U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE A. EDWARDS and U.S. POSTAL SERVICE,
POST OFFICE, Kearnysville, WV

Docket No. 01-2051; Submitted on the Record;
Issued September 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2), on the grounds that she refused suitable work.

On February 7, 1997 appellant, then a 43-year-old window clerk, injured her neck while lifting a package from a cart at work. The Office accepted the claim for cervical strain superimposed on preexisting cervical myofascial syndrome and expanded the claim to include cervical disc herniation. Appellant underwent cervical fusion surgery on January 7, 1999. She returned to limited duty on July 8, 1999, however, she was unable to complete the day. Appellant's physiatrist, Dr. Arthur Horn found that she would be best suited for a limited-duty position working only one hour a day and the employing establishment made such a position available to her on October 18, 1999. Dr. Horn later found that appellant could no longer work at all due to her work injury and appellant stopped work on November 9, 1999.

On May 26, 2000 the Office awarded appellant compensation benefits for total disability under conditions set forth in the Federal Employees' Compensation Act.

The Office referred appellant to Dr. Robert Cirincione, a Board-certified orthopedic surgeon. In a report dated May 25, 2000, he stated that appellant's physical examination revealed a significant decreased range of motion and tenderness of the cervical spine, no motor or sensory deficits and no measurable atrophy of the skeletal muscles. Dr. Cirincione thereafter diagnosed cervical disc disease and indicated that appellant had reached maximal medical improvement. He opined that appellant could return to work within the sedentary restrictions established by his May 1999 functional capacity evaluation. The evaluation outlined that appellant was restricted from lifting more than 10 pounds, repetitive stooping, bending, squatting, kneeling, reaching and excessive walking.

On September 7, 2000 the employing establishment offered appellant a position of modified distribution clerk. The duties of the job were listed as answering telephones, working

nixie mail, sorting letter mail, filing and copying. The job description noted that appellant would not be required to push, climb, stoop, kneel, crawl or lift arms beyond normal limits, nor operate a motor vehicle. It was further noted that appellant would only have intermittent repetitive wrist and elbow movements, intermittent walking, standing and sitting and would not lift or carry more than 10 pounds.

On September 12, 2000 the Office advised appellant that the offer of employment was considered to be suitable work and within her medical restrictions. She was given 30 days to either accept the job offer or to provide an explanation or evidence justifying her refusal of the offered job.

On October 5, 2000 appellant refused the offered position. She stated: "I previously tried working one hour a day at [the employing establishment] doing the same or similar task as outlined in [the] job offer and was unable to do so due to extreme pain in the left region of my neck and numbness in the left arm." Appellant also submitted documentation that indicated that Dr. Horn, her attending physician, did not agree with Dr. Cirincione that appellant was capable of such work. Appellant further submitted disability slips from Dr. Horn, which indicated that she was to remain off work until November 15, 2000.

By letter dated October 25, 2000, the Office informed appellant that her reasons for refusing the offered position were deemed unacceptable. The Office advised her that she had 15 days to either accept the job or risk termination of her compensation.

In response, appellant argued again that she was unable to perform the duties of the offered position because she could not perform similar duties when she returned to work in October 1999. She further argued that she was unable to accept the position because it would entail driving approximately 20 miles and she could only drive as a last resort in emergency situations. Appellant further submitted medical reports previously of record and an updated report from Dr. Horn dated October 11, 2000. In the report, he indicated that he believed appellant was unable to work in the offered position as a result of her cervical problem and that she felt unsafe driving due to her limited range of motion.

In a decision dated November 21, 2000, the Office terminated appellant's compensation entitlement of continuing wage loss or schedule award benefits on the grounds that she refused an offer of suitable work.[1]

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

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2]

[1] Appellant subsequently requested an oral hearing, which was scheduled for May 24, 2001. She failed to appear for the hearing, therefore, the Office issued a decision on May 31, 2001 citing that appellant abandoned her request for a hearing and the case was returned to the district Office. Appellant subsequently appealed the case to this Board.

[2] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

Section 8106(c)(2) of the Act[3] provides that the Office may terminate compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[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 her refusal to accept such employment.[7]

In this case, appellant's physiatrist, Dr. Horn, initially found that appellant could return to a limited-duty position, working only one hour a day and a position was made available to her on October 18, 1999. He later found that appellant could no longer work at all due to her work injury. Appellant stopped work on November 9, 1999 and was awarded compensation for total disability. Dr. Cirincione, the second opinion physician, found on May 25, 2000 that the duties of the modified position were within appellant's physical restrictions and that she could return to part-time limited duty. On September 7, 2000 the employing establishment offered appellant a position of modified distribution clerk with restricted duties of answering telephones, working nixie mail, sorting letter mail, filing and copying. The Office found the position suitable and within her work restrictions, however, on October 5, 2000 appellant refused the position. In an updated report dated October 11, 2000, Dr. Horn indicated that appellant would not be able to perform the offered job because of her cervical problems and that, due to her limited range of motion, she felt very unsafe driving. He opined, therefore, that appellant remained totally disabled. Based on Dr. Cirincione's May 25, 2000 report the Office, however, terminated compensation benefits.

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."

Dr. Horn opined that appellant was totally disabled due to her accepted employment injuries and could not perform the duties of the offered position. Dr. Cirincione, the Office referral physician found that appellant could return to the limited-duty position on a part-time basis with the recommended restrictions. As there is an unresolved conflict of medical opinion

[3] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516-17 (1999).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

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

[6] 20 C.F.R. § 10.516-17 (1999).

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

[8] 5 U.S.C. §§ 8101-8193, 8123(a).

evidence, the Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated November 21, 2000 is reversed.

Dated, Washington, DC
September 10, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member