U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY ANNE JACOBS and U.S. POSTAL SERVICE,
NORTH ANDREWS ANNEX, Ft. Lauderdale, FL

Docket No. 03-295; Submitted on the Record;
Issued April 15, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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.

Appellant, 41-year-old clerk, filed a notice of traumatic injury and alleged that she injured her low back in the performance of duty. The Office accepted appellant's claim for lumbar strain on January 4, 2000. Appellant returned to limited duty on September 28, 1999. The Office accepted the additional condition of aggravation of degenerative disc disease on October 6, 2000.

In a report dated August 9, 2000, appellant's attending physician, Dr. Nile R. Lestrange, a Board-certified orthopedic surgeon, found that she was totally disabled. The Office referred appellant for a second opinion evaluation with Dr. Barry Lotman, a Board-certified orthopedic surgeon, who found that appellant could work with restrictions. The Office referred appellant to Dr. Babek Sheikh, a Board-certified orthopedic surgeon, for an impartial medical examination.

The employing establishment offered appellant a limited-duty position on July 9, 2001. In a letter dated July 30, 2001, the Office found this position suitable work and allowed appellant 30 days to accept the position or offer her reasons for refusal. Appellant refused the position on the grounds that it was temporary. By letter dated September 5, 2001, the Office informed appellant that her reasons for refusing the position were not adequate and allowed her an additional 15 days to accept the position. By decision dated October 23, 2001, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Appellant requested an oral hearing on November 19, 2001. She testified at her oral hearing on June 14, 2002 and alleged that the offered position was not suitable as it was temporary, as she was not provided with an appropriate chair and as she sustained an additional employment injury on September 22, 2001. By decision dated September 24, 2002, the hearing representative affirmed the Office's October 23, 2001 decision.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act[1] 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. 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. The Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),[2] which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by the claimant was suitable.[3]

Appellant's attending physician, Dr. Lestrange, completed a report on August 9, 2000 finding that appellant was totally disabled pending the result of a provocative discogram. On August 29, 2000 Dr. Lestrange stated that the discogram revealed degenerative disc disease including dye leakage at L4-5. He found that appellant was totally disabled and recommended surgery.

The Office referred appellant for a second opinion evaluation with Dr. Lotman, a Board-certified orthopedic surgeon. In his September 20, 2000 report, Dr. Lotman noted appellant's history of injury, her medical history and performed a physical examination. He found that appellant's lumbosacral strain had resolved, but that her strain had resulted in an aggravation of her preexisting degenerative disc disease. Dr. Lotman provided work restrictions based only on appellant's accepted condition of lumbosacral strain including working eight hours a day. He stated that appellant could perform no lifting over 30 pounds and pushing and pulling up to 20 pounds. He found that appellant could not reach above the shoulder, squat, kneel nor climb. Dr. Lotman stated that appellant could sit for two hours, walk for two hours and stand for four hours.

On October 13, 2000 Dr. Lestrange indicated that appellant could return to light-duty work for four to six hours with no repetitive lifting, bending, stooping, standing, squatting or walking. He found that appellant could lift up to 15 pounds.

Section 8123(a) of the Act,[4] 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 the discrepancies in work restrictions between appellant's attending physician, Dr. Lestrange, who found that she

[1] 5 U.S.C. § 8106(c)(2).

[2] Section 8106(c) serves as a bar to claimant's entitlement to further compensation for total disability, partial disability or a schedule award for permanent impairment arising out of an accepted employment injury. *Albert Pineiro*, 51 ECAB 310, 313 (2000).

[3] *Id.* at 311-12.

[4] 5 U.S.C. §§ 8101-8193, § 8123(a).

could return to light-duty work for four to six hours, and the second opinion physician, Dr. Lotman, who found that she could work eight hours a day with restrictions, the Office referred appellant for an impartial medical examination with Dr. Sheikh, a Board-certified orthopedic surgeon.

In his November 21, 2000 report, Dr. Sheikh noted appellant's history of injury and performed a physical examination noting that appellant had no objective findings of spasms, normal motor strength, sensation and reflexes. He opined that appellant had an aggravation of her degenerative disc disease but that her lumbosacral strain had resolved. Dr. Sheikh stated that appellant did not have objective findings of any orthopedic pathology and that her x-rays were suggestive of chronic degenerative changes of the back. He stated that appellant had degenerative disc disease with no evidence of significant herniated disc. Dr. Sheikh concluded that appellant had chronic findings which did not require further treatment nor evaluation. He concluded that appellant could work eight hours a day alternating sitting and standing. Dr. Sheikh stated that appellant should not lift over her head nor reach and restricted her driving to three hours a day. He found that she could lift between 30 and 40 pounds intermittently for 5 hours and grasp for 8 hours.

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.[5] In this case, Dr. Sheikh provided a detailed history of injury and findings on physical examination. He noted that appellant had no objective findings of any orthopedic pathology, but concluded that her accepted employment injury aggravated her preexisting degenerative disc disease. Dr. Sheikh provided appellant's work restrictions based on his examination and concluded that she could work eight hours a day with restrictions. For these reasons, the Board finds that his report is sufficiently well rationalized to constitute the weight of the medical opinion evidence regarding appellant's work restrictions.

Dr. Lestrange completed an undated report received by the Office on April 20, 2001 and stated that appellant could theoretically work eight hours a day. He stated that appellant should not bend, squat, stoop, strain or lift more than 20 to 25 pounds on a repetitive basis. Dr. Lestrange noted that appellant felt that she could not spend more than two and a half hours on her feet and that she felt that she could work five to six hours a day with restrictions. He also noted that appellant felt that she required a chair with a back. Dr. Lestrange stated:

> "My recommendation would be to advance her work to 5 and/or 6-hour days, with standing no more than 2 hours at one time, with periods of rest and/or sitting, for 30 minutes to an hour, and if she can do her work in a sitting position, she can probably do that with frequent changes. The idea would be to advance her work to eight hours a day, again with the restrictions in mind under the circumstances. She could probably work eight hours a day."

The employing establishment offered appellant a light-duty position of modified clerk on July 3, 2001. This position entailed no overhead reaching, lifting 30 to 40 pounds intermittently for 5 hours a day, alternating sitting and standing, simple grasping for 8 hours a day, bending and stooping for 1 hour a day and driving for 3 hours a day.

[5] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

Appellant responded on July 16, 2001 and stated that the position offered was temporary as it was effective for the period for which appellant was declared partially disabled.[6] She stated that she rejected the job offer because of the hours, its temporary nature and her need for a "real" chair. In a note dated August 28, 2001, Dr. Lestrange stated that appellant should work 4 to 6 hours a day, standing no more than 2 hours at a time with period of rest or sitting of 30 minutes to an hour and no repetitive bending, lifting, squatting or straining more than 20 to 25 pounds. He also stated that appellant required a chair with back support while at work and that appellant's restrictions were permanent.

Dr. Lestrange's reports indicate that appellant could work up to eight hours a day and suggest that he was basing his restrictions on appellant's requests rather than on his objective physical findings. He specifically noted that appellant "felt" that she could work five to six hours and that she "felt" that she should not spend more than a few hours on her feet and finally that appellant "felt" that she needed a chair with a back. Dr. Lestrange repeatedly stated that he believed that appellant could work eight hours a day. Due to the variation of restrictions provided by Dr. Lestrange and the lack of physical findings submitted in support of his conclusions, the weight of the medical evidence remains with the well-reasoned conclusions of Dr. Sheikh. Furthermore, as Dr. Lestrange was on one side of the conflict that Dr. Sheikh resolved, the additional report from Dr. Lestrange is insufficient to overcome the weight accorded Dr. Sheikh's report as the impartial medical specialist or to create a new conflict with it.[7]

The Office is required to consider additional conditions arising after the accepted employment injury in determining whether an offered position is suitable.[8] Appellant submitted evidence in the record beginning May 3, 2001 that she had an additional condition of the left side of her neck, arm and side. The Office did not respond to appellant regarding this issue.

After the Office issued its September 5, 2001 letter informing appellant that she had 15 days to accept the offered position, appellant again stated in a September 7, 2001 letter that she had developed a neck condition. She submitted a report from Dr. Lestrange dated August 28, 2001 diagnosing cervical strain syndrome with radiculopathy and including the results of a magnetic resonance imaging scan. The Office did not address this aspect of appellant's claim in its October 23, 2001 decision.

The Board has held that once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk. Nevertheless, the Office must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.[9] While a

[6] The Board notes that the position offered appellant is not temporary as it does not specifically state a period of duration. Instead it is limited only by appellant's continued disability. *But see Arthur C. Reck*, 47 ECAB 339, 342 (1996).

[7] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b(4) (June 1996).

[9] *Kenneth R. Love*, 50 ECAB 193, 198 (1998).

review of the Office's October 23, 2001 decision indicates that the Office listed the additional letters submitted by appellant by date, the Office did not specifically mention the allegation of a subsequently arising condition raised by appellant and did not offer any reasoning explaining why appellant's additional reason for refusing the offered position were unacceptable.[10]

Appellant submitted evidence of additional physical and emotional conditions impacting on her ability to perform the offered position. The Office failed to address this aspect of appellant's claim in either its October 23, 2001 decision or its September 24, 2002 decision. As the Office is required to consider all the evidence submitted by appellant prior to termination for a refusal of suitable work and as the Office is required to consider subsequently arising conditions in determining the suitability of an offered position, the Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The September 24, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
April 15, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] Following the Office's October 2001 decision, appellant submitted a report dated November 28, 2001 from Dr. Glenn R. Cuddy, a clinical psychologist, diagnosing adjustment disorder with mixed features of anxiety and depression due to work-related stress. He suggest that appellant consider a period of short-term disability and stated that her prognosis regarding a return to work was unknown. On December 19, 2001 in a separate claim, the Office accepted that appellant developed left shoulder bursitis, cervical strain and lumbar strain due to her accepted employment duties.