U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA MARIE B. McARDLE and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, New York, N.Y.

Docket No. 97-1711; Submitted on the Record;
Issued April 22, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 11, 1997 on the grounds that she refused an offer of suitable work.

On January 21, 1993 appellant, then a 33-year-old ultrasound technician, filed a notice of traumatic injury and claim, alleging that she sustained injuries to her right shoulder and back while lifting a patient out of a wheelchair. The Office accepted appellant's claim for right shoulder strain, cervical radiculitis and lumbar strain. On July 5, 1994 appellant filed a recurrence of disability claim, alleging a recurrence beginning March 8, 1994. She stopped work on April 3, 1994. Appellant filed a second claim for recurrence of disability on July 20, 1994 and stopped work again. The Office accepted both claims for recurrence of disability. Appellant received appropriate compensation for all periods of temporary total disability. In November 1996, the employing establishment offered appellant a position as a diagnostic radiologic technician working from 10:00 a.m. to 4:30 p.m. with requirements of lifting 10 pounds 1 to 2 times an hour for 4 to 6 hours a day, and limited kneeling, bending, twisting and lifting. On November 6, 1996 appellant refused this offer, indicating that she remained totally disabled. Appellant attached a letter dated November 6, 1996 by her treating physician, Dr. Martin A. Lehman, a Board-certified orthopedic surgeon, who indicated that appellant had been under his care since 1994, could not use public transportation, was unable to sit or stand for more than 20 minutes at a time, could not push or lift more than 5 pounds and remained totally disabled. By letter dated January 9, 1997, the Office informed appellant that it found the November 1996 position suitable and informed her of the penalty provision set forth in 5 U.S.C. § 8106(c). The Office allowed appellant 30 days to provide an explanation if she refused the offer. Appellant resubmitted her refusal of the position together with the November 6, 1996 report by Dr. Lehman and form reports dated September 20 and November 4, 1996 in which he diagnosed herniated discs at the L3 to L4 and L4 to L5 levels. In a letter dated February 11, 1997, the Office advised appellant that the reasons provided for not accepting the offered position were not acceptable and provided her an additional 15 days to accept the modified position. By decision dated March 11,

1997, the Office terminated appellant's compensation effective that date on the grounds that she had no residuals of her January 10, 1994 employment injury. In the memorandum accompanying the decision, however, the Office indicated that appellant's compensation was terminated based on her refusal of an offer of suitable work.

The Board has duly reviewed the entire case record and finds that the Office improperly terminated appellant's compensation benefits effective March 11, 1997.

Under the Federal Employees' Compensation Act,[1] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[2] 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."[3] However, to justify such termination, the Office must show that the work offered is suitable.[4] 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.[5]

In the present case, the initial issue to be resolved is whether the position offered was suitable within the meaning of the Act and regulations. The regulations governing the Act provide several steps that must be followed prior to the determination that the position offered is suitable. Section 10.124(b) of the Office's regulation reads as follows:

> "Where an employee has been advised by the employing agency in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties."[6]

In this case, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work; however, the Office did not follow the regulations in effect at the time of its March 11, 1997 decision in reaching this decision. The record did not contain any reports from appellant's treating physician which indicated that she could perform the position offered. The Office based it determination that the offered position was suitable on the report of Dr. Harvey Fishman, a Board-certified orthopedic surgeon and Office referral physician, who provided the physical limitations outlined in the November 1996 position offered by the employing establishment. A review of the record indicates that when appellant's rehabilitation specialist first requested that appellant be sent for a second opinion examination to

[1] 5 U.S.C. § 8101 *et seq.*

[2] *William Kandel*, 43 ECAB 1011 (1992).

[3] 5 U.S.C. § 8106(c)(2).

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

[5] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

[6] 20 C.F.R. § 10.124(b).

determine if the offered position was suitable, the physical requirements provided that appellant must be able to lift between 10 and 13 pounds continuously, walk continuously, push and pull continuously 12 pounds and that lifting of patients was to be performed by other staff members. Although a letter from appellant's rehabilitation counselor indicates that Dr. Lehman reviewed that position description and found it unsuitable, there is no report in the record by Dr. Lehman to verify that he did in fact review the position description dated July 15, 1996. In the position offered in November 1996, the cover sheet for the position description is also dated July 15, 1996, but the last page with the physical requirements was changed at some point, apparently, after Dr. Fishman's report was reviewed. However, the record does not contain any evidence which would substantiate that Dr. Lehman reviewed either position description or specifically commented on the suitability of either position. Moreover, although in his November 6, 1996 report Dr. Lehman provided alternative physical limitations, there is no indication that the employing establishment engaged in new employment dialogue concerning appellant's work restrictions.[7] Such a dialogue is especially essential in this case where the employing establishment has made at least three different job offers with different physical requirements but the employing establishment has attached the same two position description cover sheets to each of the later offers and each position has had the same title. In addition, the brief report contained in the record from Dr. Lehman seems to conflict with the report of Dr. Fishman with respect to whether appellant was capable of performing the offered position. As the Office did not follow its procedures prior to terminating appellant's compensation and there is an unresolved conflict in the medical evidence concerning whether the position offered was suitable, the Office did not meet its burden of proof in terminating appellant's compensation effective March 11, 1997.

[7] *See Charlene R. Herrera*, 44 ECAB 361 (1993).

The decision of the Office of Workers' Compensation Programs dated March 11, 1997 is hereby reversed.

Dated, Washington, D.C.
April 22, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member