U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY THOMAS and U.S. POSTAL SERVICE,
BLUE BONNET STATION, Austin, TX

Docket No. 03-732; Submitted on the Record;
Issued May 20, 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 properly terminated appellant's compensation benefits effective October 5, 2002 on the grounds that she refused an offer of suitable work.

The Office accepted that, on March 28, 2001, appellant then a 51-year-old rural route carrier, sustained a lumbar strain in a motor vehicle collision while delivering mail.

In a March 28, 2001 report, Dr. Stephen Cox, an attending Board-certified surgeon, provided a history of injury and diagnosed a lumbar strain and lumbar radiculopathy. Dr. Cox also obtained lumbar x-rays showing degenerative disc disease at L4-5 and L5-S1.

Dr. Cox submitted periodic treatment notes from April 2001 onward, diagnosing a thoracic back sprain and herniated lumbar discs.[1]

In May 2001, appellant returned to work in a part-time light-duty capacity, working four hours per day through July 2001. She increased her schedule to eight hours per day light duty on September 5, 2001.[2] Appellant continued to perform these duties through June 2002.

In an August 20, 2001 report, Dr. James L. Smith, Jr., an attending Board-certified orthopedic surgeon, diagnosed "[d]egenerative lumbar spondylosis, normal EMG [electromyographic] [study], and normal neurologic exam[ination]." He recommended

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[1] Appellant submitted physical therapy notes from April to August 2001. She also underwent chiropractic treatment in June and December 2001. An August 20, 2001 EMG of the lower extremities was normal.

[2] On July 3, 2001 the Office assigned Wanda Atkins, a registered nurse, to assist in appellant's vocational rehabilitation. Appellant received rehabilitation nurse services through September 2001. In a November 2001 rehabilitation nurse closure report, Ms. Atkins stated that appellant had "successfully remained at eight hours of modified duty" since September 5, 2001 and was able to work "without significant difficulties."

continued light duty and conservative treatment. Dr. Smith commented that appellant's symptoms had not persisted beyond the expected range, "given her lumbar spondylolisthesis and her injury in a motor vehicle accident."

In a March 25, 2002 report, Dr. Cox found that appellant could continue to work eight hours per day, with limitations on lifting, standing, walking, kneeling, bending and simple grasping.

In an April 12, 2002 report, Dr. Cox diagnosed herniated discs at L4-5 and L5-S1 with lumbar radiculopathy.[3] He checked a box "yes" indicating his support for causal relationship. Dr. Cox opined that appellant would "have permanent weakness in legs, be unable to carry heavy weights." He limited appellant to working five days in a row and five days out of seven. Dr. Cox prescribed physical therapy. He submitted periodic progress reports through July 2002 reiterating appellant's previous diagnoses.

In a May 29 and June 27, 2002 reports, Dr. Brandywine, a family practitioner, noted limitations on walking, sitting, climbing, kneeling, bending, stooping, twisting, pulling, pushing, simple grasping and fine manipulation. He proscribed reaching above the shoulder and driving a motor vehicle.

On July 9, 2002 the employing establishment offered appellant a limited-duty position beginning July 13, 2002, with a tour of duty from 2:30 to 11:00 a.m. and rotating days off. The duties included "casing routes, working paper dolls, delivering expresses, completing P.O.M.s, answering the [tele]phone and any letter duties as assigned by [a supervisor] within limitations." Appellant declined the offered position as the schedule did not allow for two consecutive days off. She also asserted that she was given only three days notice of the schedule change, which was insufficient time for her to prepare.

In a July 10, 2002 report, Dr. Cox diagnosed a herniated nucleus pulposus with radiculopathy. He noted appellant's contention that the employing establishment was violating her work restrictions by requiring her to case mail for four hours, causing an increase in her lumbar pain. Dr. Cox recommended a functional capacity evaluation, and psychological counseling to deal with extreme stress. He limited appellant to working five consecutive days, followed by two days off.

A July 16, 2002 functional capacity evaluation revealed "some strength deficits" with testing of the neck, upper and lower extremities. Appellant was found fit for light-duty work with restrictions against kneeling and limitations on all other physical activities except sitting.[4]

[3] A March 26, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine showed a bulging disc at L3-4 impinging on the thecal sac, a broad-based herniation at L4-5 with compression of the thecal sac and mild bilateral foraminal encroachment and a bulging disc at L5-S1 with degenerative disc disease, bilateral facet joint arthrosis and foraminal narrowing bilaterally.

[4] The employing establishment did not challenge appellant's claim for compensation for the period July 15 to 19, 2002.

On July 19, 2002 the employing establishment amended the job offer by scheduling Sunday and Monday as consecutive days off. The other provisions were unchanged.

In a letter dated August 13, 2002, the Office advised appellant that she had been offered suitable work within her restrictions. The Office also advised appellant of the penalties under the Federal Employees' Compensation Act for refusing an offer of suitable work. Appellant was afforded 30 days in which to either report for duty as directed or provide sufficient reasons to justify her refusal or her wage-loss compensation would be terminated.

In an August 21, 2002 letter, appellant stated that she refused the position offered to her on July 9, 2002 as it required her to work more than five consecutive days and did not allow her two consecutive days off. She explained that, if she had reported for duty on Saturday, July 13, 2002, "after already working … five days in a row, [her] restrictions would have been violated." Appellant alleged that being given only three days notice deprived her of the 30 days notice provided by section 10.516 of the Office's regulations, and various postal regulations. She contended that she could not work from 2:30 a.m. to 11:00 a.m. as she was the guardian of her two young grandchildren. Appellant preferred the light-duty position which she had performed since September 5, 2001, with a duty shift of 8:15 a.m. to 4:15 p.m., which allowed her to care for her grandchildren. However, Supervisor Charles Corona informed her on July 19, 2002 that her previous light-duty position "no longer existed." On July 24, 2002 station manager Martin Ross and Mr. Corona again offered appellant a light-duty position, which she declined as it did not provide two consecutive days off.[5]

In an August 29, 2002 report, Dr. Cox limited appellant to lifting 10 pounds or less, restricted standing, walking, climbing and twisting to two hours per day, kneeling, bending and stooping to one hour per day, simple grasping, fine manipulation and keyboarding to four hours per day, and proscribed reaching above the shoulder and driving a motor vehicle.

In an August 29, 2002 statement, Mr. Ross stated that on July 19, 2002 appellant stated that "the Lord told her she needed to be home with her grandchildren" from 2:30 a.m. to 11:00 a.m. Appellant then argued with Mr. Corona, accusing him of being "fake" and "evil," and asserted that "she was n[o]t going to bow down to the devil and quit," refused the offer and left the office.

In a September 18, 2002 letter, the Office advised appellant to provide a written explanation regarding her refusal to report for duty. The Office afforded appellant an additional 15 days to accept the position, which was still available, noting that no further reasons for refusal would be considered. The Office also advised appellant that, if she failed to respond, or continued to refuse the job offer, a final decision would be issued terminating her wage-loss compensation benefits.

Appellant submitted a September 10, 2002 report from Dr. James E. Hansen, a Board-certified orthopedic surgeon, who provided a history of injury and treatment, and noted

[5] In employing establishment time analysis forms from July 24 to September 27, 2002, appellant stated that the July 9, 2002 job offer was not within [her] limited-duty restrictions." Appellant noted that "declining job offer resulted in [her] being put off clock" on leave without pay.

appellant's symptoms of lumbar pain and right foot paresthesias. He opined that appellant's pain was either mechanical or discogenic, and also diagnosed bilateral plantar fasciitis. Dr. Hansen commented that, although MRI reports showed a disc protrusion with moderate stenosis at L4-5, there were no findings on examination of "neurogenic claudication from central canal stenosis."

By decision dated October 4, 2002, the Office terminated appellant's compensation effective October 5, 2002 on the grounds that she refused an offer of suitable work. The Office found that appellant did not accept the offered position, which was within the restrictions provided in July 2002 by Dr. Cox and was therefore suitable work. The Office also found that appellant had not submitted any new evidence demonstrating that she was medically incapable of performing the offered position.

Appellant filed her appeal with the Board on January 29, 2003.[6]

The Board finds that the Office properly terminated appellant's wage-loss compensation benefits on the grounds that she refused an offer of suitable work.

It is a well settled principle that once the Office accepts a claim, it has the burden of justifying termination of compensation benefits under 5 U.S.C. § 8106(c)(2) for a claimant's refusal to accept suitable work.[7] Section 8106(c)(2)[8] of the Federal Employees' Compensation Act 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. To establish that appellant has refused or abandoned suitable work, the burden is first on the Office to substantiate that the position offered was consistent with appellant's physical limitations, and provide the claimant with a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable.[9] The burden then shifts to the claimant, under section 10.517(a)[10] of the Office's regulations, to show that his or her refusal or neglect of suitable work was reasonable or justified. Claimants shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[11] Finally, the burden shifts back to the Office for determination of whether appellant's reasons for declining or refusing the position were unjustified.[12]

[6] Following the issuance of the Office's October 4, 2002 decision, appellant submitted additional medical and factual evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final merit decision in the case. 20 C.F.R. § 501.2(c).

[7] *Shirley B. Livingston*, 42 ECAB 855 (1991).

[8] 5 U.S.C. § 8106(c)(2).

[9] *John E. Lemker*, 45 ECAB 258 (1993); *Mary A. Howard*, 45 ECAB 646 (1994); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[10] 20 C.F.R. § 10.517(a).

[11] *Maggie L. Moore*, *supra* note 9.

[12] *Supra* note 9.

In this case, the Office properly determined that appellant had refused an offer of suitable work and followed the appropriate procedures prior to issuing the October 4, 2002 decision.

Regarding the threshold issue of suitability, the Board finds that there is no evidence of record indicating that appellant was medically incapable of performing the modified position offered to her on July 19, 2002. Dr. Cox, an attending Board-certified surgeon, provided July 10, 2002 restrictions against working more than five days consecutively, followed by two days off. Dr. Cox's periodic reports from April 2002 onward limited appellant to sedentary work. The July 19, 2002 job offer is in compliance with those restrictions.

Thus, the Office advised appellant by August 13, 2002 letter that the July 19, 2002 job offer had been determined to be suitable work and of the Act's penalty provision for refusing the offer. Appellant then submitted an August 21, 2002 letter explaining her reasons for refusal.

First, appellant contended that she refused the position offered to her on July 9, 2002, with a start date of July 13, 2002, as the offer violated section 10.516[13] of the Office's implementing regulations. This section provides that an employee offered suitable work should be afforded "the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability." The Board finds that appellant is correct that the employing establishment did not give her 30 days notice regarding the July 9, 2002 job offer. However, the employing establishment withdrew that offer as it was not within appellant's medical restrictions. Appellant was given a second modified job offer on July 19, 2002 providing for two consecutive days off. Appellant was given until October 3, 2002 to accept the position, a period of more than 30 days. The Office's October 4, 2002 decision terminating appellant's wage-loss compensation benefits concerns only her refusal of the July 19, 2002 job offer. Therefore, the issue of the sufficiency of notice regarding the July 9, 2002 job offer is irrelevant.

Second, appellant alleged that the offered position did not provide for two consecutive days off, in violation of Dr. Cox's July 10, 2002 medical restrictions. While the July 9, 2002 job offer did not provide for two consecutive days off, this offer is no longer at issue. The July 19, 2002 job offer, which appellant refused on July 24, 2002, provides for Sunday and Monday off. Thus, appellant's contention is not supported by the facts.

Third, appellant asserted that she could not perform the offered position as the 2:30 a.m. to 11:00 a.m. duty shift created difficulties with her child care responsibilities. Appellant thus preferred remaining on her 8:15 a.m. to 4:45 p.m. work schedule. However, the Board has held that an employee's dislike of the work hours scheduled is not an acceptable reason for refusing an offer of suitable work.[14] Also, appellant has not shown a medical need to work from 8:15 a.m. to 4:45 p.m.

The Office then advised appellant by September 18, 2002 letter that her reasons for refusing the July 19, 2002 job offer were insufficient. Appellant was afforded another 15 days, until October 3, 2002, in which to either accept the offer or face termination of her wage-loss

[13] 20 C.F.R. § 10.516 (April 2002).

[14] *Patricia M. Finch*, 51 ECAB 165 (1999).

compensation benefits. Although this letter stated that no further reasons for refusal would be considered, appellant submitted an additional medical report from Dr. James Hansen, a Board-certified orthopedist. Dr. Hansen did not address the July 19, 2002 job offer or indicate that appellant was disabled for work.

As appellant did not accept the July 19, 2002 job offer or report for work within 15 days of the September 18, 2002 letter, the Office issued the October 4, 2002 decision terminating her wage-loss compensation benefits effective October 5, 2002. As set forth above, the October 4, 2002 decision is correct under the law and facts of this case.

The decision of the Office of Workers' Compensation Programs dated October 4, 2002 is hereby affirmed.

Dated, Washington, DC
May 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member