U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN B. JONES and U.S. POSTAL SERVICE,
RICHMOND MAIN POST OFFICE, Richmond, VA

Docket No. 00-201; Submitted on the Record;
Issued March 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work; (2) whether the Office properly found that appellant had received a $2,428.80 overpayment in compensation; and (3) whether appellant was with or without fault in the creation of the overpayment.

On September 9, 1997 appellant, then a 38-year-old casual clerk, was pulling a tray of mail from a tray cart when the tray disengaged from the track of the cart and turned over, causing appellant to twist her wrist and back. She returned to work on September 12, 1997 but stopped again on September 22, 1997. She returned to work the next day.

In an October 12, 1997 letter, the Office accepted appellant's claim for left lumbosacral strain and wrist sprain. Appellant's temporary appointment with the employing establishment ceased December 31, 1997. The Office began payment of temporary total disability compensation effective January 5, 1998.

In a July 17, 1998 letter, the employing establishment offered appellant a position as a modified casual clerk, sorting mail into a letter case while using an adjustable rest bar stool. The employing establishment indicated that physical requirements of the position were lifting 30 pounds intermittently, continuous standing with frequent changes of position, no bending or stooping and intermittent reaching at shoulder level with no repetitive reaching above shoulder level.

In a July 21, 1998 letter, the Office informed appellant that it found the job offered by the employing establishment to be suitable. The Office gave appellant 30 days to accept the position or provide her reasons for refusing it. The Office stated that any reasons or explanations given by appellant would be considered prior to a determination of whether her reasons for refusing the position were justified. The Office warned appellant that a refusal to accept an offer of suitable employment without justification would result in a termination of compensation.

In an August 14, 1998 letter, appellant refused the offered position. She stated that the offered position was the same position that her physician had stopped her from performing because it caused constant, irritating back pain. In a September 3, 1998 letter, the Office found that the reasons given by appellant for refusing the position were unacceptable. The Office gave appellant 15 days to accept the position, after which it would issue a final decision. In a September 22, 1998 decision, the Office terminated appellant's compensation effective October 11, 1998 for refusing to accept suitable employment. Appellant requested an oral hearing.

In a December 7, 1998 letter, the Office informed appellant that it had been unable to stop the issuance of a December 5, 1998 compensation check. The Office noted that appellant was not entitled to any compensation after October 11, 1998 and, therefore, had received an overpayment in compensation for October 11 through December 5, 1998. The Office asked appellant to return the December 5, 1998 compensation check.

In a February 26, 1999 letter, the Office made a preliminary determination that appellant had received a $2,428.80 overpayment in compensation for October 11 through December 5, 1998 because she received compensation after her entitlement to compensation was terminated. The Office further found that appellant was at fault in the creation of the overpayment because she was advised that she was not entitled to further compensation but accepted payment of compensation that she should have known she was not entitled to receive.

The Office advised appellant of her right to submit evidence if she disagreed with the finding of an overpayment, the amount of the overpayment, or believed that the overpayment occurred through no fault of her own and recovery of the overpayment should be waived. The Office also informed appellant of her right to seek a hearing before an Office hearing representative. In a March 3, 1999 response, appellant requested a hearing before an Office hearing representative.

On May 12, 1999 appellant received separate hearings on the termination of her compensation for refusing suitable work and the overpayment of compensation. In separate decisions, issued and finalized on August 5, 1999, the Office hearing representative found that the Office had properly terminated appellant's compensation for refusal to accept suitable work and had properly found that appellant had received an overpayment in compensation and was at fault in the creation of the overpayment.

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[1] An employee who refuses or

[1] 5 U.S.C. § 8106(c)(2).

neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[2]

In a March 25, 1998 report, Dr. Albert M. Jones, a Board-certified physiatrist, reviewed appellant's medical history and complaints. He related that appellant had a sedentary job, in which she sat and sorted mail, but complained that this was too much for her to tolerate. Appellant reported pain aggravated by any bending, lifting and twisting. She denied any sciatica. Dr. Jones reported that findings from a December 11, 1997 magnetic resonance imaging (MRI) scan were compatible with degenerative disc changes at L4-5 and L5-S1. He indicated there was no evidence of disc protrusion, herniation or any type of stenosis.

Dr. Jones found tenderness on palpation in the left lumbar paraspinal muscles and in the iliolumbar region. He stated that motor and sensory examinations were normal. Dr. Jones diagnosed a chronic lumbar strain with poor body mechanics. He commented that appellant's history and examination were consistent with a deep muscular ligamentous strain which appeared to be more symptomatic on the left.

In an April 7, 1998 report, Dr. Jones stated that appellant had no real change in her complaints with localized pain in her left flank and lumbar areas. He indicated that she had had a physical demand capacity of light, according to a recent functional capacity evaluation. Dr. Jones commented that he would be willing to review work opportunities within appellant's capacity.

In a June 9, 1998 report, Dr. Jones stated that appellant could lift or carry up to 15 pounds continuously and up to 30 pounds intermittently. He stated that there was no restriction in standing as long as appellant had frequent opportunities to change position. Dr. Jones indicated that there were no specific restrictions in walking. He restricted appellant from bending or stooping. Dr. Jones commented that appellant could push and pull weights up to 30 pounds. He stated that appellant should not do much reaching above her shoulder level on a repetitive basis. Dr. Jones concluded that appellant could do light work within his restrictions.

In a July 15, 1998 report, Dr. Robert S. Adelaar, a Board-certified orthopedic surgeon, stated that appellant had negative straight leg raising, full range of S1 joint hip motion and intact deep tendon reflexes, sensation and motor strength. He reported that spinal x-rays did not show any evidence of significant degenerative disease or congenital variation. Dr. Adelaar concluded that appellant had no objective evidence of ongoing medical disability other than subjective symptoms of pain with activity. He indicated that appellant could return to work in her job as a mail processor and clerk. Dr. Adelaar commented that, in spite of appellant's symptoms, a return to that type of work should not cause any danger to her lumbar spine. He diagnosed a chronic lumbar strain that had been well treated.

In a July 21, 1998 report, Dr. Jones indicated that he had reviewed the job offer of the modified casual clerk position with appellant. He related that appellant predicted the position would be very aggravating to her back due to the need to reach forward constantly in sorting

[2] 20 C.F.R. § 10.124.

mail. She stated that she wanted to return to work as a mail verifier, which was her initial limited-duty assignment after the employment injury.

Dr. Jones stated that he had reviewed the job description for the modified casual clerk position and had explained to appellant that he could not find a medical reason that appellant would not have the physical capacity for the position. Dr. Jones commented that, if the job of mail verifier were available, it should be considered. He offered to review any job description of the position.

The medical evidence of record, particularly the reports of Dr. Jones, showed that the modified casual clerk position was within the physical restrictions set by him for appellant. Dr. Jones specifically stated that he could not see any reason why appellant could not perform the duties of the offered position. Appellant contended that the job would aggravate her back condition. However, she did not submit any medical evidence to establish that the physical requirements of the job offered to her would aggravate her employment-related condition.

In a May 18, 1999 report, Dr. Jones clarified that appellant had lifting restrictions of up to 15 pounds continuously and 30 pounds intermittently. He indicated that appellant had no restrictions in terms of standing, sitting or walking. Dr. Jones commented that she would have aggravation of her back pain if she had to perform repetitive reaching above her shoulder 50 to 60 times an hour. He stated that, if the job allowed appellant to stand and sort mail at shoulder level, it would be fine. Dr. Jones indicated that even from a sitting position appellant should have the ability to reach up to a 130-degree angle at the shoulder if she was not required to do so more than 15 to 20 times an hour.

Appellant has not submitted any evidence to show that the offered position would exceed the restrictions set forth by Dr. Jones. The Office, therefore, properly concluded, on the basis of the medical evidence of record, that the job was suitable for appellant and, therefore, properly terminated her compensation for refusing such suitable employment.

The Board further finds that appellant received a $2,428.80 overpayment in compensation.

Appellant's compensation was properly terminated effective October 11, 1998 because she refused to accept suitable work offered to her. She was not entitled to any compensation from the Office after that date. Therefore, the subsequent payment of $2,428.80 to appellant constituted an overpayment of compensation.

The Board finds that appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment of recovery would defeat the purpose of the Act or would be against equity and

good conscience."[3] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provide in relevant part:

> "A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--
>
> > (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
> >
> > (2) Failed to furnish information which he or she knew or should have known to be material; or
> >
> > (3) Accepted a payment which he or she knew or should have been expected to know was incorrect. (This provision applies to the overpaid individual only.)"[4]

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

The Office, in terminating appellant's compensation, informed her that she was not entitled to any further payment of compensation after October 11, 1998. In a December 4, 1998 memorandum of a telephone conversation, a Office claims examiner indicated that appellant was informed that she was not entitled to the check dated December 5, 1998 and was asked to return the check. The claims examiner reported that appellant indicated the check was in the bank and instructed the claims examiner to call her congressman. The Office followed the telephone call with a December 7, 1998 letter to appellant, informing her that she was not entitled to the compensation payment and instructing her to return the check. Appellant, therefore, was fully informed that she was not entitled to further compensation after October 11, 1998, particularly to the December 5, 1998 check issued to her after that date. Her acceptance of that check was the acceptance of a compensation payment to which she knew or should have known she was not entitled.

At the May 12, 1999 hearing, appellant contended that she had not returned the compensation check because she had not returned to work. Appellant, however, had refused to return to work, specifically to a job that had been found suitable for her. She, therefore, was not entitled to any compensation after she refused the offered position even if she remained unemployed.

The Board notes that the issuance of a compensation payment after the termination of compensation was an error by the Office. The Board has held, however, that where an employee

[3] 5 U.S.C. § 8129(b).

[4] 20 C.F.R. § 10.433(a).

is with fault in the creation of an overpayment, the overpayment must be recovered even though the overpayment resulted from the negligence by employees of the government.[5]

The decisions of the Office of Workers' Compensation Programs, dated August 5, 1999, are hereby affirmed.

Dated, Washington, DC
March 13, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[5] *Fergus Tait*, 30 ECAB 929 (1979).