

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNA M. DELANEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 00-2090; Submitted on the Record;
Issued February 22, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment.

On November 1, 1972 appellant, then a 39-year-old registered nurse, sustained an employment-related low back sprain. She returned to work on November 3, 1972 and sustained a recurrence of disability on December 21, 1972. On February 21, 1973 appellant underwent a lumbar laminectomy for herniated nucleus pulposus at L4-5 and L5-S1. She returned to work on September 12, 1973 and thereafter sustained a recurrence of disability on September 11, 1974. Appellant stopped work at that time and has not returned. In 1998 she was referred for vocational rehabilitation¹

The Office continued to develop the claim and, by letter dated April 9, 1999, proposed to reduce appellant's compensation, because the medical evidence of record demonstrated that she had the capacity to earn wages as a hospital admitting clerk.² Appellant, through her attorney, disagreed with the proposed reduction in compensation. On July 19, 1999 the employing establishment offered appellant a position as health aid. The Office then found that a conflict in medical opinion existed between the opinions of Dr. Robert M. Yanchus, a Board-certified orthopedic surgeon, who had provided a second opinion evaluation for the Office and appellant's treating physician, Dr. Robert Love Baker, a Board-certified neurosurgeon. By letter dated August 17, 1999, the Office referred appellant to Dr. Robert P. Durning, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

¹ The record indicates that appellant was initially referred to vocational rehabilitation in 1985.

² In an October 4, 1998 report, Karen Krull, a rehabilitation counselor, completed a labor market survey and determined that the position of hospital admitting clerk, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities.

In a letter dated November 17, 1999, the Office advised appellant that the position offered was suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond. By letter dated December 17, 1999, appellant's attorney disagreed with the suitability of the offered position. By letter dated December 20, 1999, the Office advised appellant that her reasons for refusing the offered position were not acceptable and she was given an additional 15 days to respond. By decision dated January 5, 2000, the Office terminated appellant's wage-loss compensation, effective January 30, 2000, on the grounds that she declined an offer of suitable work. Appellant, through counsel, requested a review of the written record. In a decision dated May 26, 2000 and finalized June 1, 2000, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act³ provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁴ 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.⁵ 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.⁶

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 opportunity to make such a showing before entitlement to compensation is terminated.⁷ 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.⁸

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.⁹ 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,

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

⁶ See *Robert Dickerson*, 46 ECAB 1002 (1995).

⁷ 20 C.F.R. § 10.517(a) (1999).

⁸ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

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.¹⁰

In the present case, the record reflects that the physical restrictions of the health aid position offered to appellant on July 19, 1999 were in agreement with those provided by Dr. Robert P. Durning, a Board-certified orthopedic surgeon, who provided an impartial medical evaluation. In a September 22, 1999 report, Dr. Durning set forth appellant's history, complaints and findings of physical examination. He diagnosed status post-two-level discectomies in 1973 and 1974 and mixed bilateral L5 and S1 radiculopathies. Dr. Durning advised that appellant was at maximum medical improvement with neither worsening nor improvement expected and that she could perform sedentary and light activity.¹¹ He also submitted a work capacity evaluation dated September 22, 1999 in which he advised that appellant was able to work sitting six hours daily, walking or standing four hours daily, twisting two hours daily with no restrictions on reaching or repetitive movements of the wrists or elbows. Dr. Durning further advised that she could push 40 pounds for 1 to 2 hours daily, pull 25 pounds for 1 to 2 hours daily, lift 25 pounds for 1 to 2 hours daily, squat for 3 to 4 hours daily, kneel and climb for less than 1 hour daily, and should take a 10 to 15 minutes break every 60 minutes.

The physical requirements of the offered position of health aid include lifting of 0 to 10 pounds, walking 0 to 2 hours, standing 0 to 3 hours and sitting 2 to 8 hours with permission to alternate positions, get up and walk or stretch as needed.¹²

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 factual background, must be given special weight.¹³ Dr. Durning provided such an opinion. The medical evidence of record thus establishes that appellant was capable of performing the modified position.¹⁴

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give

¹⁰ See *Connie Johns*, 44 ECAB 560 (1993).

¹¹ Dr. Durning further advised that he had reviewed the position of medical voucher clerk and opined that appellant was physically capable of performing this job.

¹² The principal duties and responsibilities were described as feeding and serving patients, making unoccupied beds, dusting and cleaning patient areas, passing ice water, filling glove boxes, straightening supplies, cleaning refrigerator and microwave, escorting patients, responding to patients' calls and communicating patients' needs to the nursing staff, receptionist duties, delivering and reading mail to patients, complete menus for patients, assisting recreation therapists.

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

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

appellant 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 November 17, 1999, 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 December 17, 1999, appellant's attorney disagreed that the offered position was physically suitable, stating that Dr. Durning's opinion was insufficient to establish that appellant could perform the offered position. By letter dated December 20, 1999, 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. She did not respond. 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 30, 2000.

The decision of the Office of Workers' Compensation Programs dated May 26, 2000 and finalized June 1, 2000 is hereby affirmed.

Dated, Washington, DC
February 22, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ See *Maggie L. Moore*, *supra* note 8.