U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SIUMING QIU and U.S. POSTAL SERVICE,
AIR MAIL FACILITY, JOHN F. KENNEDY AIRPORT, N.Y.

Docket No. 97-176; Submitted on the Record;
Issued December 16, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof in terminating appellant's monetary compensation benefits effective July 21, 1996 on the grounds that she refused an offer of suitable work; and (2) whether the Office's refusal to reopen the record pursuant to section 8128(a) of the Federal Employees' Compensation Act constituted an abuse of discretion.

On September 17, 1991 appellant, then a 42-year-old clerk, filed a notice of traumatic injury and claim, alleging that she sustained low back pain on September 15, 1991. The Office accepted appellant's claim for lumbosacral sprain. Appellant accepted a limited-duty position as a modified clerk and returned to work. On April 20, 1993 appellant filed a claim for recurrence of disability beginning April 6, 1993. Appellant stopped work from April 7 to 16, 1993. On October 25, 1993 the Office accepted appellant's claim for recurrence of disability. On July 2, 1994 appellant filed a second claim for recurrence of disability, alleging that the recurrence began June 13, 1994. Appellant stopped work from June 15 to 19, 1994 and began again on July 2, 1994. After further development of the medical evidence, on March 21, 1996 appellant was referred for participation in a rehabilitation program. On April 12, 1996 the employing establishment offered appellant a limited-duty position as a full-time modified distribution clerk with restrictions of no bending and no lifting or carrying over 15 pounds. On April 17, 1996 appellant rejected the offer and submitted a report from her treating physician which she believed substantiated her refusal. In a letter dated April 22, 1996, the Office informed appellant that it found the offered position suitable despite the medical evidence received from her treating physician, Dr. Gai-Fu William Yang, a Board-certified physiatrist, finding that the weight of the medical evidence of record established that the job offer was suitable. The Office advised appellant of the penalty provision set forth in 5 U.S.C. § 8106(c) of the Act and allowed appellant 30 days to provide an explanation if she refused the offer. By letter dated May 24, 1996, the Office advised appellant that she had an additional 15 days to either refuse or accept the job offer. In the event she refused the job offer her compensation benefits would be terminated. Appellant did not accept the proposed position and advised her

rehabilitation counselor of her continued intent to reject the said offer. On June 4, 1996 the Office granted appellant's request for a new magnetic resonance imaging (MRI) of her lumbosacral spine. The Office received the MRI report, had it reviewed by an Office medical adviser and did not receive any additional reports from Dr. Yang. In a decision dated July 1, 1996, the Office terminated appellant's compensation effective July 21, 1996 on the grounds that she refused an offer of suitable work. On July 2, 1996 appellant accepted the limited-duty position as it had been approved by her physician. Appellant returned to work and filed claims for wage-loss compensation for the other four hours of work. Appellant filed a request for reconsideration, alleging that she was working in pain and requesting loss wages for four hours per day beginning July 6, 1996. In a decision dated August 27, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitive and not sufficient to warrant merit review.

The Board finds that the Office met its burden of proof in terminating appellant's monetary compensation benefits effective July 21, 1996 on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This burden of proof is applicable if the Office terminates pursuant to section 8106(c) for refusal to accept suitable work. The Office met its burden on this case.[1] Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered … is not entitled to compensation."[2] However, to justify such termination, the Office must show that the work offered is suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.[4]

In the present case, the Office properly exercised its authority granted under the Act and the implementing federal regulations. Initially the Office must review the written job offer and preliminarily assess whether the job offer is suitable. In this regard, the Office reviewed the medical evidence of record and the job offer. Prior to assigning appellant to a rehabilitation program the Office had referred appellant to Dr. Melpakkam D. Kasy, a Board-certified orthopedic surgeon, for an impartial medical examination and a report due to a conflict in the medical evidence between Dr. Yang and Dr. Robert Swearingen, a Board-certified orthopedic surgeon and Office referral physician, regarding appellant's diagnosed conditions, the degree of disability therefrom and whether or not appellant was capable of working eight hours a day. Dr. Yang diagnosed disc herniation at the L5 to S1 level, disc bulges at the L1-2 and L2-3 levels, mild tibia neuropathy and low back which totally disabled appellant. On the other hand, Dr. Swearingen found that appellant was post two back incidents with no unequivocal current objective findings, had a mild disability from degenerative back condition and was capable of

[1] *See Arthur C. Reck,* 47 ECAB ___ (Docket No. 94-1072, issued December 4, 1995).

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Comacho,* 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

[4] 20 C.F.R. § 10.124; *see Catherine G. Hammond,* 41 ECAB 375 (1990).

returning to work with a restrictions of no lifting over 25 pounds. Thus, the Office properly referred appellant for an impartial medical examination. In a report dated July 20, 1995, Dr. Kasy diagnosed low back pain and degenerative disc disease of the lumbar spine with a very mild disability. He concluded that appellant could return to work for eight hours a day with limitations on bending and lifting objects over 15 pounds. The employing establishment's position description in the April 12, 1996 job offer was consistent with these restrictions, and the Office properly concluded that, given appellant's limited work restrictions, the position was suitable. Although appellant submitted additional medical reports by Dr. Yang, these reports reiterated his earlier diagnoses and conclusions contained in previously considered reports of record. The Board notes that Dr. Kasy was selected to resolve the conflict in the medical evidence between Drs. Yang and Swearingen. For this reason, the subsequent reports by Dr. Yang which are essentially repetitive of his prior reports are insufficient to outweigh the special weight given the report by Dr. Kasy as Dr. Yang participated in the creation of the conflict which was referred to Dr. Kasy for resolution.[5] Moreover, Dr. Yang requested that an additional MRI be performed and this request was granted. In an MRI report dated June 20, 1996, Dr. Richard Rafal, a Board-certified radiologist, noted a reversal of the upper lumbar lordosis, desiccated discs from L1-2 through L5 to S1, multiple Schmorl's nodes as noted above, posterior osteophytes associated with aforementioned bulging discs, narrowing of the ventral portion of the thecal sac in affected discs and a posterior bulging disc at L5 to S1. As an Office medical adviser noted, this report is substantially the same as an earlier MRI dated July 15, 1994 which had been reviewed by Dr. Kasy. Thus, this MRI report does not contain any new objective evidence which supports appellant's claim of continuing disability. In addition, shortly after receiving this report, Dr. Yang approved the proposed position as within appellant's physical capabilities, adding that she not sit for more than one hour. Therefore, the weight of the medical evidence remains with the report by Dr. Kasy, and the Office properly determined that the position offered was suitable. The Office has met its burden of proof in terminating appellant's compensation benefits pursuant to section 8106(c) of the Act.

The Board further finds that the Office's refusal to reopen the record did not constitute an abuse of discretion.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain a review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[8]

[5] *Josephine L. Bass*, 43 ECAB 929 (1992); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB

On reconsideration, appellant submitted additional form reports by Dr. Yang reiterating his previously noted diagnoses and finding appellant partially disabled from July 6 to August 2, 1996. This evidence is repetitive of evidence previously considered in the record and therefore has no evidentiary value as he has not provided any objective bases for his continued finding of disability. Consequently, the Office properly denied appellant's request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 27 and July 1, 1996 are hereby affirmed.[9]

Dated, Washington, D.C.
December 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

1090 (1984).

[8] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] The Board notes that appellant requested resolution of her wage loss claims on reconsideration. As there is no formal decision addressing these claims in the record, this issue is not before the Board.