U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENEE KRUGEL and U.S. POSTAL SERVICE,
POST OFFICE, Shelton, CT

Docket No. 02-1023; Submitted on the Record;
Issued January 23, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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

On February 7, 1994 appellant, then a 38-year-old letter carrier, slipped on ice and injured her head and back. She was six months pregnant at the time. The Office accepted appellant's injury for contusion of the cervical and lumbar spine and a concussion. Appellant stopped work on February 7, 1994 and returned on September 15, 1994 to a light-duty position for four hours per day. On September 16, 1996 she experienced an exacerbation of her condition and stopped work and returned on September 26, 1996 to light duty four hours per day. Appellant was paid appropriate compensation.

Subsequently appellant submitted various medical records from Dr. William S. Lewis, a Board-certified orthopedist, dated May 23, 1994 to April 1995. Dr. Lewis noted a history of appellant's injury indicating that she sustained back and neck injuries without radiculopathy while in the performance of duty. He noted that appellant could return to work in a limited-duty position in July 1994, four hours per day subject to various restrictions. Dr. Lewis noted that appellant's continued complaints of muscle spasms in her neck and low back pain.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and also to impartial medical examiners.[1]

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[1] This included referring appellant to a second impartial specialist in 1996 when the first impartial specialist did not provide the clarification requested by the Office. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office, or if the physician is unable to clarify or elaborate on the original report, or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial medical specialist for a rationalized medical opinion on the issue in question. *See Margaret M. Gilmore,* 47 ECAB 718 (1996); *Terrence R. Stath,* 45 ECAB 412 (1994); *Nathan L. Harrell,* 41 ECAB 402 (1990); *John I. Lattany,* 37 ECAB 129 (1985).

On September 17, 1996 appellant underwent a functional capacity evaluation (FCE).[2] She stopped work on September 18, 1996 and returned to work on limited duty for four hours per day with restrictions.

Appellant continued to submit reports from Dr. Lewis indicating that she remained disabled and under treatment for contusion of the cervical spine and lumbar spine and could work limited duty for four hours per day under restrictions.

On March 16, 1999 the Office referred appellant for a second opinion to Dr. Alan H. Goodman, a Board-certified orthopedist. The Office provided Dr. Goodman with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated May 3, 1999, Dr. Goodman indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's condition. The physical examination was essentially normal. Dr. Goodman diagnosed appellant with chronic strain of the cervical spine, chronic strain of the lumbar spine and plantar fasciitis of the right heel. He noted that appellant's current condition was probably related to the accident in 1994. Dr. Goodman indicated that appellant was capable of carrying out the duties of a letter carrier full time. He noted that the bulges on the intervertebral discs of the lumbar and cervical spine were not related to appellant's fall in 1994.

Appellant submitted several reports from Dr. Lewis dated April 6 to September 30, 1999. Dr. Lewis indicated that appellant still experienced residuals of the work-related fall in 1994 and he recommended surgery. In his report of May 10, 1999, he diagnosed appellant with lumbar radiculopathy at multiple levels and a herniated lumbar disc at L4-5 and L5-S1. Dr. Lewis noted that appellant could return to work four hours per day subject to restrictions on lifting of 10 pounds; standing for no more that 50 minutes at one time; and no squatting, bending, stooping or crawling.

The Office determined that a conflict of medical opinion had been established between Dr. Lewis, appellant's treating physician, who indicated that appellant was disabled and employable for light duty four hours per day, and Dr. Goodman, an Office referral physician, who determined that appellant did not suffer residuals from the contusion of the cervical and lumbar spine and concussion and could return to work full time.

To resolve the conflict appellant was referred to a referee physician, Dr. Kenneth M. Kramer, a Board-certified orthopedist.

In a medical report dated October 5, 1999, Dr. Kramer indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Kramer indicated an essentially normal physical examination with full cervical and lumbar range of motion; with posterior cervical tenderness;

[2] On September 16, 1996 appellant filed a claim for compensation alleging that as a result of the FCE she sustained an exacerbation of her preexisting injuries. On August 1, 1997 the Office accepted that appellant sustained an exacerbation of her preexisting injuries; however, noted that this was not a new injury.

and no sciatic notch tenderness. He diagnosed appellant with chronic cervical and lumbar strain syndromes which were causally related to the work incident of 1994. Dr. Kramer noted an absence of disc herniations or other surgical pathology on the cervical and lumbar magnetic resonance imaging (MRI) scans. He indicated that appellant could work four hours per day with tasks involving repetitive bending, lifting and sorting; and four hours a day of sedentary work with no bending or lifting requirements; or alternatively eight hours of sedentary work. Dr. Kramer noted on a work capacity evaluation form that appellant was restricted to 10 pounds of pushing, pulling or lifting. He noted that the job description with the duties described above would be appropriate for appellant.

Appellant submitted several reports from Dr. Lewis dated October 28 to November 22, 1999. Dr. Lewis noted that appellant still experienced back and neck spasms and pain. He recommended that appellant undergo a decompression and fusion of the cervical and lumbar spine. Dr. Lewis indicated that appellant was restricted to working 4 hours a day subject to restrictions on lifting of 10 pounds; standing for no more than 50 minutes at one time; and no squatting, bending, stooping or crawling.

The employing establishment offered appellant a modified light-duty position on December 21, 1999 conforming with the restrictions imposed by Dr. Kramer, the impartial medical examiner. The job specifically indicated that appellant would work 4 hours a day performing intermittent casing and sorting of mail; and 4 hours a day of sedentary work with lifting, pushing and pulling restrictions of 10 pounds and no twisting, squatting, kneeling or climbing. A copy of the job offer was submitted for review by Dr. Kramer, who noted that appellant could perform the job.

By letter dated January 7, 2000, the Office informed appellant that it had reviewed the position description and found the job offer suitable with her physical limitations. Appellant was advised that she had 30 days to accept the position or offer her reasons for refusing. She was apprised of the penalty provisions of the Federal Employees' Compensation Act if she did not return to suitable work.

In a letter dated January 30, 2000, appellant responded to the Office's letter and declined the December 21, 1999 job offer. She indicated that the job offer did not conform to her treating physician, Dr. Lewis' restrictions. Appellant noted that the job would be detrimental to her cervical and lumbar radiculopathy. She also submitted reports from Dr. Lewis dated January 3 and February 1, 2000. Dr. Lewis indicated that appellant could return to work 4 hours per day under restrictions on lifting of 10 pounds; standing for no more that 50 minutes at one time; no squatting, bending, stooping or crawling; and no walking or driving a route.

By letter dated February 3, 2000, the Office informed appellant that the refusal of the offered position was found to be unjustified, based on the opinion of the impartial medical examiner, Dr. Kramer and provided 15 days for her to accept the job.

In a letter dated February 15, 2000, appellant noted that she was refusing the job offer of December 21, 1999 based on the advice of her physician Dr. Lewis and because she believed the position would jeopardize her health. She submitted a letter from Dr. Lewis dated February 10, 2000. Dr. Lewis indicated that the performance of the duties in the job offer would

be detrimental to appellant's condition. He diagnosed appellant with lumbar and cervical radiculopathy.

By decision dated February 28, 2000, the Office terminated appellant's compensation, finding that she refused an offer of suitable work.

In a letter dated March 5, 2000, appellant requested a hearing before an Office hearing representative. The hearing was held on September 20, 2000. Appellant submitted several reports from Dr. Lewis dated March 30, 2000 to October 3, 2001. Dr. Lewis indicated that appellant could return to a position 4 hours per day under restrictions on lifting of 10 pounds; standing for no more than 50 minutes at one time; no squatting, bending, stooping or crawling; and no walking or driving a route. In his letter dated October 3, 2000, Dr. Lewis indicated that he disagreed with Dr. Kramer's evaluation. He noted that appellant has disc herniations at C5-6 and L4-5 and L5-S1 and degeneration of multiple levels of her cervical spine. Dr. Lewis diagnosed appellant with cervical and lumbar radiculopathy. He indicated that appellant could only work four hours per day and for her to work more than this would be detrimental to her well being.

In a decision dated November 6, 2000, the hearing representative denied appellant's claim on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

By letter dated October 31, 2001, appellant requested reconsideration and submitted additional evidence including several reports from Dr. Lewis dated November 22, 1999 to February 5, 2002 and an MRI scan dated December 11, 2000. The medical reports from Dr. Lewis from November 22, 1999 to October 3, 2000 were duplicative of those already in the record. The treatment notes from November 2 to 30, 2000 indicated that appellant's symptoms were unchanged. He diagnosed appellant with lumbar and cervical radiculopathy and cervical disc degeneration. Dr. Lewis' note of December 14, 2000 indicated that the MRI scan of July 12, 2000 revealed degenerative disease at C6-7. Dr. Lewis noted that appellant experienced radiation of pain in the neck and lower back. His notes of January 4 to June 26, 2001 indicated that appellant continued to experience back pain and sciatica with loss of motion. Dr. Lewis' note of August 6, 2001 noted that appellant experienced degenerative arthritis of the cervical and lumbar spine. He recommended that appellant work only four hours per day subject to the previous work restrictions. Dr. Lewis' reports of September 4, 2001 to March 5, 2002 diagnosed appellant with cervical and lumbar radiculopathy. He noted that appellant's condition had not changed and that she continued to experience neck and lower back residuals of the 1994 injury.

In a decision dated January 24, 2002, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work where the impartial medical examiner, Dr. Kramer, supported the suitability of the offered position.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] In this case, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c) on the basis that she refused an offer of suitable work. Section 8106(c) 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.[4]

The Office's implementing federal regulations[5] provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of establishing that such refusal or failure to return to work was reasonable or justified and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[6] To justify termination of compensation, the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.[7]

The Office reviewed the medical evidence and determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Lewis, who indicated that appellant had residuals of her accepted cervical condition and could only work four hours a day, and Dr. Goodman, the Office referral physician who indicated that appellant did not have residuals of her work-related cervical condition and could return to work full time. Consequently, the Office referred appellant to Dr. Kramer to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[8]

The Board finds that, under the circumstances of this case, the opinion of Dr. Kramer is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant could return to work full time, four hours of bending, lifting and sorting and four hours of sedentary duties, and that the job offer of December 21, 1999 was suitable.

The Board finds that, under the circumstances of this case, the opinion of Dr. Kramer is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that job offer of December 21, 1999 was suitable.

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

[4] 5 U.S.C. § 8106(c).

[5] 20 C.F.R. § 10.124(c).

[6] *Id.*

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

[8] *Aubrey Belnavis*, 37 ECAB 206 (1985).

The Board finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable and providing her with the opportunity to accept the position or provide her reasons for refusing.[9] The record reflects that appellant did respond to the Office's notice in a letter dated January 30, 2000 and indicated that the job offer did not conform to her treating physician, Dr. Lewis' restrictions. Appellant noted that the job would be detrimental to her cervical and lumbar radiculopathy. She also submitted reports from Dr. Lewis dated January 3 and February 1, 2000. In a letter dated February 15, 2000, appellant noted that she was refusing the job offer of December 21, 1999 based on the advice of her physician Dr. Lewis. She submitted a letter from Dr. Lewis dated February 10, 2000 where he diagnosed her with lumbar and cervical radiculopathy. However, this evidence was insufficient to show that the offered position was not medically suitable. Dr. Lewis' treatment notes are similar to his prior reports and merely reiterated his findings and are insufficient to overcome that of the Dr. Kramer, independent medical examiner, or to create a new medical conflict, as Dr. Lewis was on one side of the earlier conflict Dr. Lewis diagnosed appellant with lumbar and cervical radiculopathy, however, he did not explain, how, over five years following the accepted contusion of the cervical and lumbar spine, it was exacerbated by appellant's employment factors to result in lumbar and cervical radiculopathy. The Office never accepted that appellant sustained lumbar and cervical radiculopathy as a result of her February 7, 1994 work injury and there is no rationalized medical evidence to support such a conclusion.[10] The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[11] Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.[12]

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 the medical evidence.[13] In this case, the medical evidence provided from Dr. Kramer, the impartial medical examiner, establishes the suitability of the offered position. The Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work. Thereafter, the burden shifted to appellant to establish that the refusal of the job offer was justified.[14]

[9] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[10] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship. *Alice J. Tysinger*, 51 ECAB 638 (2000).

[11] *See Theron J. Barham*, 34 ECAB 1070 (1983).

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

[13] *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickerson*, 46 ECAB 1002 (1995).

[14] *See Deborah Hancock*, 49 ECAB 606 (1998); *Henry P. Gilmore*, 46 ECAB 709 (1995).

The January 24, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member