U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNETTE ZWEIG and DEPARTMENT OF THE AIR FORCE, AIR MOBILITY COMMAND, McCHORD AIR FORCE BASE, WA

Docket No. 01-883; Submitted on the Record;
Issued January 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

On August 23, 1996 appellant, then a 52-year-old library technician, filed a claim for occupational disease alleging that she developed arm and neck pain as a result of performing her employment duties. The Office accepted appellant's claim for bilateral carpal tunnel syndrome, cervical strain and aggravation of preexisting right rotator cuff tendinitis. Appellant stopped work on July 23, 1997 and was paid compensation for total wage loss beginning August 2, 1997.

On August 25, 1997 the Office referred appellant, with a statement of accepted facts and list of questions, to Dr. Alfred I. Blue, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of appellant's condition. In his report dated October 13, 1997 and in supplemental reports dated November 7 and December 12, 1997, Dr. Blue stated that appellant's diagnosed conditions were neurologically chronic and that she did not have any medical conditions causally related to her employment.

On November 11, 1997 appellant underwent a physical capacity evaluation under the direction of her attending physician, Dr. Anthony G. Johnson, a Board-certified family practitioner. The evaluation revealed that, during an 8-hour day, appellant could sit for 30 minutes at a time for 5 to 6 hours intermittently, stand for 45 minutes at a time for 5 to 6 hours intermittently, walk for 1 hour at a time, for 5 to 6 hours intermittently and alternately sit, stand and walk for 2 hours at a time. In addition, appellant could not perform any overhead lifting, but could occasionally lift 10 pounds to the waist and 5 to 10 pounds to the shoulder and could frequently lift up to 5 pounds to the waist and up to 3 pounds to the shoulder. Appellant further demonstrated the ability to carry 10 pounds occasionally and 5 pounds frequently, for 200 feet,

as well as push and pull up to 10 pounds on an occasional basis. Finally, the evaluation revealed that appellant could frequently squat, bend, crouch, climb stairs and operate foot controls, could occasionally kneel, perform fine manipulation and operate hand controls, but could seldom climb ladders or reach overhead.

Based on the results of the physical capacity evaluation, on January 30, 1998, the employing establishment developed a limited-duty position for appellant as a suggestion program assistant.[1] The position description was forwarded to Dr. Johnson for his comments. In a report dated February 6, 1998, Dr. Johnson did not specifically address the suitability of the offered position, but stated that any ongoing repetitive motion prior to appellant receiving corrective surgery was only going to make appellant's condition worse.

On September 19, 1998 in order to resolve the conflict in medical opinion between appellant's treating physicians, Drs. Johnson, Teeny[2] and Arroyo and Blue, the Office second opinion physician, as to the extent of appellant's employment-related conditions, the Office referred appellant for examination by Dr. William T. Thieme, a Board-certified orthopedic surgeon and impartial medical specialist. In addition to addressing the issues of continuing causal relationship, the necessity for surgery and appellant's ability to return to gainful employment, the Office requested that Dr. Thieme review the offered limited-duty position and comment on its suitability.

In his report dated October 5, 1998, Dr. Thieme diagnosed bilateral carpal tunnel syndrome, left worse than right, probable right shoulder impingement syndrome, possibly a rotator cuff tear, mild right AC joint arthritis and chronic cervical spondylitis. He stated that the diagnosed bilateral carpal tunnel syndrome and right shoulder problems were caused or aggravated by appellant's employment and that the results of the November 11, 1997 physical capacity evaluation were consistent with his examination. Dr. Thieme stated that appellant should have an arthrogram to determine the extent of injury to her right shoulder and should undergo bilateral carpal tunnel release surgery. He concluded that appellant had the physical capacity to perform the work of a suggestion program assistant and that with appropriate treatment to her shoulder and wrists she would probably be able to work at a higher physical level.

In a report dated November 17, 1998, Dr. Johnson stated that he had reviewed Dr. Thieme's report and was in agreement with all of his findings and recommendations except with respect to appellant's cervical radiculitis. Dr. Johnson stated that he felt appellant's cervical

[1] The offered position required appellant, on an intermittent basis, to sit for 6 to 8 hours, stand 1 to 2 hours, walk 1 hour, climb stairs ½ hour, bend and stoop 1 hour, lift and carry up to 10 pounds for 1 hour and perform find manipulation, including keyboarding, for 1 to 2 hours a day. The position description specifically provided that typing would be intermittent, would not exceed two hours a day and that appellant could pace herself throughout the day, performing the task in 5 to 10 minute increments. The position was further described as being sedentary, allowing appellant to sit comfortable to do the work, but requiring some walking, standing, bending, climbing of stairs, carrying light items such as papers and books weighing up to 10 pounds.

[2] Dr. Teeny was originally an Office second opinion physician. However, appellant continued to seek treatment from him.

radiculitis was also causally related to her employment, but conceded that the symptoms with respect to this condition were minimal by comparison.

On December 9, 1998 a right shoulder arthrogram was performed which revealed that appellant's right rotator cuff was not torn.

By letter dated February 9, 1999, the employing establishment notified the Office that the offered limited-duty suggestion program assistant position was still available to appellant. On March 22, 1999 the Office informed appellant that it found this position suitable and allowed her 30 days to accept the position or offer her reasons for refusal.

In response, on April 20, 1999, appellant, through counsel, refused the position on the grounds that it was not medically suitable. In support of her actions, appellant submitted additional treatment notes from Dr. Johnson. In his note dated March 29, 1999, Dr. Johnson stated that appellant had given him a copy of the position description, which purportedly was in compliance with her functional capacity evaluation, but explained that the "problem with that functional capacity evaluation is that it is incomplete in that it assumes the patient will be proceeding with carpal tunnel surgery, so essentially she is not capable of working right now with her hands until that is remedied." In an accompanying treatment note dated April 8, 1999, Dr. Johnson further commented on the offered position stating: " Walking up and down stairs is not suitable because it involves use of the hands. The job description is not suitable and repetitive movement using her hands is not appropriate until further evaluation and treatment is made."

The Office responded on May 17, 1999, informed appellant that her reasons for refusal were unacceptable and allowed her an additional 15 days to accept the position. Appellant submitted an additional medical report from a Dr. Levin P. Schoenfelder, which did not address the offered position. Appellant did not otherwise respond to the Office's letter. By decision dated June 30, 1999, the Office terminated appellant's wage-loss compensation benefits finding that she refused an offer of suitable work. Appellant, through her attorney, requested an oral hearing before an Office representative. After the hearing, in a decision dated January 28, 2000, an Office hearing representative affirmed the Office's prior decision.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act[4] 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. Section 10.517(a) of the applicable regulations[5] provides that an employee who refuses or neglects to work after suitable work has been offered or secured the employee has the burden of

[3] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6]

In this case, there is a conflict of medical opinion evidence between appellant's physician, Dr. Johnson, who opined that appellant could not return to work until after she had received additional treatment, including surgery, for her employment-related conditions and Dr. Thieme, who indicated that appellant could perform the duties of the offered suggestion program assistant position and, following surgery, would probably be able to work at a higher level.[7]

Section 8123(a) of the Federal Employees' Compensation Act[8] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

Due to this unresolved conflict of medical opinion evidence, the Board finds that the medical evidence is not sufficient to establish that the offered position is within appellant's physical limitations.

As the Office failed to meet its burden of proof in establishing that the offered position was suitable based on the medical evidence of record, the Office failed to establish that appellant refused a suitable work position.

[6] *Arthur C. Reck*, 47 ECAB 339 (1995).

[7] The Board notes that in addition to acting as an impartial medical specialist to resolve the conflict in medical opinion as to the extent of appellant's employment-related conditions, the continuing causal relationship between these conditions and her employment and the necessity for surgical treatment, Dr. Thieme offered an opinion as to the suitability of the limited-duty job offer. However, as there was no conflict at that time with respect to whether appellant could perform the duties of a suggestion program assistant, Dr. Thieme is considered an Office second opinion physician with respect to the issue of the suitability of the offered position.

[8] 5 U.S.C. §§ 8101-8193, 8123(a).

The January 28, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
January 15, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member