U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALLEN INGRAM and U.S. POSTAL SERVICE,
HILLCREST POST OFFICE, Little Rock, AR

Docket No. 00-949; Submitted on the Record;
Issued March 15, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 2, 1997 on the grounds that she refused an offer of suitable work.

On August 20, 1997 appellant, then a 43-year-old distribution and window clerk, filed an occupational disease claim alleging that she sustained systemic, chronic musculoskeletal pain, beginning with a December 1, 1977 injury which caused right rotator cuff tendinitis with impingement syndrome.[1] She also alleged that she sustained anxiety and frustration related to her chronic pain.

Appellant stopped work on August 11, 1997 and did not return. She used leave to cover wage loss from August 11, 1997 through January 16, 1998, then used leave without pay from January 19 to February 18, 1998. Her application for disability retirement was approved on June 2, 1998.

Appellant submitted medical reports from Dr. Rose Shaw-Bullock, an attending family practitioner. In these reports, dated from August 18 to October 13, 1997, she noted appellant's complaints of systemic musculoskeletal pain and diagnosed "occupational overuse syndrome arthritis," fibromyalgia, right shoulder rotator cuff tendinitis with impingement and radiculopathy to the upper back and chest wall, spinal stenosis, low back pain, carpal tunnel

[1] The Office accepted the December 1, 1977 injury for right rotator cuff tendinitis with impingement. This claim is not before the Board on the present appeal.

syndrome, cervical spondylosis and depression.[2] Dr. Shaw-Bullock held appellant off work from August 18 to September 4 and from October 1 through December 24, 1997. Beginning on September 9, 1997, for periods when appellant was released to work, she restricted her to working four hours per day, with no lifting, reaching, kneeling, pushing or pulling and all activities to be performed on an intermittent rather than a continuous basis.

Dr. Shaw-Bullock submitted November 4 and December 2, 1997 work absence slips holding appellant off work "until further notice" and November 4 and December 2, 1997 duty status reports renewing previous work restrictions.[3] She submitted periodic reports holding appellant off work through December 24, 1997, when she released appellant to "part-time" work.[4]

In a January 2, 1998 duty status report, Dr. Shaw-Bullock indicated that appellant was able to work 4 hours per day within the previously prescribed restrictions against continuous activity, no reaching, kneeling, pushing or pulling, and no lifting greater than 20 pounds.[5]

On January 20, 1998 the employing establishment offered appellant a limited-duty position as a modified window clerk. She was to box mail with her left hand only and perform other clerical duties. The employing establishment noted that in accordance with Dr. Shaw-Bullock's instructions, lifting would be limited to 20 pounds and all other activities would be intermittent during a 4-hour workday. The employing establishment also advised appellant that, under the Federal Employees' Compensation Act,[6] a partially disabled employee who refused or neglected suitable work would not be entitled to compensation. She was afforded five days in which to either accept or reject the offer. The record indicates that appellant did not sign or otherwise respond to the job offer.

[2] In an October 16, 1997 report, Dr. Derek Lewis, an associate of Dr. Shaw-Bullock's, diagnosed depression which appellant related to unspecified factors of her federal employment. In a December 3, 1997 narrative report, Dr. Shaw-Bullock newly diagnosed "suspected synovitis of the hands." She characterized appellant's musculoskeletal pain as "chronic … of unknown etiology and difficult to treat.… With her chronic unrelenting pain and risk of further injuring her rotator cuff, she … is a poor candidate for employment."

[3] In the December 2, 1997 duty status report, Dr. Shaw-Bullock did not respond to Question 12, "Employee Advised to Resume Work?" or Question 13, "Employee Able to Perform Regular Work …?"

[4] In a December 24, 1997 attending physician's form report (Form CA-20), in response to Question 21, "Has employee been advised that he/she can return to work?" Dr. Shaw-Bullock checked a box "yes," and wrote "part time."

[5] Dr. Shaw-Bullock made identical recommendations in a February 4, 1998 duty status report.

[6] 5 U.S.C. §§ 8101-8193.

On January 23, 1998 appellant claimed a schedule award.[7]

In a February 16, 1998 letter, Dr. Shaw-Bullock noted advising appellant to "try the new position offered," as the employing establishment would not require her "to continue duties which worsen her symptoms. Since her symptoms are subjective, the controvers[y] arises whereby [appellant] feels she is too mentally and physical[ly] handicapped to work and the physician thinks otherwise." Dr. Shaw-Bullock noted that appellant "complained of not being able to drive due to depression, adverse reaction to medications, … fatigue, … [fear] of getting fired if she has to take off from work due to illness" and the subjective belief that she could not lift more than two pounds. She opined that appellant's main difficulty was depression.

In February 24, 1998 letters, the Office advised appellant that the limited-duty window clerk position offered to her by the employing establishment had been found to be suitable work, and that the position remained available. She was provided 30 days in which to accept or decline the position. The Office specifically advised appellant that under section 8106(c)(2) of the Act, "a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation." Therefore, any claimant who refuses an offer of suitable employment … is not entitled to any further compensation for wage loss or schedule award." The Office emphasized that if appellant failed to accept the offered position without sufficient justification, her right to further compensation would "be jeopardized."

In a March 23, 1998 letter, Dr. Shaw-Bullock stated that she had reviewed the job offer and that appellant "should be able to perform the duties. Currently, she is taking nonsedating analgesics; therefore, she should stay alert."[8] Dr. Shaw-Bullock recommended that appellant be referred "for a second opinion, because she has indicated that she [was] unable to work under any conditions because of physical and emotional symptoms."

In an August 25, 1999 letter, the Office advised appellant that her reasons for refusing the position were unacceptable and that she had 15 days to accept the offer of suitable work before a final decision would be rendered in her case.

By decision dated September 15, 1999, the Office terminated appellant's wage-loss compensation effective December 2, 1997, "the date that Dr. Shaw[-Bullock] stated that [she] could return to work four hours per day" on the grounds that she had refused an offer of suitable

[7] In a March 4, 1998 report, Dr. Lewis opined that appellant had reached maximum medical improvement as of March 4, 1998. Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.), in particular "pages 41 to 66 as well as pages 65 to 72," Dr. Lewis noted a 2 percent impairment of cervical extension, hip extension limited to 45 degrees equaling a 2 percent impairment and lumbar spinal extension limited to 20 degrees equaling a 2 percent impairment. He also noted category 2 neck pain radiating into the right upper extremity, equaling a 5 percent impairment according to page 110 of the A.M.A., *Guides*. Dr. Lewis opined that appellant was "more mentally impaired than physically," and required "another neuropsychological evaluation."

[8] The Office sent Dr. Shaw-Bullock a copy of the limited-duty job offer accompanying a February 19, 1998 letter asking whether the accepted right rotator cuff condition would prevent appellant from performing those duties. The Office noted that appellant's "stress condition had not been accepted…."

work. The Office found that Dr. Shaw-Bullock stated that appellant could return to restricted duty for four hours a day beginning January 2, 1998 and that a job offer meeting those restrictions was made to appellant on January 20, 1998. The Office found that appellant refused the offered position on February 16, 1998, citing an alleged inability to drive due to depression, reactions to medication and fear that she would be fired if she took time off for medical reasons. She also did not respond to the Office's February 24, 1998 and August 25, 1999 letters advising her that the offered position remained available and had been determined to be suitable work and that her reasons for refusing the position were found insufficient. The Office noted that appellant remained entitled to "medical treatment associated with the effects of the December 1, 1977 injury."

The Board finds that the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work. The Board further finds, however, that the December 2, 1997 termination date was premature.

It is a well-settled principle that, once the Office accepts a claim, it has the burden of justifying termination of compensation.[9] Section 8106(c)(2)[10] of the Act 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. To establish that appellant has refused or abandoned suitable work, the burden is first on the Office to substantiate that the position offered was consistent with appellant's physical limitations and provide the claimant with a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable.[11]

Under section 10.124(c)[12] of the Office's regulations, the burden then shifts to the claimant to show that his or her refusal or neglect of suitable work was reasonable or justified. The Office's regulations specify that claimants shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[13] Finally, the burden shifts back to the Office for determination of whether appellant's reasons for declining or refusing the position were unjustified.[14] To justify termination of compensation, the Office must show that the work offered was suitable[15] and must inform appellant of the consequences of refusal to accept such employment.[16]

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[9] *Shirley B. Livingston*, 42 ECAB 855 (1991).

[10] 5 U.S.C. § 8106(c)(2).

[11] *Mary A. Howard*, 45 ECAB 646 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] 20 C.F.R. § 10.124(c).

[13] *Maggie L. Moore*, 42 ECAB 484 (1991).

[14] *See* cases cited *supra* at note 11.

[15] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[16] *See Maggie L. Moore*, *supra* note 11.

The Board finds that the Office properly determined that appellant had rejected an offer of suitable employment and met its burden of proof in terminating her monetary compensation benefits.[17] The evidence of record establishes that, despite providing appellant with an opportunity to accept the position following notification of the Office's suitability determination and subsequent notification that her reasons for rejecting the job offer were insufficient, appellant did not accept the job offer. Appellant did not demonstrate or submit any evidence that the modified clerk position was outside her physical limitations as noted by Dr. Shaw-Bullock.

However, under the facts and circumstances of this case, the Office's selection of December 2, 1997 as the date upon which to terminate appellant's compensation is clearly in error. In its September 15, 1999 decision, the Office terminated appellant's compensation effective December 2, 1997 on the grounds that she had refused an offer of suitable work. However, the limited-duty job offer was not made until January 20, 1998. Thus, it is impossible that appellant could have refused an offer on December 2, 1997 that she did not receive until January 20, 1998.

Once appellant received the January 20, 1998 offer, the Office allowed appellant the opportunity, as provided for in section 10.124(c) of its regulations, to submit any reasons why she believed that the offered position was not within her medical capabilities. Although appellant did not respond directly to the employing establishment or the Office regarding the job offer, she did explain on February 16, 1998 to Dr. Shaw-Bullock, her attending family practitioner, that she could not perform the offered position. Dr. Shaw-Bullock opined that appellant was capable of performing the modified window clerk position, although appellant contended that depression, fatigue and fear of reprisal prevented her from working.

The burden of proof then shifted back to the Office, who sent appellant February 24, 1998 letters specifically advising that the offered position had been determined to be suitable work, and that her refusal could result in termination of her compensation under section 8106(c) of the Act. The Board finds that the February 24, 1998 letters fulfill the Office's requirement of notifying appellant that the offered position was suitable work and of the Act's penalty provisions for refusing such an offer.[18] However, the Office did not advise appellant that her reasons for refusing the offered position were found insufficient until the Office's August 25, 1999 letter, which also afforded her an additional 15 days before a final decision would be rendered in her case.

Thus, the Office could not properly terminate appellant's compensation benefits until the day following 15 days after August 25, 1999, which falls on Friday, September 10, 1999. As of that date, the Office had determined the offered position was suitable work and properly notified appellant, notified appellant of the Act's penalty provision for refusing suitable work, afforded her an opportunity to submit her reasons for refusal and notified her that her reasons for refusal were not justified. The Office also took the additional step of giving appellant another 15 days in which to respond and thus could not render a decision until the day after that 15-day period.

[17] *See Karen L. Mayewski*, 45 ECAB 219 (1993); *Steven R. Lubin*, 43 ECAB 564 (1992).

[18] *Id.*

Therefore, the Board finds that the Office cannot properly terminate appellant's monetary compensation benefits prior to September 10, 1999.

The case must be returned to the Office for the amount of wage-loss compensation due to appellant for December 2, 1997 through September 10, 1999 for any periods of disability related to the accepted right rotator cuff tendinitis with impingement syndrome.

The decision of the Office of Workers' Compensation Programs dated September 15, 1999 is hereby affirmed as modified.

Dated, Washington, DC
March 15, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member