounds that she refused an offer of suitable work.

On September 15, 1995 appellant, then a 53-year-old medical technologist, filed an occupational disease claim alleging that she developed depression in the performance of duty.

Appellant submitted two reports dated October 10, 1995 and February 20, 1996 from Dr. Lane F. Smith, a Board-certified psychiatrist. Dr. Smith diagnosed major depression that was work related.

On June 4, 1996 the Office referred appellant, together with a statement of accepted facts which included a listing of those employment factors found to be compensable under the Federal Employees' Compensation Act, and questions to be addressed, to Dr. Steven V. Teynor, a Board-certified psychiatrist, for a second opinion examination.

By report dated June 20, 1996, Dr. Teynor reviewed the medical reports of record, reviewed appellant's history, examined and tested her, and diagnosed "major depression, recurrent and severe, in partial remission." He opined: "[t]he compensable work-related factors above aggravated her premorbid, severe, recurrent, major depression, which is currently in partial remission. All of the previously mentioned compensable specific work-related events aggravated her depression." Dr. Teynor noted that, at that time appellant's depression was lifting and was only exacerbated when she thought of work, and he opined that, because of that he believed that it was a temporary aggravation of a premorbid condition.

In response to an Office request for clarification, on September 12, 1996 Dr. Teynor noted:

“I would estimate that the temporary aggravation ceased on March 28, 1996, as this was the beginning of the third month that she had been on Serzone, and she was having a beneficial response to it. This, in conjunction with gains in individual psychotherapy, allowed her to function more appropriately and adequately in her personal life.”

Dr. Teynor opined that, at about that time he believed what was hindering appellant's return to work was her fear of the supervisor implicated in the misconduct identified as compensable factors of employment and he opined that appellant's depression was adequately treated on approximately that date.

By letter dated September 19, 1996, the Office advised appellant that, it had accepted that she had sustained a temporary aggravation of depression which was resolved by March 28, 1996.

On October 1, 1996 the employing establishment sent Dr. Smith a copy of a proposed job for appellant as a medical technologist in the microbiology section versus the chemistry section where she had previously worked, for his approval. The employing establishment noted that the offered position was under a different supervisor, Dave Porter and was in a room physically separated from the chemistry section. Dr. Smith responded on October 7, 1996, crossing out his initial response¹ and writing “[appellant] is still depressed [and] still phobic to the [employing establishment]. In my opinion she [wi]ll never return to your laboratory to work. She [i]s choosing to explore disability/medical retirement.” By response dated October 11, 1996, appellant declined the job offer presented to her through Dr. Smith.

By letter dated October 27, 1996, appellant requested reconsideration of the Office's determination that her condition ceased by March 28, 1996.² In support of her request, she submitted an October 28, 1996 report from Dr. Smith, which noted that, on appellant's three most recent visits, she broke down and cried in his office and was still significantly depressed. He noted that the “proximity to her former place of distress and people with whom that distress was associated plus the new work as such causes her to become very anxious. It is obvious that she cannot return to that environment and would choose to do almost anything else rather than do so.” Dr. Smith diagnosed “Major depression, moderate, recurrent, nonpsychotic” and had developed a specific phobia to her former employment. He indicated that appellant “had shown virtually no progress in the past year despite psychotherapy and adequate doses of appropriate medications for long enough periods of time” and opined that “[appellant's] medical condition has been somewhat static and neither improved nor significantly gotten worse in the past year.” Dr. Smith opined that appellant would become far more depressed, anxious and dysfunctional should she return to work at the employing establishment, based upon the fact that she broke down and cried in his office at the mere suggestion of returning, and he opined that it was best if

¹ The doctor initially replied that appellant was capable of returning to work in a part-time capacity “while she brings her work skills and knowledge back up to standards.”

² She again requested reconsideration on January 22, 1997.

she not return to the employing establishment, and that it was unlikely that she could work anywhere at the present time.

By report dated November 4, 1996, Dr. Ruth A. Richter, a Board-certified psychiatrist, noted that she had been treating appellant since October 16, 1996 for major depression, single episode, without psychotic features, with Serzone; she opined that appellant's illness was directly related to the stressful job situation that she left August 21, 1995 and she explained that appellant continued to suffer from depressive symptoms, and that returning to her former employment would exacerbate her illness and prevent a full recovery.

In a January 14, 1997 report, Dr. Richter noted:

"[T]he [employing establishment] has offered [appellant] a job back in the lab with a different supervisor, but I believe that [appellant] cannot return to the very unhealthy work environment that she experienced at the [employing establishment]. Although she wants to return to work and would be capable of working in a healthy and well-managed work situation, returning to the traumatic environment of the [employing establishment] would most likely cause a recurrence of her symptoms of anxiety and depression and she would once again be unable to work."

On March 21, 1997 the Office referred appellant, together with a lengthy statement of accepted facts including compensable conditions, the case record and specific questions to be addressed, to Dr. George E. Kalousek, a Board-certified psychiatrist, to resolve the conflict in medical opinion between Drs. Richter, Smith and Teynor.³

By report dated April 4, 1997, Dr. Kalousek reviewed appellant's history, noted that on the scale of 1 to 10, where 10 was the maximum amount of depression she suffered from, she was then a level 5 or 6, that it was "quite clear that [she] became very depressed and did indeed suffer from a rather significant recurrent major depressive disorder" and that the situation at work "caused and/or exacerbated her underlying depressive disorder." He noted that appellant was still suffering from residuals from employment factors, indicating "[s]he still has the same signs and symptoms that she complained of," and that "her subjective level of distress has only gone [down] by about 50 percent and her presentation today surely matched that of a woman who was moderately depressed." Dr. Kalousek opined that the specific work event that was affecting appellant was the personality clash between her and her immediate supervisor, and he noted that the compensable work factors were symbolically important of this larger underlying problem. Regarding whether appellant could perform the offered position, he noted that appellant "literally became physically ill when I asked her about going back to work even in the same section of the building where her former supervisor was. There is simply no way that this woman would be able to last for more than a week or so if she was in close physical proximity to that gentleman." Dr. Kalousek opined that appellant was fully employable "but not near this individual who was her supervisor." He opined that "[b]y staying in the VA system she is

³ The Office specifically asked Dr. Kalousek whether appellant was still suffering residuals from employment factors, and whether the offered position in a different area of the laboratory was suitable.

putting herself into a lose-lose situation,” and that “[t]he ideal situation would be if there were a second VA hospital in the general area that she could transfer to and work in the medical laboratory.”

By letter dated May 5, 1997, the Office requested clarification from Dr. Kalousek and advised that “[a] difference with a supervisor is not a valid reason for not accepting a job.”

In a reply dated June 15, 1997, Dr. Kalousek opined, regarding possible jobs for appellant’s specialized skills and referring to his previous report which stated that there was only one laboratory that she could at in the VA system, that the “most likely job for her would still be in the same clinical laboratory that her former supervisor would be in -- this is just a different portion of the room. She still finds that unacceptable,” but then he noted “I would tend to agree that one of the specific restrictions that [appellant] has is that she cannot work in the vicinity of her previous supervisor.” Dr. Kalousek opined that, if the employing establishment offered appellant the job of telephone operator that would not be in the vicinity of the previous supervisor, she would be able to do the job.

On August 11, 1997 an Office medical adviser opined “based on above (Dr. Kalousek’s job restrictions) and the job offer, claimant can perform job offer without adverse affects to herself.”

On August 11, 1997 the employing establishment offered appellant a position as a medical technologist in the pathology and medical laboratory service with Betty J. Lash as the supervisor on the night shift.

Also by letter of the same date, the Office advised appellant that the offered position of medical technologist had been found to be suitable to appellant’s “work capabilities,” that she had 30 days within which to accept the position or to provide reasons for her refusal, and that, if she failed to accept the position, she would not be entitled to further compensation under 5 U.S.C. § 8106(c)(2).

By response dated August 22, 1997, appellant advised the employing establishment that she was declining the offered position based upon the advice of her treating physicians. She cited to the recommendations regarding work in the written reports of Drs. Smith and Richter, and noted that Dr. Kalousek had verbally told her that he was in agreement with the other clinicians and that she “would be a basket case within a week were [she] to return to this environment.” Appellant further claimed that sleep disturbance was a major factor and symptom in her illness, that working the midnight shift was not consistent with normal body rhythms, that she was still taking medication and required extra sleep, and that working that position would completely disrupt her sleep cycle causing a chemical imbalance which would aggravate her stress-related disability. She further claimed that the job description noted that she would serve “in all major areas of the clinical laboratory,” including chemistry, which was still under the prior supervisor who was responsible for both day and night performance, and that, even though there was a different night supervisor, the prior supervisor was very much present in the picture.

In a letter to the Office dated September 8, 1997, the employing establishment noted that appellant would work primarily in hematology/coagulation, blood bank, microbiology and only do duties associated with chemistry/urinalysis on an emergency basis.

By letter dated September 9, 1997, the Office advised appellant that she would be supervised by different supervisors, that the Office had not accepted sleep disturbance as a work-related condition in this claim and that assignment of hours was an administrative matter. The Office gave appellant 15 days within which to accept the position, or suffer termination of her compensation benefits.

By decision dated September 25, 1997, the Office terminated appellant's compensation entitlement finding that she had refused an offer of suitable work. The Office found that Dr. Kalousek's only work restriction for appellant was that she could not work "in close proximity" to her previous supervisor.

Appellant requested an oral hearing which was held on October 28, 1998. She testified that, although she would work a different shift from the prior supervisor, her hours would continue until 7:00 a.m. and the prior supervisor frequently started at 6:30 a.m., such that, there would be direct contact. The night supervisor testified that, with the offered position appellant would come into contact with the prior supervisor because shifts overlapped and because the prior supervisor was responsible for reviewing all work done, which included appellant's work.

On September 20, 1997 appellant claimed that the prior supervisor's wife was the hematology supervisor and a person she would have to be directly involved with, that they had a very close connection, and that they always conferred on employee decisions. She further submitted a January 8, 1997 statement alleging that the service chief had stood behind the prior supervisor's actions and decisions, several of which were found to be compensable factors of employment.

Also submitted was a September 26, 1997 report from Dr. Richter which strongly advised that appellant could not return to the employing establishment, and that, if she did return, she was likely to be retraumatized, decompensate and become ill again. Dr. Richter further noted that working the night shift "may destabilize [appellant], especially since in this position she will continue to have contact with her former abusive supervisor."

In an October 28, 1998 statement, appellant argued that she had been repeatedly counseled by her treating physicians that she should not return to the setting in question, that the five laboratory departments all shared space which was an open area with much cross interfacing, that they shared specimens and information on a daily basis with all employees involved, that there was no way to avoid interaction with other employees, and that the service chief was aware of appellant's mistreatment by the former supervisor and allowed it to go on by supporting his supervisory decisions.

By decision dated December 30, 1998, the hearing representative affirmed the September 25, 1997 Office decision finding that the opinion of Dr. Kalousek constituted the weight of the medical evidence. The hearing representative noted that Dr. Szakacs testified that the position shift was offered so as to minimize the chances of running into Mr. Fontenot, that

appellant did not want to work night shift and had asked for day shift, but that Dr. Szakacs had never met appellant. He further noted that the additional reports from Drs. Smith and Richter were on one side of the conflict resolved by Dr. Kalousek.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁷ The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant. The burden is on the Office with respect to the period subsequent to the date when compensation is terminated or modified.⁸

Under section 8106(c)(2) of the Act,⁹ the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.¹⁰ Section 10.124(c) of the Office's regulations¹¹ provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.

The Board finds that the Office misconstrued the impartial medical examiner's reports. Dr. Kalousek noted on April 4, 1997 that appellant clearly remained depressed and had residuals

⁴ *Harold S. McGough*, 36 ECAB 332 (1984); see Federal (FECA) Procedure Manual, Chapter 2.812, para. 3 (March 1987).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁷ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

⁸ See *Patrick P. Curran*, 47 ECAB 247 (1995); *George J. Hoffman*, 41 ECAB 135 (1989); *Raymond M. Shulden*, 31 ECAB 297 (1979).

⁹ 5 U.S.C. § 8106(c)(2).

¹⁰ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 253, 259 (1984).

¹¹ 20 C.F.R. § 10.124(c).

of her accepted employment-related condition. Further, rather than stating that appellant could resume her date-of-injury job or another job within the same laboratory complex, he opined that, there was “simply no way that this woman would be able to last for more than a week or so if she was in close physical proximity to that gentleman,” and that “by staying in the VA system she is putting herself into a lose-lose situation.” The Board notes that this statement does not support that appellant can return to work at the employing establishment. Thereafter, Dr. Kalousek opined that one of appellant’s restrictions would be that appellant could not work in the vicinity of the prior supervisor. The Board notes that he did not state that appellant could perform the job description with which he had been provided, and therefore, he did not provide an opinion on an essential question of this case, such that, the Office cannot now claim that he opined that appellant could perform the offered position. Therefore, the Office has failed to establish the suitability of the offered position or to resolve the conflict as to what appellant could do. Additionally, Dr. Kalousek mentioned that working in the vicinity restriction was only one of appellant’s restrictions, but he failed to articulate or elaborate on the others. Therefore, the Board finds that his medical report is incomplete and cannot constitute the weight of the medical evidence in this matter. Accordingly, the suitability of the offered position has not been established, and appellant did not refuse suitable work.

Accordingly, the decision of the Office of Workers’ Compensation Programs dated December 30, 1998 is hereby reversed.

Dated, Washington, DC
January 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member