U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSIE N. DALLURA and U.S. POSTAL SERVICE
POST OFFICE, Brooklyn, NY

Docket No. 02-1579; Submitted on the Record;
Issued December 5, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective January 2, 2002, on the grounds that she refused suitable work.

On August 29, 1995 appellant, then a 43-year-old letter carrier filed a Form CA-2a, notice of recurrence of disability, claiming that on August 24, 1995 she felt a sharp pain in her lower back and found it difficult to walk.[1] Appellant stopped work on August 24, 1995 and returned to light duty on July 22, 1996.

By letter dated November 2, 1995, the Office requested additional medical and factual evidence. Appellant was allotted 30 days.

By letter dated November 8, 1995, appellant enclosed additional information.

In a statement dated November 14, 1995, appellant indicated that she was lifting trays of letter-sized mail and buckets of flat-sized mail.

In a report dated November 16, 1995, Dr. David M. Leivy, a Board-certified neurological surgeon, indicated that, on August 24, 1995, as appellant was preparing to deliver letters and moving mail around, she developed back pain, which, while working, radiated down her legs, principally on the right. He opined that appellant suffered from an extruded intervertebral disc at L4-5, secondary to lifting mail at work. Dr. Leivy indicated that "considering appellant had a

[1] Appellant alleged that the recurrence of disability was connected to a prior work-related injury of October 1990, which the Office accepted. Prior to filing the aforementioned recurrence claim, appellant had been performing eight hours of full-duty employment with no physical limitations since April 10, 1991 when she sustained a lower back injury in the performance of duty. The record reflects that appellant had preexisting back problems dating back to 1983. The record also reflects that appellant previously had two surgeries to repair lumbar herniated discs at two levels.

prior herniated disc in 1990, this new problem is definitely related to her work and possibly related to the incident of January 27, 1990 as well."

By letter dated March 28, 1996, the Office advised appellant that they were treating her claim as a new traumatic injury claim, as a factor was identified as being the causative element to appellant's condition.

On April 4, 1996 the Office accepted the claim for the condition of aggravation of herniated disc.[2]

On July 22, 1996 appellant returned to a limited-duty assignment for eight hours a day in accordance with certain physical limitations and continued through December 6, 1999.

On December 27, 1999 appellant filed a notice of recurrence of disability occurring on December 6, 1999, indicating that she experienced debilitating pain in her lower back and legs she stopped work on December 7, 1999.

Appellant returned to a limited-duty assignment for four hours a day, effective March 28, 2000. The physical restrictions included no pushing, pulling, kneeling, lifting or twisting, with intermittent walking, standing and operating a motor vehicle up to two hours a day. Appellant's responsibilities included: casing mail; performing administrative office carrier duties; lobby monitor; answering customer inquiries; and processing nixie and CFS mail. She performed this assignment for a few days.

Appellant suffered another recurrence of disability April 1, 2000, which the Office accepted. She did not return to work.

By letter dated April 3, 2001, the Office referred appellant to Dr. Harvey Levine a Board-certified orthopedic surgeon, for a second opinion examination.

In an April 19, 2001 report, Dr. Levine noted appellant's history of injury and treatment. He found that examination of the thoracolumbar spine revealed a six-inch healed incision scar, which was tender and in the coccyxgeal region. Further, Dr. Levine noted that flexion of the trunk, was 50/90, while other range of motion were found to be within normal limits. He determined that the Kemp, Goldwaith and Valsalva's tests were all negative and the Lasegue's test was positive on the right side in a sitting position at 100 degrees and in a supine position at 45 degrees. Dr. Levine explained that, upon examination of appellant's right foot, difficulty was noted when she walked on her heels and toes and exhibited a decreased Achilles reflex on the right and numbness on the right leg from the knee distally into the right foot. He also found that there was also evidence of weakness of plantar flexion of the right great toe. Dr. Levine indicated that appellant had a temporary aggravation of herniated lumbar discs associated with the work-related injury of August 24, 1995 and that appellant's condition returned to a preinjury status. He stated that she was capable of performing four hours of limited-duty employment.

[2] The Office retroactively authorized a repeat laminotomy and foraminotomy at L4-5 on the right with a disc excision on October 9, 1995.

Dr. Levine indicated that appellant could work with restrictions of not sitting or standing for more than four hours a day. He also added that she could not lift more than 20 pounds.

By letter dated May 10, 2001, the Office advised appellant that a conflict had arisen and she was referred for an independent medical examination.

In a June 14, 2001 report, Dr. Michael Katz, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He indicated that she had a well-healed posterior approach to the lumbar spine and range of motion in forward flexion was 30 percent of normal, no extension, no side-to-side bending, straight leg raising test was negative bilaterally, extensor hallucis longus, tibialis anterior, tibialis posterior and peroneal 5/5 bilaterally. Further, Dr. Katz determined that sensation was intact in the L3-S1 dermatomes and motor was intact in the lower extremities. He provided a diagnosis of lumbar derangement with radiculopathy. He also indicated that appellant would benefit from aquatic therapy and use of a spinal cord stimulator. Additionally, he stated that appellant was not able to return to her preinjury job but she was capable of performing limited employment with no lifting of greater than 10 pounds.

In a report dated July 10, 2001, Dr. Robinson indicated that appellant had an exacerbation of her chronic lumbar condition with left lower extremity radiculopathy and chronic pain syndrome.

By letter dated July 31, 2001, the Office requested that Dr. Katz, complete an OWCP-5 form.

On August 7, 2001 Dr. Katz responded and indicated: that, for one hour a day, no lifting over 10 pounds; for 2 hours a day no pushing or pulling of greater than 10 pounds; for 4 hours a day, walking and standing; 4 up to 2 hours a day, reaching and reaching above the shoulder; and for up to 8 hours a day, sitting. He offered that other physical restrictions included no squatting, kneeling and no climbing.

In an August 9, 2001 OWCP-5 form, Dr. Lawrence J. Robinson, a Board-certified psychiatrist and neurologist, indicated that appellant was released to four hours of limited-duty employment. He indicated that appellant's physical restrictions included: sitting, walking and standing of up to four hours a day, with rare instances of reaching and reaching above the shoulder. Dr. Robinson also indicated that appellant was capable of pushing, pulling, lifting, squatting, kneeling and climbing for 4 hours a day of no greater than 15 pounds. He also indicated that he anticipated that appellant would be capable of increasing her employment hours and that reassessment would be made within four to eight weeks from August 9, 2001.

By letter dated October 18, 2001, the employing establishment offered appellant an eight-hour a day limited-duty job based on the restrictions set forth by Dr. Katz. The offered position informed appellant of the physical demands and responsibilities of the position classified as a modified letter carrier. The responsibilities of the position included casing mail, delivering mail to apartment houses utilizing sacks or buckets under ten pounds, processing CFS mail, updating carrier books and data, answering customer inquiries, acting as lobby coordinator and assisting carriers in new delivery.

By letter dated October 18, 2001, the Office advised appellant that the offered job was found to be suitable by this Office. At that time, appellant was given 30 days to either accept the job or to provide a reasonable, acceptable explanation for refusing the offer.

On October 26, 2001[3] appellant refused the light-duty position for medical reasons. She cited the June 14, 2001 report of Dr. Katz, where he indicated that she could only do limited-seated work and had a marked partial degree of disability. She also noted that casing and delivering mail would not be within her restrictions.

On October 26, 2001 the employing establishment revised the light-duty offer due to a discrepancy between the second opinion report and OWCP-5 form, completed by Dr. Katz. The employing establishment, eliminated the duties of delivering mail to apartment houses utilizing sacks or buckets under 10 pounds.

By letter dated October 26, 2001, the Office advised appellant that the offered job was found to be suitable. She was advised that she had 30 days to either accept the offered job or supply a reasonable and acceptable explanation for refusing the offered job.

By letter dated November 19, 2001, appellant refused the offered position. She indicated that the offered job was in direct conflict with the opinion expressed by Dr. Katz and that she believed that he altered his opinion concerning her ability to work based on leading questions or coercion.

In a November 26, 2001 letter, the Office notified appellant that her reasons for refusing the offer of suitable work were unacceptable. She was given an additional 15 days to accept the job offer or else her compensation would be terminated.

By letter dated December 7, 2001, the Office received a statement from an attorney, Peter Tufo. He stated that he represented appellant in matters pertaining to her compensation claim. Mr. Tufo also indicated that the proposed action by the Office was improper and that additional medical documentation in support of appellant's disability status would be provided.[4]

By letter dated December 26, 2001, appellant's representative enclosed two reports from Drs. Robinson and Leivy.

In a December 14, 2001 report, Dr. Robinson indicated that appellant had a chronic lower back syndrome status post multiple lumbar laminectomies at L4-5 and L5-S1. He noted that she suffered a work-related injury approximately two years ago which exacerbated her condition and accentuated her radiculopathy. Dr. Robinson opined that, because of this injury and the subsequent exacerbation of her condition, she was unable to return to work as a letter carrier. He explained that appellant had an ongoing disability with respect to her lower back and radiculopathy limiting her from physical work that would produce any stress on her lower back

[3] Appellant faxed a letter dated October 18, 2001 regarding the light-duty position.

[4] However, no signed release was submitted from appellant designating the individual as an authorized third party.

or lower extremities. Dr. Robinson opined that the prognosis was guarded and he would presume permanency. He advised that she would benefit from continued neurological follow up.

In a December 20, 2001 report, Dr Leivy indicated that he treated appellant until he retired on May 29, 2001. He opined that, in view of her three laminectomies, recent physical findings, epidural scarring on her last magnetic resonance imaging (MRI) and established efforts to work whenever possible, that appellant was definitely disabled for work and would most likely remain disabled on a permanent basis. Dr. Leivy indicated that any attempts to return appellant to even limited work would only aggravate her physical condition.

By decision dated January 2, 2002, the Office terminated appellant's wage-loss compensation, effective the same date on the grounds that she declined an offer of suitable work.

By letter dated February 22, 2002, appellant, through counsel, requested reconsideration. Her representative alleged that the Office was adversarial in its approach to claims, the second opinion was of little or no probative value, the referee examination was deficient and the job offer did not outline the physical requirements and or comply with the referee medical examination.

In a decision dated April 1, 2002, the Office affirmed the January 2, 2002 termination decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective January 2, 2002, on the grounds that she refused to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act[5] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[6] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[7] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[8]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8106(c)(2).

[7] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[8] *See Robert Dickerson*, 46 ECAB 1002 (1995).

opportunity to make such a showing before entitlement to compensation is terminated.[9] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[10]

The issue 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 medical evidence.[11] In assessing medical evidence, the number of physicians supporting one position or another is not controlling the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[12]

In the present case, the record reflects that the physical restrictions of the modified letter carrier position offered to appellant on October 26, 2001, were in agreement with those provided by Dr. Katz, a Board-certified orthopedic surgeon, who provided an impartial medical evaluation to resolve the conflict between Drs. Leivy and Levine. In a June 14, 2001 report, Dr. Katz noted appellant's history of injury and treatment, complaints and findings of physical examination. He conducted a thorough examination, noting a well-healed posterior approach to the lumbar spine, range of motion in forward flexion was 30 percent of normal and there was no extension. He found testing that revealed no side-to-side bending, straight leg raising test was negative bilaterally, extensor hallucis longus, tibialis anterior, tibialis posterior and peroneal 5/5 bilaterally. Further Dr. Katz determined that sensation was intact in the L3-S1 dermatomes and motor was intact in the lower extremities. Dr. Katz provided a diagnosis of lumbar derangement with radiculopathy. Further he indicated that appellant would benefit from aquatic therapy and use of a spinal cord stimulator. Additionally, he stated that she was not able to return to her preinjury job but appellant was capable of performing limited employment with no lifting of greater than 10 pounds. In the work restriction form dated August 7, 2001, Dr. Katz indicated that appellant could do the following: for 1 hour a day, no lifting over 10 pounds; for 2 hours a day no pushing or pulling of greater than 10 pounds; for 4 hours a day, walking and standing; 4 up to 2 hours a day, reaching and reaching above the shoulder; and for up to 8 hours a day, sitting. He offered that other physical restrictions included no squatting, kneeling and no climbing. These restrictions were consistent with the modified letter carrier position.

In situations 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 opinion of such specialist, if sufficiently well rationalized and based on a proper

[9] 20 C.F.R. § 10.517(a) (1999).

[10] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd* on *recon.*, 43 ECAB 818 (1992).

[11] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[12] *See Connie Johns*, 44 ECAB 560 (1993).

factual background, must be given special weight.[13] Dr. Katz provided such an opinion. The medical evidence of record thus establishes that appellant was capable of performing the modified position.[14] As the weight of the medical opinion evidence, Dr. Katz's report justifies the Office's termination of appellant's compensation benefits effective January 2, 2002,

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106(c), the Office must provide her with a notice of its finding, that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[15] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated October 26, 2001, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable, and allotted her 30 days to either accept or provide reasons for refusing the position. In a letter dated November 19, 2001, appellant disagreed that the offered position was physically suitable, stating that Dr. Katz's initial opinion was sufficient to establish that she could not perform the offered position. Appellant stated that she initially determined that she could not return to her preinjury job and she was capable of limited employment with no lifting over 10 pounds. She alleged that Dr. Katz was somehow coerced but did not provide any evidence to support her allegation. By letter dated November 26, 2001, the Office advised appellant that the reason given for not accepting the job offer was unacceptable. Appellant was given an additional 15 days in which to respond. Her representative, on December 7, 2001 alleged that the proposed action was improper and additional documentation was forthcoming.

Subsequent to Dr. Katz's June 14 and August 7, 2001 reports, appellant submitted additional reports from her treating physician, Dr. Robinson, dated July 10, 2001 and August 9 and December 14, 2001. Dr. Robinson continued to state that appellant was disabled and could not return to her preinjury job. However, he did not address appellant's work restrictions. Without such medical rationale addressing the crucial issues of causal relationship and continuing disability, his reports are of diminished probative value.[16]

Additionally, appellant submitted a December 20, 2001 report from Dr. Leivy.

The Board notes that Dr. Leivy's report is of little probative value as he was on one side of the conflict in medical opinion evidence that was resolved by the report of Dr. Katz and this report is insufficient to overcome the weight accorded to the impartial medical examiner.[17]

In the instant case, the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under 5 U.S.C. § 8106 her compensation was properly terminated effective January 2, 2002.

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[13] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

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

[15] *See Maggie L. Moore, supra* note 10.

[16] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[17] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

The April 10 and January 3, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 5, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member