U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRACE J. RASCHEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilkes-Barre, PA

Docket No. 02-2130; Submitted on the Record;
Issued July 23, 2003

DECISION and ORDER

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

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

On December 9, 1998 appellant, then a 47-year-old licensed practical nurse, filed an occupational disease claim alleging that she developed a rash on her hands from wearing latex gloves. She attributed her possible latex allergy to federal employment. She first sought medical attention from the agency health unit on December 1, 1999, at which time she selected the clinic as her primary health care provider. On January 14, 1999 Dr. David J. Strange, a dermatologist, diagnosed "contact dermatitis (rubber) (nickel)" and indicated that the condition was work related. On January 27, 1999 Dr. Raymond Khoudary, a consulting allergist, noted a positive IgE (immunoglobulin E, an antibody) for latex and diagnosed latex allergy.

The Office initially accepted appellant's claim for dermatitis, not otherwise specified, but then changed the accepted condition to contact dermatitis due to latex exposure. Appellant came under the care of Dr. Tracey Boros Galardi, an internist, who reported on April 21, 1999 that appellant was suffering from moderately severe latex allergy and was having increasing breathing problems and bronchospasm secondary to an allergic reaction to latex. Dr. Galardi reported on June 22, 1999 that appellant's only limitation was to work in a latex-free environment. Latex was found in everything from carpeting to plastics, Dr. Galardi explained. As long as that material was present, appellant would suffer from extreme bronchospasms and asthmatic attacks.

Appellant stopped work in July 1999 and did not return. She received compensation for temporary total disability on the periodic rolls.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Harold J. Milstein, a dermatologist, for an opinion on her diagnosis and disability. On September 5, 1999 Dr. Milstein reported that, based only on his review of the

medical records, appellant's diagnosis was contact/allergic dermatitis due to latex or rubber or similar products. No laboratory testing was available for his review. Because she was not exposed to latex or rubber gloves or products for some time, appellant had no findings on examination. Dr. Milstein attributed appellant's condition to wearing the latex/rubber gloves she wore for many years at work. He opined that, if appellant was exposed to latex or rubber gloves at work, her symptoms would immediately recur. In the proper environment, however, she would be able to function at her full capacity. His concern was whether appellant would be exposed to a rubber or latex environment if she were required to circulate through various assigned working areas. Dr. Milstein recommended further testing to more accurately establish a working and definite diagnosis.

Dr. Galardi referred appellant to a consulting allergist, Dr. Vincent A. Carboni. On December 18, 1999 Dr. Carboni reported as follows:

> "[Appellant] was referred for evaluation of an allergic diathesis to latex. She presented with eligible laboratory work that appeared to be photostat over photostat demonstrating positive RAST [radioallergosorbent test] to latex. I took the liberty to repeat this RAST which demonstrated Class 0, *i.e.*, no detectable IgE to latex. I also obtained Total IgE and an Eosinophil Count which was also within normal limit, not suggestive of allergies.
>
> "By my findings, I cannot discern any IgE mediated allergy to latex. If you are considering contact dermatitis to latex, further evaluation by a Dermatologist would be indicated."

The Office determined that Dr. Carboni's report conflicted with other medical evidence in the record. Specifically, the Office found a conflict on what conditions were related to or aggravated by appellant's federal employment. To resolve this conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Joseph Soma, a Board-certified allergist.

In a report dated June 13, 2000, Dr. Soma noted that there was no laboratory work to verify the positive IgE for latex reported by Dr. Khoudary. The record did contain laboratory work supporting Dr. Carboni's report of a negative RAST for latex. Dr. Soma clarified the following matters:

> "1. Natural rubber latex that causes latex allergy is used as a liquid to produce dipped products such as rubber gloves and balloons. Other rubber products are produced from synthetic rubber and are dry products or injection molded. Exposure to these latter products rarely, if ever, causes sensitivities.
>
> "2. Patch testing and IgE antibody testing for latex, whether negative or positive, is not 100 percent accurate.
>
> "3. There is little evidence of cross reactivity of latex with foods.
>
> "4. Contact dermatitis secondary to latex sensitivity clears when removed from the presence of latex gloves."

Dr. Soma continued:

> "History of contact dermatitis secondary to latex sensitivity has existed. Confirmation exists in employee's records.
>
> "Confirmation of asthma secondary to inhalation of latex particles is not confirmed by employee's records. A normal FEV_1 [Forced Expiratory Volume in the First Second] on pulmonary function testing when not exposed to latex particles and then a decreased to an abnormal FEV_1 following exposure to such would confirm the presence of pulmonary reaction to latex particles.
>
> "In general, reactions to chemicals, especially airborne, cannot be adequately tested for with our present degree of technology. Patch testing using standard tests available would not rule in or rule out the presence of chemical or latex sensitivity. It may aid in showing no reaction to non-dipped rubber materials.
>
> "The patient's history and records show an increasing sensitivity to various chemicals which again does not lend itself to accurate laboratory testing.
>
> "In conclusion, there appears to be positive findings for contact dermatitis related to the use of latex gloves. There appears to be no confirmation in employee's records of the presence of occupationally related asthma. A latex free environment should afford complete relief from the contact dermatitis. Following the previously described pulmonary function testing, I would then rule out the presence of asthma if and when the patient is exposed to latex particles that are airborne. There is no other positive way of determining the presence or absence of such."

Dr. Galardi continued to report that appellant could resume work in a latex-free environment.

The employing establishment began efforts to provide appellant with a latex-free working environment. On December 20, 2000 the employing establishment contacted Dr. Khoudary about a possible work site:

> "We would like to offer [appellant], Latex-Allergy Person, a job in the business office in Building T42. This trailer is located to the rear of the [m]edical [c]enter over by the [p]avilion. Do you feel the carpeting in the single occupancy office will affect this individual? Please respond ASAP [as soon as possible] as we would like to make her a job offer."

Dr. Khoudary responded on December 27, 2000 as follows:

> "The carpet usually do not contain Latex. As long as there is gloves used in this room that contain [no?] latex, I think it will [be a] safe environment for any latex allergy person."

On September 19, 2001 the employing establishment requested the Office's review of a proposed job offer for appellant. The position was that of office assistant and was available immediately. It involved personal contact mainly with Human Resource staff and medical center employees. The work environment was described as follows: "Work area is in a private office setting, climate controlled, well ventilated and well lighted, without carpeting, walls primed and painted with latex free paint, and a hepafilter, cotton gloves will be given to wear, and also a mask will be provided."

On October 18, 2001 the Office notified appellant that the position of office assistant was suitable to her work capabilities and was currently available. The Office gave appellant 30 days either to accept the position or to provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2).

On October 22, 2001 Dr. Galardi reported that appellant was able to resume work in a latex-free environment.

On October 31, 2001 appellant's attorney advised the Office that it failed to attach a description of the duties and physical limitations of the position. The attorney further advised that appellant was refusing acceptance of this position "until we receive further information based upon the [a]ttending [p]hysician's [r]eport that indicates that she continues to be unable to work unless there is a latex free environment."

On November 6, 2001 the Office received a call from the office of appellant's senator indicating that the actual job description was not included in the Office's October 18, 2001 letter. The Office faxed a copy of the job description to the senator's office that day.

In a letter dated November 8, 2001, appellant advised the Office that her doctor had not released her to return to work, according to the attending physician's report dated October 22, 2001. Appellant noted that the job description did not state that the work environment was "latex free." She contended that the surrounding areas should also be latex free, especially if she had to walk through them.

On November 12, 2001 appellant declined the offered position and gave six reasons: 1. Her doctor did not release her to return to work; 2. Her doctor did not review the placement for environment issues; 3. The offer did not state that the area of work and surrounding areas were latex free; 4. The restriction "latex free environment" should have been listed in the work environment; 5. The acceptance/declination statement referenced the job title first as file clerk and later as office assistant; 6. Copies of letters from her attorney were enclosed. Appellant also expressed concerns about accepting a lower pay grade.

On December 12, 2001 the Office notified appellant that it had considered her reasons for refusing the position and had found them to be unacceptable. The Office afforded appellant an additional 15 days to accept the position.

In a decision dated December 31, 2001, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she abandoned suitable work as an office assistant without justification.

In a letter dated December 31, 2001, appellant advised the Office that an administrative law judge for the Social Security Administration had found her to be "disabled."

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on March 28, 2002, appellant's attorney stated that his client's condition required her to have absolutely no contact with latex, chemicals or perfumes, to which she was extremely sensitive. He stated that the job would require appellant to have contact with people coming from the medical center who, most likely, would have contact with latex and gloves or instruments, bringing such into her work environment. It would require her to be around people wearing perfume. Appellant would have to leave her work area to use the restroom or to get files, which were not latex-free areas or chemical-free areas or perfume-free areas. Appellant submitted a copy of the job description and a decision on her application for disability under the Social Security Act.

In a decision dated June 17, 2002, the hearing representative affirmed the termination of appellant's compensation.

The Board finds that the Office properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, 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.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

The Office has met its burden in this case. Dr. Milstein, a dermatologist and Office referral physician, reported that appellant's diagnosis was contact/allergic dermatitis due to latex or rubber or similar products. Dr. Carboni, appellant's consulting allergist, disagreed. He reported that a repeat RAST demonstrated no detectable IgE to latex. He also obtained Total IgE and an Eosinophil Count, which were within normal limits and "not suggestive of allergies." His inability to discern any IgE-mediated allergy to latex created a conflict in medical opinion.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[4]

The Office properly referred appellant to Dr. Soma, a Board-certified allergist, to resolve the conflict. Dr. Soma reported that appellant's records confirmed the existence of contact dermatitis secondary to latex sensitivity but did not confirm the presence of occupationally-related asthma secondary to the inhalation of latex particles. He concluded that a latex-free environment should afford appellant complete relief from contact dermatitis.

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to a referee medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5] The Board finds that Dr. Soma's opinion is sufficiently well rationalized and is based on a proper factual background. It represents the weight of the medical evidence on the issue of appellant's employment-related condition and ability to work in a suitable environment.

Although appellant asserted that her physician did not release her to return to work, Dr. Galardi, her attending internist, consistently reported that she was able to return to work in a latex-free environment. This restriction is consistent with the opinion of the referee medical specialist, Dr. Soma. The medical record establishes no other restriction, such as working in a chemical-free or perfume-free environment. As Dr. Soma reported, appellant's records did not confirm asthma secondary to inhalation of latex particles. In general, he explained, reactions to chemicals, especially airborne, cannot be adequately tested for with present technology. Appellant's history and records showed an increasing sensitivity to various chemicals, but Dr. Soma explained that this, again, did not lend itself to accurate laboratory testing. The record establishes that appellant was not totally disabled for all work. When not exposed to latex or rubber gloves for some time, she had no findings, as Dr. Milstein reported. She had a capacity to work if the work environment was correctly designed.

The employing establishment made efforts to provide a specially-designed work site to accommodate appellant's medical restriction. The position of office assistant was in a private office setting that was climate controlled, well ventilated and well lighted, without carpeting, and with walls primed and painted with latex-free paint. A hepafilter, cotton gloves and mask were also provided. Before submitting this offer to the Office for a finding on the issue of suitability, the employing establishment asked Dr. Khoudary, appellant's allergist, to review the position and report whether it would affect appellant as a latex-allergic person. Dr. Khoudary reported on December 27, 2000 that as long as the gloves used in the room contained no latex, it would be a safe environment for any latex-allergic person.

The weight of the evidence thus establishes that the offered position was suitable. Appellant declined the offer for a number of reasons, but none justified her refusal. Dr. Galardi did release her to return to work, and a doctor did review the placement for environmental issues.

[4] 5 U.S.C. § 8123(a).

[5] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The absence of the phrase "latex free" in the job description, and the failure to reference the job title with complete uniformity, are mere technical objections and do not establish that the specially designed work site was unsuitable. That the offered position paid less than her date-of-injury job is also no justification for refusal.[6]

The issue of disability under the Social Security Act has been raised in other cases and has been squarely settled by the Board. A determination made for disability retirement purposes is not determinative of the extent of physical impairment or loss of wage-earning capacity for workers' compensation purposes. The two relevant statutes, the Social Security Act and the Federal Employees' Compensation Act, have different standards of medical proof on the question of disability; disability under one statute does not prove disability under the other. For a disability determination under the Federal Employees' Compensation Act, appellant's conditions must be shown to be causally related to her federal employment. Under the Social Security Act, conditions that are not employment related may be taken into consideration in rendering a disability determination.[7]

In this case the Office has met its burden of showing that the work offered to and refused or neglected by appellant was suitable, and it properly afforded appellant procedural due process in terminating her compensation pursuant to 5 U.S.C. § 8106(c)(2).

The December 31, 2001 and June 17, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[6] *Allen W. Hermes*, 41 ECAB 838 (1990).

[7] *E.g., Hazelee K. Anderson*, 37 ECAB 277 (1986).