

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA ELENA PINTO and U.S. POSTAL SERVICE,
POST OFFICE, Davie, FL

*Docket No. 01-716; Submitted on the Record;
Issued June 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 August 3, 1994 appellant, then a 52-year-old postal carrier, sustained an employment-related cervical strain when her employing establishment vehicle was hit from the rear. She stopped work that day, received appropriate continuation of pay and compensation and was placed on the periodic rolls. The accepted condition was later expanded to include dizziness. After a brief return to work from August 2 to August 7, 1995, appellant again stopped work.

In October 1994, she came under the care of Dr. John E. Vinsant, a Board-certified orthopedic surgeon and Dr. Paul I. Ginsberg, who is Board-certified in psychiatry and neurology, in June 1995. She continually underwent physical therapy. An October 24, 1994 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated osteoarthritis and degenerative disc disease. A left shoulder MRI scan on March 17, 1995 revealed rotator cuff tendinitis. Studies on April 12, 1995 demonstrated normal brainstem evoked response.

The Office continued to develop the claim and on May 31, 1995 referred appellant to Dr. Martin B. Silverstein, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her orthopedic condition. He diagnosed vertigo of undisclosed etiology and cervical strain and sprain with occipital headaches by history. Dr. Silverstein advised that, while the cervical condition was still symptomatic, appellant could return to her regular work. A July 14, 1995 electronystagmography was normal. In a July 21, 1995 report, Dr. Vinsant advised that appellant could return to work from an orthopedic standpoint. A brain MRI scan done on August 21, 1995 was interpreted as negative. In a report dated November 27, 1995, Dr. Lawrence R. Grobman, a Board-certified otolaryngologist, advised that appellant's examination was normal.

On December 5, 1995 the Office referred appellant to Dr. Alan Borenstein, who is Board-certified in psychiatry and neurology, for evaluation of her dizziness. In a report dated December 27, 1995, he diagnosed vestibular dysfunction that was caused by the employment motor vehicle accident and recommended vestibular exercises. In a supplementary report, Dr. Borenstein advised that appellant could not work due to the vertigo.

Drs. Ginsberg and Vinsant continued to submit reports and appellant underwent vestibular exercises. In an investigative report dated February 9, 1998, the employing establishment advised that it had conducted a surveillance of appellant between August 19 and December 18, 1997. She was observed volunteering at church on a regular basis, including at a three-day church fair during which she was videotaped doing volunteer work for up to five hours. She was also observed conducting routine activities such as driving and shopping. Interviews were conducted with her parish priest and several church volunteers who were also employed by the employing establishment. Dr. Vinsant, who was interviewed, advised that there was nothing to keep her from returning to work as far as her neck, back and shoulder injuries were concerned. Dr. Ginsberg was also interviewed and advised that, after viewing the surveillance tape, questions were raised about her true condition. Drs. Vinsant and Ginsberg completed work-restriction evaluations advising that appellant could return to work eight hours per day.

On April 30, 1998 the employing establishment offered appellant a modified part-time flexible (PTF) clerk position. On May 5, 1998 Dr. Ginsberg approved the offered position. On May 5, 1998 the employing establishment again offered appellant the modified PTF position, which she refused, stating she could not work due to vertigo.

By decision dated August 5, 1998, the Office terminated appellant wage-loss compensation, effective that day, on the grounds that she refused an offer of suitable work. The Office credited the opinion of Dr. Ginsberg in finding the position suitable. On September 1, 1998 appellant requested a hearing. She returned to part-time work on November 12, 1998.¹

At the hearing, held on April 27, 1999, appellant testified regarding her treatment and condition. In a decision dated July 15, 1999 and finalized July 19, 1999, an Office hearing representative affirmed the prior decision. On July 11, 2000 appellant, through her representative, requested reconsideration and submitted additional evidence. By decision dated August 31, 2000, the Office denied modification of its 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 Act² provides in pertinent part, "[a] partially disabled employee who ... refuses or neglects to work after suitable work is

¹ Appellant returned to four hours per day of light duty that included three hours of casing mail and one hour of clerical duties.

² 5 U.S.C. §§ 8101-8193.

offered ... is not entitled to compensation.”³ 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.⁴ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁵

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.⁶ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁷

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.⁸ 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.⁹

In the present case, the record reflects that the modified clerk position offered to appellant on May 5, 1998 was reviewed by her treating Board-certified neurologist, Dr. Paul I. Ginsberg, who, in a report dated May 5, 1998, advised that appellant could perform the job duties. The record also contains a work restriction evaluation dated January 15, 1998 in which Dr. Ginsberg advised that appellant could work eight hours a day with physical restrictions and avoidance of unprotected heights and high speed working. In a February 6, 1998 work restriction evaluation, Dr. Vinsant also advised that, with reference to appellant’s orthopedic condition, she could work eight hours a day with restrictions to her physical activity. The Board

³ 5 U.S.C. § 8106(c)(2).

⁴ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

⁵ See *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁶ 20 C.F.R. § 10.517(a) (1999).

⁷ *Maggie L. Moore*, 42 ECAB 484 (1991), *aff’d on recon.*, 43 ECAB 818 (1992).

⁸ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁹ See *Connie Johns*, 44 ECAB 560 (1993).

therefore, finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.¹⁰

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.¹¹ The record in this case indicates that the Office properly followed the procedural requirements. By letter dated May 8, 1998, 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 response, appellant stated that she could not return to work due to vertigo. By letter dated June 10, 1998, the Office advised appellant that the reason given for not accepting the offered position was unacceptable. She was given an additional 15 days in which to respond. Appellant again responded that she could not work because of dizziness. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and the offer was refused. Thus, under 5 U.S.C. § 8106 her compensation was properly terminated on August 5, 1998.

At the hearing appellant testified regarding her disagreement with Dr. Ginsberg's conclusion that she could return to work. Dr. Vinsant continued to submit treatment notes in which he noted appellant's complaints of pain and dizziness which, he stated, was the reason she was not working. In a July 30, 1998 treatment note, he reiterated, "I do think she can work with the appropriate restrictions and precautions from an orthopedic standpoint." In a September 3, 1998 report, Dr. Vinsant stated that the above report contained a typographical error, advising that it should state, "I do not think that she can work." The Board finds Dr. Vinsant's report dated September 3, 1998 of diminished probative value as he did not explain why appellant could not work and thus did not contain adequate medical rationale supporting his conclusion, especially in light of his previous reports.¹² Appellant, therefore, failed to demonstrate that the termination of compensation on August 5, 1998 for refusal of suitable work was not justified.

Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.¹³ The medical evidence submitted subsequent to the August 5, 1998 decision includes a report dated August 27, 1998 in which Dr. Ginsberg stated that he had reexamined appellant. He advised, "I could not sign the letter saying that she is unable to work at this time." In an October 28, 1998 report, Dr. Ginsberg advised that

¹⁰ See *John E. Lemker*, 45 ECAB 258 (1993).

¹¹ See *Maggie L. Moore*, *supra* note 7.

¹² See generally *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

¹³ *Deborah Hancock*, 49 ECAB 606 (1998).

appellant had seen “Dr. Tusa” who found no objective signs of vestibular dysfunction and did not recommend vestibular rehabilitation. Dr. Ginsberg continued:

“I went over the studies in some detail with [appellant]. Basically, Dr. Tusa’s authority is probably greatest in this regard. He did not leave me any avenues for treatment. I explained to her that without anything more objective there really is not much to do. Even if vestibular rehabilitation was considered, [appellant] has really been reasonably active for the last few years and her work actually involves a lot of head movements which would be thought to act in the way of vestibular rehabilitation. Thus I cannot really find any other avenues of treatment and cannot verify the presence of a true organic abnormality here.”

In a November 17, 1998 report, Dr. Vinsant noted that appellant had returned to part-time work, stating “from [an] orthopedic standpoint I think this is a very good idea.” In reports dated February 4, March 9, May 11 and June 10, 1999 and December 18, 2000, Dr. Vinsant noted appellant’s complaints of pain and dizziness and findings of tenderness on examination of the cervical and lumbosacral spine and right shoulder. He advised that she should continue to work part time. Dr. Vinsant, however, did not provide any explanation regarding his recommendation that appellant should work only four hours per day. While he advised that she continued to be symptomatic due to her cervical condition, he did not indicate whether this was due to the employment-related cervical strain or to her underlying degenerative disc disease and osteoarthritis. The Board, therefore, finds that the medical evidence submitted by appellant does not sufficiently explain why she could not perform the duties offered by the employing establishment and, thus, the termination of compensation on August 5, 1998 was justified.¹⁴

¹⁴ On October 27, 1999 appellant filed both a recurrence claim and a Form CA-7, claim for compensation, for the period November 1998 and continuing. The Board notes that, because appellant refused suitable employment, section 8106 serves as a bar to her receipt of further compensation arising from the accepted employment injury. 5 U.S.C. § 8106; *see Merlind K. Cannon*, 46 ECAB 581 (1995). By letter dated November 22, 1999, the Office informed appellant that she was not entitled to further wage-loss compensation but accepted the recurrence claim to reflect an update for medical treatment only.

The decision of the Office of Workers' Compensation Programs dated August 31, 2000 is hereby affirmed.

Dated, Washington, DC
June 11, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member