U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY L. SMITH and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dayton, OH

Docket No. 01-335; Submitted on the Record;
Issued March 13, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

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 met its burden of proof to terminate appellant's compensation benefits.

On July 22, 1991 appellant, then a 42-year-old nursing assistant, filed a claim alleging that she injured her back in the performance of duty. She stopped work on July 22, 1991 and did not return. The Office accepted appellant's claim for lumbosacral strain and subsequently expanded its acceptance to include a bulging lumbar disc. However, in a report dated February 16, 1996, appellant's treating physician stated that the bulging disc had resolved. The Office began paying all appropriate compensation benefits.

On May 24, 1996 the employing establishment provided appellant with a modified job offer as a medical clerk typist. On May 30, 1996 appellant declined the offered position. On May 31, 1996 the employing establishment sent appellant a revised job offer. In a letter dated June 3, 1996, the Office informed appellant that it found the position to be suitable, informed her of the penalty provisions of the Federal Employees' Compensation Act and allowed 30 days for a response. By letter dated July 5, 1996, the Office granted appellant an additional 15 days to accept the position.

By decision dated August 14, 1996, the Office terminated appellant's compensation benefits effective August 17, 1990 as she had refused a suitable position. Subsequent to an oral hearing, held at appellant's request, by decision dated May 19, 1997, the Office reversed the prior termination on the grounds that the Office had failed to follow proper procedures in terminating appellant's benefits. The Office hearing representative noted that a revised job offer had been sent to appellant on May 31, 1997, but that the Office had not allowed appellant any opportunity to accept the amended job offer.

After a period of medical and factual development, on May 21, 1999 the employing establishment again provided appellant with a job offer as a modified medical clerk typist. On May 28, 1999 appellant declined the offered position. In a letter dated June 2, 1999, the Office informed appellant that the position was suitable, informed her of the penalty provisions of the Act and allowed 30 days for a response. Appellant submitted additional medical evidence, which was reviewed by the Office. By letter dated July 19, 1999, the Office informed appellant that her proffered reasons for declining the position were insufficient and granted appellant an additional 15 days to accept the position. Appellant again declined to accept the position and by decision dated August 4, 1999, the Office terminated appellant's compensation benefits effective that date as she had refused a suitable position.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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 Act[2] 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 of the applicable regulations[3] provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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 showing before a determination is made with respect to termination of entitlement to compensation.[4]

By letter dated August 5, 1997, the Office requested an updated medical report from appellant's treating physician, Dr. Philip Becker. When he declined to provide such a report,[5] on March 15, 1999 the Office referred appellant, together with a statement of accepted facts, copies of the relevant medical evidence of record, a copy of the amended job offer and a list of questions to be answered, to Dr. Rudolph Hofmann, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated April 2, 1999, Dr. Hofmann reviewed appellant's medical history and medical evidence of record. Following a complete physical examination and a discussion with appellant regarding her symptoms before and after the automobile accident, the physician diagnosed appellant as suffering from an employment-related chronic lumbosacral strain or sprain, possibly aggravated by the car accident. While Dr. Hofmann opined that appellant could not return to her date-of-injury job as a nursing assistant, due to residuals of her

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

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.517.

[4] *Arthur C. Reck*, 47 ECAB 339 341-42 (1995).

[5] Upon receipt of two short and largely irrelevant treatment notes from Dr. Becker, by letter dated June 24, 1998, the Office requested that the physician provide a detailed narrative report. Dr. Becker's staff requested prepayment by the Office for the medical report, which the Office declined to provide, explaining that there was no provision in the Act for such prepayment and noting that Dr. Becker had never before requested prepayment for his reports. He again declined to prepare a report for the Office.

accepted back condition, which he did not expect to resolve; he stated that she could perform the modified medical clerk typist position for eight hours a day. Dr. Hofmann clarified that appellant should avoid prolonged sitting or standing in the same position, that she could bend, squat and kneel occasionally but not repetitively and could not lift or carry more than 10 pounds frequently, or 20 pounds occasionally.

The full-time light-duty position offered by the employing establishment specified that the majority of the duties could be performed from a seated position and that appellant would be allowed to sit and stand at will. The position required some walking and occasional bending but did not require lifting over 10 pounds on a repetitive basis. The job offer further provided that appellant would be provided with on-the-job training and that the position only required basic knowledge of a keyboard. The Office properly found the position offered by the employing establishment as well within appellant's work restrictions and, therefore, constituted suitable work.

Appellant refused the position stating that she had been involved in an automobile accident in August 1998 and had sustained additional debilitating injuries. She also stated that she felt that Dr. Hofmann's examination was not thorough and should not be determinative. Finally, appellant stated that she had never been a clerk typist and had not worked at all for nine years. In support of her refusal, appellant also submitted treatment notes from Dr. Robert Powers, a chiropractor and Dr. John P. Moore, a Board-certified internist and her new treating physician. The reports submitted by appellant's chiropractor cannot be considered medical evidence in this case[6] and Dr. Moore, her new treating physician, discussed his treatment plan but did not address appellant's level of disability or capacity to perform the duties of the offered position. Therefore, appellant's reasons for refusing the position are not acceptable and the Office properly terminated her compensation based on her refusal to accept a suitable work position.

[6] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under 5 U.S.C. § 8101(2). A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist. *Thomas R. Horsfall*, 48 ECAB 180 (1996). In this case, the Office did not accept appellant's claim for a spinal subluxation and there is no evidence such a subluxation exists. While at one point, the Office accepted appellant's claim for a disc bulge, her treating physician reported that this condition resolved by February 13, 1996. In addition, the Board notes that Dr. Powers did not address appellant's ability to work.

The August 4, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 13, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member