U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAM M. UMBEHANT and U.S. POSTAL SERVICE,
POST OFFICE, Demorest, GA

Docket No. 00-2087; Submitted on the Record;
Issued June 21, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits, effective May 24, 1999, on the grounds that she refused an offer of suitable work.

On February 28, 1997 appellant, a 38-year-old rural carrier, injured her neck when her vehicle was struck from behind by another vehicle. She filed a claim for benefits on March 4, 1997, which the Office accepted on May 19, 1997 for cervical strain. Appellant has not returned to work since that time.

By letter dated October 17, 1997, the Office asked appellant's treating physician, Dr. Nabil Muhanna, Board-certified in psychiatry and neurology, to determine appellant's current condition and evaluate her ability to return to some form of modified employment.

In a report dated January 12, 1998, a vocational rehabilitation counselor stated that appellant was capable of performing a sedentary job on a part-time basis, up to four hours per day. She stated that appellant could lift up to eight pounds with her left hand and up to five pounds with her right hand, on occasion, with no overhead lifting or repetitive use of the right hand.

In a report dated February 5, 1998, Dr. Muhanna stated that a magnetic resonance imaging (MRI) scan appellant underwent showed no major abnormalities, although she complained of constant pain.

On February 11, 1998 the employing establishment offered appellant a limited-duty job as a modified temporary relief carrier, performing sedentary work, with the option of sitting and standing as comfort dictated. The position required no lifting over eight pounds with her left hand, no lifting more than five pounds with her right hand and would allow her to work from four to eight hours as her restrictions permitted.

On March 6, 1998 Dr. Muhanna approved the modified position offered by the employing establishment, indicating his assent with a handwritten notation on a copy of the modified job offer. He added that appellant should not use her right hand for more than one out of every four hours, and should avoid overhead lifting. On March 10, 1998 Dr. Muhanna indicated that appellant should rest for 20 minutes twice every 4 hours and advised that she was able to work 4 hours per day.

By letter dated February 20, 1998, the Office referred appellant to Dr. Christopher Edwards, a specialist in orthopedic surgery, for a second opinion examination.

In a report dated March 10, 1998, Dr. Edwards stated that appellant exhibited evidence of a possible mechanical component to her neck pain. He noted that the MRI scan suggested some posterior bulging at the C5-6, C6-7 disc space levels and advised that with regard to her work, she was still in tremendous continued pain. Dr. Edwards indicated that, on the basis of one visit, he could not recommend that she return to her former work capacity.

In a report dated April 27, 1998, Dr. Edwards indicated that appellant had undergone normal computerized axial tomography (CAT) scan and electromyelogram (EMG) and stated: "With regards to her overall clinical picture, objectively, we simply cannot find any objective evidence at all as to why [appellant] keeps complaining with the subjective complaints she has."

Dr. Edwards opined that appellant should return to work at her previous job, although he stated that he was not familiar with the specific duties of that particular job. He then stated in an addendum that he had reviewed the February 11, 1998 modified job offer from the employing establishment and that based on the job description, he recommended that appellant return to work effective immediately.

By letter dated May 4, 1998, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).[1]

By letter dated May 15, 1998, appellant refused the modified job offer.

By letter dated June 8, 1998, the Office advised appellant that it had received the May 15, 1998 letter from her attorney indicating she had refused to accept the employing establishment's modified job offer. The Office advised appellant that she had 15 days in which to accept the position, or it would terminate her compensation. Appellant did not respond to this letter within 15 days.

In a report dated June 12, 1998, Dr. Richard Bernstein, Board-certified in psychiatry and neurology, stated that EMG studies of appellant he conducted were normal and advised that there were absolutely no objective abnormalities on neurological examination.

[1] 5 U.S.C. § 8106(c)(2).

Appellant submitted a Form CA-20 dated February 11, 1999, a report dated November 9, 1998 and an undated report from Dr. Stewart, a Board-certified. In his Form CA-20, Dr. Stewart diagnosed cervical radiculopathy of unknown etiology and checked a box indicating that he believed the condition found was caused or aggravated by her employment; *i.e.*, her February 28, 1997 employment injury. In his two reports, Dr. Stewart reviewed appellant's history of cervical spine disease and cervical spine surgery, stated findings on examination, indicated his course of treatment and diagnosed chronic pain syndrome with radicular components. He did not provide an opinion regarding whether these conditions would affect her ability to perform the modified job offered by the employing establishment.

The Office issued a proposed notice of termination on March 9, 1999. The Office informed appellant that she had 30 days in which to submit additional argument evidence in opposition to the proposed termination.

Appellant submitted a December 22, 1998 report from Dr. Stewart in which he essentially reiterated his earlier findings and conclusions.

By decision dated May 24, 1999, the Office found that appellant was not entitled to compensation benefits on the grounds that she had refused to accept a suitable job offer.

By letter dated June 22, 1999, appellant's attorney requested an oral hearing, which was held on December 13, 1999. In support of her request, appellant submitted several additional reports from Dr. Stewart. None of these reports, however, contained an opinion regarding whether she was capable of performing the modified job.

By decision dated March 7, 2000, an Office hearing representative affirmed the May 24, 1999 termination decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective May 24, 1999 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. Under section 8106(c)(2) of the Federal Employees' Compensation Act[2] 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.[3] Section 10.124(c) of the Office's regulations 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 a showing before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such

[2] 5 U.S.C. §§ 8101-8193.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[4] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

employment.[5] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The determination 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 the medical evidence.[6] In the instant case, the employing establishment located a light-duty, sedentary job as a modified temporary relief carrier, which Drs. Muhanna and Edwards both approved as suitable for appellant and within her physical restrictions. The Office found that the weight of the medical evidence rested with Dr. Edwards' opinion, which indicated that appellant was capable of performing the modified job and returning to work on light duty. This decision was proper, as Dr. Edwards' opinion represented the weight of medical opinion at the time of the Office's termination decision.[7] Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Accordingly, the refusal of the job offer therefore cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation. Therefore, as the Office met its burden of proof to establish that appellant refused a suitable position, the Office met its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant, who thereafter submitted numerous reports from Dr. Stewart. These reports, however, did not contain countervailing, probative medical evidence that appellant continued to have residual disability from her accepted February 28, 1997 injury or that she was physically unable to perform the modified, light-duty job. Dr. Stewart merely stated findings on examination and provided periodic updates on appellant's cervical condition. He provided no opinion as to whether appellant is capable of performing the modified position.[8] Thus, Dr. Stewart's reports did not satisfy appellant's burden of proof to submit medical evidence sufficient to warrant modification of the Office's May 24, 1999 termination decision. Accordingly, the Board affirms the Office's March 7, 2000 decision, affirming the May 24, 1999 termination decision.

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

[6] *Robert Dickinson*, 46 ECAB 1002 (1995).

[7] *Barbara R. Bryant*, 47 ECAB 715 (1996).

[8] The form report from Dr. Stewart that supported causal relationship with a checkmark is insufficient to establish the claim, as the Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

The decision of the Office of Workers' Compensation Programs dated March 7, 2000 is affirmed.

Dated, Washington, DC
June 21, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member