U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRI A. LUSH and U.S. POSTAL SERVICE,
POST OFFICE, Campbell, CA

Docket No. 03-580; Submitted on the Record;
Issued June 18, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) 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; and (2) whether the Office properly refused to reopen appellant's case for merit review.

On February 15, 2000 appellant then a 39-year-old mail carrier, filed a traumatic injury claim alleging that on February 14, 2000 she slid on mud while delivering mail and injured her right leg. The Office accepted the claim for right knee strain and authorized arthroscopic surgery, performed by Dr. Nicholas Colyvas, a Board-certified orthopedic surgeon, on June 13, 2000. Appellant stopped work on June 6, 2000 and was released to a limited-duty position of no more than two and a half hours of walking a day. On October 18, 2000 she underwent a follow-up arthroscopic surgery for her right knee and was disabled for work for approximately six to eight months. A total knee replacement was subsequently recommended in May 2001.

In a November 29, 2001 work capacity evaluation, Dr. Colyvas outlined work restrictions for appellant as a result of her work-related knee injury and a total knee replacement. The physician noted that appellant was capable of working eight hours a day, however, her activities of sitting, walking, standing, lifting, squatting, kneeling and operating a motor vehicle should be limited.

In a letter dated December 17, 2001, the employing establishment offered appellant a rehabilitation position as a video coding system technician in compliance with her medically determined work limitations. The general duties of the position were described as follows: "The worker reads addresses into a headset microphone as individual pieces of mail are displayed on a computer screen. The worker may sit or stand as needed for comfort. The worker gets a five minute break every hour and a 30 minute lunch, during an 8-hour work shift. The first two weeks of work consist of on-the-job training." The physical requirements of the position were described as follows: "Ability to see a computer screen and read displayed text. Ability to

speak. The voice recognition software is capable of understanding accents. Work duties do not require any use of hands. No manual mail handling (including 'loading' or 'sweeping' of mail) is required."

On February 8, 2002 Dr. Colyvas reviewed the job offer and indicated that there were no medical conditions which restricted appellant from performing the essential functions of the position.

In a letter dated March 5, 2002, the Office advised appellant that she had been offered the rehabilitation job position as a video coding system technician, with the employing establishment, which the Office found to be suitable to her work capabilities and complied with the restrictions provided by Dr. Colyvas. The Office advised appellant that she had 30 days from the date of that letter to either accept the position or provide an explanation of the reason for refusing it.

In a letter dated March 28, 2002, appellant rejected the job offer, noting that Dr. Colyvas recommended that she needed more time for physical therapy and treatment and had extended her disability until June 11, 2002. The Office contacted Dr. Colyvas regarding appellant's disability and, in a letter dated April 10, 2002, Dr. Colyvas replied: "[A]s I do believe my office has indicated to you, I do believe she could complete a sit down job as of March 19, 2002. I remain of that opinion." In a letter dated April 11, 2002, the Office advised appellant that her reason for rejecting the job offer was not acceptable because her treating physician, Dr. Colyvas had stated that she was capable of working a seated position. Appellant was advised that she had 15 days from the date of that letter to accept the position or her compensation payments would be terminated.

In a letter dated April 24, 2002, appellant indicated that she was not refusing the position but that she was not physically capable of working at that point. She asserted that her knee was not stable or flexible and she believed that she should have her knee manipulated again and hoped that her compensation would not be denied. A memorandum of record dated May 1, 2002 reflects that appellant subsequently called the Office and indicated that she was taking care of her mother, who had a stroke. She reported that she would be returning to California in one week, however she was in no condition to return to work and that her knee needed to be manipulated again.

By decision dated May 21, 2002, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.[1]

In a letter dated August 24, 2002, appellant requested reconsideration. She contested the denial of compensation. Appellant asserted that she had worked for the employing establishment for 20 years and that she had sustained approximately 45 percent disability to her knee due to her work. She asserted further that her compensation should be reinstated so that she could start to heal and move on with her life.

[1] The record reflects that the Office authorized an additional manipulation of appellant's knee, a cold therapy purchase and a CPM equipment rental on or about August 2, 2002.

By decision dated September 27, 2002, the Office denied merit review of appellant's claim on the grounds that the evidence submitted in support of her request for reconsideration was immaterial.

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides in pertinent part: "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[4] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[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 his refusal to accept such employment.[7]

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 medical evidence.[8] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

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[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

[4] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[5] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[6] 20 C.F.R. § 10.517(a) (1999).

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

[8] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[9] *See Connie Johns*, 44 ECAB 560 (1993).

The record reflects that the physical restrictions of the modified position offered to appellant on December 17, 2001 conformed with the limitations provided by Dr. Colyvas. He noted that appellant could perform in a seated position, with other physical limitations. In a February 8, 2002 report, Dr. Colyvas, indicated that he was furnished with the job offer and description of duties and found that appellant was able to perform the specified duties of the position. He reiterated on April 10, 2002 that appellant could perform the duties of the position. The Board finds that Dr. Colyvas's opinion with respect to appellant's work limitations are based on a proper factual background and is sufficient to establish that the position is medically suitable to her work restrictions.

The employing establishment offered appellant a job based on the work limitations provided by her treating physician. The Office found the position suitable and properly advised appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2). She rejected the offer but submitted no medical evidence specifically addressing the suitability of the offered video coding system technician position. The Office properly notified appellant that the issue of suitability was primarily a medical issue and that her reasons for rejecting the offer were unacceptable. The Office advised that appellant had 15 additional days from April 11, 2002 to accept the offer and if she did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made.[10] She neither accepted the offer nor reported for duty by the Office deadline. Thus, under section 8106 of the Act, her compensation was properly terminated.

The Board also finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[12] If the reconsideration request fails to meet at least one of the standards discussed in 10.606(b)(2) the Office will deny the request without reopening the claim for a review on the merits.[13]

Presented with appellant's request for reconsideration were her arguments regarding concerns about her compensation being terminated and physical limitations with regard to the modified-duty job offer. These same arguments had been considered in the prior termination decision and, therefore, were repetitive. As noted, no additional medical evidence was submitted. In the present case, appellant did not meet any of the requirements of section 10.606(b)(2). She did not show that the Office erroneously applied or interpreted a point

[10] *See Maggie L. Moore*, *supra* note 7.

[11] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Federal Employees' Compensation Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[12] 20 C.F.R. §§ 10.606(b)(2).

[13] 20 C.F.R. § 10.608(b).

of law, advance a point of law or a fact not previously considered by the Office or constitute relevant and pertinent evidence not previously considered by the Office. Accordingly the Office may deny appellant's request for reconsideration without a merit review of the claim.

The decisions of the Office of Workers' Compensation Programs dated September 27 and May 21, 2002 are affirmed.

Dated, Washington, DC
June 18, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member