U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAURISSA MACK and U.S. POSTAL SERVICE,
WORLDWAY POSTAL CENTER, Los Angeles, CA

Docket No. 97-821; Submitted on the Record;
Issued August 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act; and (2) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after November 25, 1995 causally related to her June 24, 1992 work-related injury.

In this case, appellant, then a 34-year-old mailhandler, filed a notice of traumatic injury on September 24, 1992 alleging that she bruised her right hand when it got caught between two all-purpose containers while unloading mail. The Office accepted the claim for right wrist sprain, right arm tendinitis and right carpal tunnel syndrome. Appellant returned to work on December 12, 1992, stopped work on December 14, 1992, returned on December 19, 1992 and stopped again on December 28, 1992. Appellant filed a recurrence claim on December 14, 1992. Appellant returned to light-duty work on September 26, 1993, but has not worked since October 6, 1993.

Dr. Edward A. Ridgill, appellant's treating physician, indicated that appellant was totally disabled since September 28, 1993 as appellant returned to a work assignment that required her to work outside her restrictions. In letters dated October 28 and November 4, 1993 and January 4, 1994, Dr. Ridgill opined that appellant was temporarily totally disabled from performing her work duties.

The Office referred appellant for a second opinion to Dr. Peter S. Lorman, a Board-certified orthopedic surgeon, who concluded that there was no objective evidence of disability. In a supplemental letter dated October 19, 1993, Dr. Lorman concluded that appellant had carpal tunnel syndrome on the median nerve area based upon the nerve conduction study. By letter dated November 2, 1993, Dr. Lorman stated that, while appellant does have evidence or right carpal tunnel syndrome, there was no "objective basis for placing her on disability" and that she

could perform her regular work duties. In a letter dated November 9, 1993, Dr. Lorman noted that appellant was not working even though he had cleared her to return to work.

Due to the conflict of opinion between Drs. Ridgill and Lorman, the Office referred appellant to Dr. Myron M. Isaacs, a Board-certified orthopedic surgeon, for an impartial medical examination.[1] Dr. Isaacs stated, in a report dated January 31, 1995, that appellant had no objective evidence of carpal tunnel syndrome and that the diagnosis was apparently made on her complaints. Dr. Isaacs opined that appellant was disabled based upon her subjective complaints, but that there was no objective evidence of disability. Dr. Isaacs opined that there were no limitations based on the physical examination, but recommended additional tests. In a March 2, 1995 report, Dr. Isaacs stated that, based upon the February 28, 1995 electromyographic test, appellant had median nerve entrapment and recommended surgery. Dr. Isaacs opined that, if appellant refused treatment, then he would restrict her work by requiring no repetitive use of the fingers of the right hand and repetitive flexion and extension of the right wrist.

On October 17, 1995 the employing establishment offered a modified mailhandler position to appellant, which consisted of no repetitive use of the fingers of the right hand and no repetitive flexion and extension of the right wrist. Appellant accepted the position on October 23, 1995, returned to work on November 20, 1995 and stopped work on November 25, 1995.

In a letter dated November 27, 1995, Dr. Ridgill opined that appellant was totally disabled to work the modified mailhandler position. Dr. Ridgill indicated that the employing establishment did not comply with appellant's work restrictions upon her return to work. He noted that appellant had been required to perform repetitive work with her hands despite work restrictions which limited appellant's use of her hand in a repetitive manner. Due to the employing establishment's failure to comply with the work restrictions limiting repetitive use of her hands, appellant suffered an "acute exacerbation of her *Bilateral Carpal Tunnel Syndrome with Tenosynovitis*." (Emphasis in the original.) Dr. Ridgill opined that appellant was totally disabled due to the exacerbation of her disability which was caused by the employing establishment's failure to comply with the specific restrictions regarding the use of appellant's hands in her work.

In his report dated January 8, 1996, Dr. Ridgill opined that appellant remained totally disabled due to the failure of the employing establishment to comply with the restrictions regarding excessive use of her hands at work. The physician indicated that appellant "was returned to work activities that did require repetitive use of the hands" which "resulted in an acute exacerbation and recrudescence of her clinical condition resulting in additional disability."

[1] Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. *Shirley L. Steib*, 46 ECAB 309, 317 (1994); *see Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

Dr. Ridgill, in a report dated February 22, 1996, indicated that appellant remained "temporarily totally disabled and unable to work since *November 25, 1995*." (Emphasis in the original.) Regarding appellant's return to light duty, he opined:

> "As detailed to your office on January 8, 1996, this patient was medically clear to return to work with light-duty restrictions. *These restrictions were not honored* and the patient suffered an exacerbation of her injury which has prevented her from returning to any work duties since the *November 25, 1995 date*. *There was a direct causal relationship between the failure of the [employing establishment] to honor her work* restrictions and the current exacerbation of her injuries." (Emphasis in the original.)

The physician also noted that appellant had not made any progress clinically and stated:

> "[Appellant] is still suffering with severe, incapacitating, right wrist and right hand pains with right hand weakness of such severity that she is unable to perform routine household chores with the affected hand.… This patient is *right-hand dominant.* This patient's customary occupation is as a *mailhandler*. This work activity requires that the patient use both hands repeatedly during an entire work shift. The patient remains incapable of performing this type of work activity at this time. This patient is incapable of resuming the taxing physical demands of her work and will remain *temporarily totally disabled* until *May 1, 1995*." (Emphasis in the original.)

On June 20, 1996 the Office advised appellant that her position as modified mailhandler had been found to be suitable by Dr. Isaacs; the Office informed appellant that she had 30 days to either accept the position or provide a reasonable, acceptable explanation for refusing. Appellant did not respond to the Office's letter.

In a decision dated July 23, 1996, the Office terminated appellant's wage-loss compensation under section 8106(c)(2) of the Act for refusing suitable work.

Appellant requested reconsideration of the Office's July 23, 1996 decision in a letter received by the Office on August 19, 1996 and submitted additional medical reports from Dr. Norman P. Zemel, an orthopedic surgeon, and an operative report for right carpal tunnel surgery dated July 23, 1996.

In a decision dated October 4, 1996, the Office denied modification of its July 23, 1996 decision.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Act.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Act[3] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

The implementing regulation[6] 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.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[8]

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.[9] In assessing medical evidence, the number of physicians supporting one position over 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.[10]

In its July 23, 1996 decision terminating appellant's compensation for refusal of suitable work under 5 U.S.C. § 8106(c), the Office found that the position of modified mailhandler offered to appellant by the employing establishment was suitable since it was within the work tolerance limitations set forth by Dr. Isaacs who the Office considered an impartial medical specialist resolving a conflict of medical opinion. However, Dr. Isaacs did not examine appellant after her return to work on November 20, 1995 and was unaware of her physical

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[6] 20 C.F.R. § 10.124(c).

[7] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[8] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[10] *Connie Johns*, 44 ECAB 560, 570 (1993).

condition at that time. In addition, by the time the Office determined that the offered position was suitable, Dr. Isaacs' opinion was almost 10 months old. Thus, Dr. Isaacs' opinion is of little probative value in determining whether appellant was capable of performing her limited-duty position on or after November 20, 1995 as he did not have any actual knowledge of appellant's physical condition after having worked from November 20 to 25, 1995.

In this case, appellant has submitted sufficient medical evidence to demonstrate that she could not work after November 25, 1995 due to her bilateral carpal tunnel syndrome with tenosynovitis. Dr. Ridgill, in his reports dated November 27, 1995 and January 8 and February 22, 1996, diagnosed exacerbation of her bilateral carpal tunnel syndrome with tenosynovitis and related this condition to the repetitive use of her hands which was directly contrary to her work restrictions in her limited-duty position. Accordingly, the Office has not met its burden of proof, and the Office's termination of her compensation is reversed.

The Board further finds that appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after November 25, 1995 causally related to her September 24, 1992 work-related injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish, by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[11]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her September 24, 1992 employment injury.[12] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[13]

In this case, the Office accepted that appellant sustained a right wrist sprain, right arm tendinitis and right carpal tunnel syndrome. Appellant returned to work on November 20, 1995 in a modified mailhandler position working eight hours per day and stopped work on November 25, 1995. Dr. Ridgill reported that appellant has sustained an exacerbation of her bilateral carpal tunnel syndrome with tenosynovitis due to her work activities which required repetitive use of her hands despite work restrictions limiting use of her hands while working. The Board finds that, in the absence of probative medical opinion evidence to the contrary,

[11] *See Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 859, 864 (1989).

[12] *Lourdes G. Davila*, 45 ECAB 139 (1993); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[13] *Louise G. Malloy*, 45 ECAB 613 (1994).

Dr. Ridgill's November 27, 1995 and January 8 and February 22, 1996 reports support a change in the nature and extent of the injury-related condition and therefore supports appellant's claim of a recurrence of disability on November 25, 1995 causally related to her accepted employment injury. The Office should further develop the evidence regarding subsequent period or periods of disability.

The decisions of the Office of Workers' Compensation Programs dated October 4 and July 23, 1996 are hereby reversed and the case returned to the Office for determination of all periods of disability, payment of appropriate medical expenses and payment of appropriate compensation.

Dated, Washington, D.C.
August 2, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member