U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA E. RUTHERFORD and DEPARTMENT OF LABOR, WORKING CAPITAL FUND, Washington, DC

Docket No. 97-2012; Submitted on the Record;
Issued August 20, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective January 8, 1995 on the grounds that she refused an offer of suitable employment pursuant to section 8106(c) of the Federal Employees' Compensation Act; (2) whether appellant met her burden of proof that she continues to suffer residuals from her consequential ankle injury; and (3) whether the Office properly denied authorization for surgery of appellant's accepted low back condition.

The Board has reviewed the case record and finds that the Office met its burden of proof in terminating appellant's compensation effective January 8, 1995 on the grounds that she refused an offer of suitable employment.

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.[1] Section 8106(c)(2) of the Act [2] 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.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

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

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

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

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

The implementing regulation [5] 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 or her 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]

In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

In this case, appellant, then a 46-year-old bindery machine operator, reported injuring her lower left side and back on April 3, 1986 as she was lowering a table by winding a crank and the table fell, pulling her to her knees. The Office accepted appellant's claim for a chronic lumbar strain and an acute cervical strain.[11]

On March 8, 1992 appellant sustained a right ankle injury and sought treatment from Dr. Francis Fowler, a Board-certified orthopedist. The Office accepted the right ankle fracture as consequential to the accepted employment injury of April 3, 1986.

Dr. Daniel Ignacio, appellant's treating physician and a Board-certified physiatrist, continued to opine that appellant suffers from the cervical and lumbar disc syndrome sustained from her work accident and is totally disabled for any kind of productive work.

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[5] 20 C.F.R. § 10.124(c).

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

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

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

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

[10] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[11] Concurrent conditions not accepted by the Office are a preexisting cervical condition for which appellant underwent an anterior cervical fusion at the C5-6 levels in 1979, and a left knee medial meniscus tear diagnosed in March 1989.

In a January 14, 1993 letter, Dr. Fowler stated appellant had fully recovered from her right ankle injury. He further wrote that appellant had no residuals and was able to work at her usual job. Dr. Fowler noted that appellant was under the care of Dr. Sharon Marselas, a neurosurgeon, for treatment of a continuing problem of back and right leg pain, presumed to be related to the back.

Dr. Marselas, in a February 18, 1993 medical report, requested authorization to perform a L4-5 discectomy and possible one level spinal stabilization due to appellant's complaints of increasingly severe low back and left leg pain. The Office referred the case to an Office medical adviser who opined that the procedure should not be authorized as the diagnostic studies indicate that appellant's left side symptomatology would not be benefited by the operative intervention. The Office medical adviser noted that the most recent magnetic resonance imaging (MRI) scan demonstrated only a minimal right-sided pathology, which is appellant's nonsymptomatic side.

By letter dated June 2, 1993, appellant was referred by the Office to Dr. Harvey Ammerman for a second opinion evaluation. Dr. Bruce Ammerman, a Board-certified neurologist and an associate of Dr. Harvey Ammerman, wrote, in a June 17, 1993 report, that appellant sustained a lumbar strain as a result of the April 3, 1986 injury without focal neurologic deficit. He felt there was no indication for surgical intervention and opined that appellant was able to return to her previous employment.

In a September 23, 1993 report, Dr. Marselas stated appellant has a known disc injury at the L4-5 level and that she has had persistent and consistent symptoms suggesting a left L5 radiculopathy for a number of years without improvement. Dr. Marselas stated that when appellant remains severely incapacitated after many years of conservative treatment, she should have the right to the option of a surgical procedure, if she desires such.

In an October 6, 1993 letter, the Office denied the requested surgery finding that the weight of the medical evidence, as represented by Dr. Ammerman, did not establish any objective findings to support a need for the operative intervention of her left-sided complaints.

Appellant's treating physicians, Drs. Marselas and Ignacio, continued to submit medical reports that listed appellant's multiple complaints of neck pain, left shoulder pain, low back and left hip pains.

Because of a conflict of opinion between Drs. Ammerman and Marselas regarding appellant's ability to work, the Office referred appellant to Dr. Edward Rabbitt, a Board-certified orthopedist, for an impartial medical evaluation.[12] Dr. Rabbitt stated in a November 12, 1993 report, that appellant had pain with extension of the back, some pain with forward flexion and side bending, and pain radiating down the legs when laying recumbent on the table. He stated that the MRI revealed a small to moderate right paracentral disc herniation with some facet arthroscopy. Dr. Rabbitt diagnosed chronic lumbar strain and facet arthropathy with a small disc

[12] 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)

rupture without evidence of radiculopathy. He stated that appellant was capable of working 8 hours per day with a 20-pound weight lifting restriction. Based on his physical examination and MRI findings, Dr. Rabbitt stated appellant was not a surgical candidate.

The employing establishment proposed a modified management services assistant position to appellant. The primary duties associated with this position were listed as being performed in an office setting while seated. Functions performed on an intermittent basis included walking and standing for 2 hours a day and a maximum 20-pound weight lifting restriction. The employing establishment stated that appellant was not required to visit other facilities or buildings and that an electric cart could be obtained for appellant's use.

In a January 24, 1994 letter, Dr. Rabbitt opined that appellant would be able to handle the duties of the management services assistant with the restrictions he had given. He stated that as there was a fair amount of inspection work, the use of an electric cart was necessary. Dr. Rabbitt further stated that appellant was able to drive to and from her home or to the various satellite parking facilities without restrictions.

On March 28, 1994 the employing establishment offered the above position to appellant. On April 19, 1994 the position was found to be suitable and was offered to appellant; the Office informed appellant she had 30 days from April 19, 1994 to accept the job offer or to provide a reasonable, acceptable explanation for refusing.

In response, appellant submitted an April 6, 1994 medical report from Dr. Ignacio, who stated that appellant was complaining of increasing pain in her back that radiated into her legs, particularly the left side with weakness in the lower extremities. He noted that the recent electromyogram (EMG) performed in November 1993 revealed evidence of denervation along the lower limbs and the lumbar spine on both sides. After describing his examination, he opined that appellant's condition was deteriorating with more severity of the pain. He concluded that appellant was totally disabled for work as a management service assistant due to the combination of her injuries, intractable pain and neurological dysfunction.

The Office referred the case to an Office medical adviser to determine whether the findings represented a significant change in appellant's condition which would render her unable to perform the job offered on March 28, 1994. By letter dated August 3, 1994, the Office medical adviser stated that he reviewed Dr. Ignacio's report along with the other reports concerning appellant's clinical status since approximately 1993. Based upon the diagnostic studies reviewed, the Office medical adviser opined that Dr. Ignacio's April 6, 1994 report did not demonstrate that appellant's condition had worsened. The Office medical adviser noted that Dr. Ignacio's report was based upon appellant's allegations of increased dysfunction and complaints of "pain," but he failed to demonstrate that her clinical physical findings had worsened.

By letter dated October 3, 1994, the Office stated that the job had been found to be suitable and within the restrictions identified by the medical evidence, and that the medical evidence appellant submitted was insufficient to change that determination. The Office allowed appellant an additional 15 days in which to accept this position in light of their finding. The

Office further advised appellant that if she continued to refuse the job, the Office would proceed with a final decision and would not consider any further reasons for refusal.

By decision dated December 23, 1994, the Office terminated appellant's claim for compensation benefits effective January 8, 1995, on the grounds that she failed to respond to the 15-day warning letter and had neglected to work after suitable work was offered to, procured by, or secured for her under section 8106(c)(2). The Office denied further benefits for the right ankle fracture as Dr. Fowler's January 14, 1993 report established that there was no residuals from the consequential ankle injury. The Office also denied authorization for the proposed surgery as the weight of the medical evidence established that there were no objective findings to support the need for requested surgery.

In a December 11, 1995 merit decision, the Office denied appellant's request for modification of its prior decision. The Office noted that the new reports submitted by Drs. Jackson, Marselas and Ignacio were substantially similar to reports previously considered, were not based on recent MRIs or myelograms and did not overcome the weight of the medical evidence as provided by Dr. Rabbitt.

In a March 11, 1997 merit decision, the Office denied appellant's request for modification of its prior decision. The Office noted that the new reports from Drs. Marselas and Jackson did not contain a reasoned medical opinion that would support the need for the proposed surgery, would support that appellant's degenerative findings were made worse by the April 3, 1986 incident or support that appellant was unable to perform the modified position which her employing establishment offered.

The Board finds that the Office met its burden of proof in terminating appellant's compensation because the evidence of record establishes that the Office complied with the required procedures and that the offered position was medically suitable.

Because of a conflict in opinion between Drs. Ammerman and Marselas regarding appellant's ability to work, the Office referred appellant to Dr. Rabbitt, a Board-certified orthopedist, for an impartial medical examination. The Board finds that Dr. Rabbitt's November 12, 1993 report and letter of January 24, 1994 sufficiently rationalized and responsive to the Office's inquiries to be entitled to special weight. Dr. Rabbitt was provided with a statement of accepted facts, the entire medical record with treatment notes and diagnostic findings, and performed his own examination of appellant. Based on his findings, Dr. Rabbitt opined that appellant was not an operative candidate either from the physical examination or MRI findings. He found that she was able to perform the duties of a management services assistant with the use of an electric cart which the employing establishment agreed to provide. He found no restrictions on appellant's driving to and from her home to the various satellite parking facilities. Dr. Rabbitt's report was based on accurate facts, thorough examination and all medical records and diagnostic results available. Dr. Rabbitt's conclusion is supported by medical rationale and is fully responsive to the inquiries of the Office. The Board finds that the report of Dr. Rabbitt is entitled to special weight and is sufficient to support termination of appellant's wage-loss benefits as appellant refused a suitable job offer.

On reconsideration, appellant resubmitted April 19, July 11 and October 10, 1994 reports from Dr. Marselas; submitted reports of November 22, 1994, January 24, March 7, May 9 and June 20, 1995 from Dr. Marselas; an April 6 and December 6, 1994, January 23, March 16, May 15, June 1 and August 7, 1995 reports from Dr. Ignacio; a duplicate report of October 20, 1994 and a previously considered report of May 8, 1992 from Dr. Ignacio; a March 10, 1995 and CA-20 form from Dr. Jackson; and resubmitted a March 12, 1992 report from Dr. Fowler. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[13]

The October 10, 1995 report from Dr. Marselas reported appellant's continued complaints with motor and reflex. Examination of the lower extremities bilaterally was within normal limits. All reports from Dr. Marselas report appellant's complaints of pain request low back surgery with no guarantee of substantial clinical improvement. In her May 9, 1995 report, Dr. Marselas noted recent x-rays taken by Dr. Jackson revealed a spur at the L4-5 level, disc space collapse on the left side only, and partial sacrolization of the S1 segment. Dr. Marselas, however, provided no rationalized opinion or connection of the findings to the accepted April 3, 1986 work injury. In addition, these findings were based upon x-rays only.

The March 10, 1995 report from Dr. Jackson reported persistent low back and left leg pain and referred to x-rays taken of the lumbar spine. Dr. Jackson reported lumbar disc displacement and segmental instability of L4-5, chronic, with nerve root irritation L5-S1 roots on the left side and probable chronic denervation of the left S1 nerve root. He recommended surgery. The record indicates that the MRI scan of July 1986 was essentially normal with a mild bulge at L4-5 more to the right than left side. Dr. Jackson failed to explain how left-sided symptoms developed in view of a lack of left-sided findings in 1986. Dr. Jackson's opinion that appellant is a surgical candidate is of reduced probative value as he fails to provide any rationale for his opinion.[14]

The June 1, 1995 report from Dr. Ignacio reported left lower extremity pain, numbness and tingling and provided a diagnosis of lumbar disc syndrome, radiculopathy, left knee arthropathy, which is not an accepted injury in this case, and cervical strain. His May 15, 1995 report recorded appellant's complaints of neck and lumbar pain. Dr. Ignacio's March 16, 1995 report reported pain complaints, kidney infection and a return to a home therapy program with aquatic therapy. No new findings were provided which were supported by test results.

The reports submitted by Drs. Jackson, Marselas and Ignacio are substantially similar to reports previously considered. Their opinions are not based upon a recent MRI or myelogram. The Board has held that reports submitted following issuance of a pretermination notice from the Office, which are similar to prior reports of record, are insufficient to overcome the weight accorded to the impartial medical specialist's report or to create a new conflict.[15] As such, the

[13] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[14] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[15] *Howard Y. Miyashiro*, 43 ECAB 1101 (1992); *Louis G. Psyras*, 39 ECAB 264 (1987).

reports are insufficient to overcome the weight accorded to Dr. Rabbitt as the impartial medical specialist or to create a new conflict.

In her November 14, 1996 report, Dr. Marselas noted appellant's complaints and set forth her examination findings. With respect to the lower back, she noted mild tenderness at the L4-5, S1 segments with no sciatic notch tenderness. Considering appellant's long course of good compliance with every conceivable treatment modality except surgery, without much benefit, Dr. Marselas recommended that appellant undergo lumbar decompression and fusion.

In his March 1, 1996 report, Dr. Jackson stated that his "evaluation is based on treating thousands of patients over the last 23 years and doing many hundred of spine operations, that this patient, indeed, is a surgical candidate that, indeed, has findings that are, indeed, related to the incident of April 3, 1986 except at this stage 10 years later we are seeing the late sequela of the injury of April 3, 1986." He further opined that decompression and stablilization of this patient's spinal segment in all likelihood will cause improvement not only in decrease in pain, but in increase in function and improve the quality of this suffering patient's life."

In his October 29, 1996 report, Dr. Jackson noted that in his report of March 10, 1995, reference to x-rays taken of the lumbar spine were actually taken on March 10, 1995. He stated that there was significant pathology on the x-rays which comes as a result to the April 3, 1986 work injury. He also noted that the MRI study done on July 8, 1986 was not essentially normal and that an asymmetric bulge of a disc fits under the usual category of a rupture/herniation of a disc. He wrote "By no stretch of the imagination is [appellant] fit to work 8 hours a day or lift up to 20 pounds, walk up to 2 hours a day and bend up to 1 hour a day. This is based on her severe spine injury of April 3, 1986, that has slowly worsened and degenerated from the injury." Dr. Jackson further stated that he felt that the use of an electric cart is contraindicated with appellant's back condition and may be of some help if indeed light work is available to her.

There is no reasoned opinion that supports that appellant is unable to perform the modified position that was offered by her employing establishment. It appears that Dr. Jackson, in his October 29, 1996 report, clearly opines that appellant may be able to work light duty if an electric cart was made available. He does not indicate that appellant was not able to perform the offered position. As such, the Board finds that the medical evidence of record establishes that appellant is capable of full-time, light-duty work, based on the opinion of Dr. Rabbitt. Accordingly, the Office properly terminated appellant's wage-loss compensation.

Further review also finds that there is no evidence to support that the worsening is more than the natural progression of the degenerative process. Although Drs. Jackson and Marselas have both opined that appellant's degenerative findings were related to the April 3, 1986 incident, they have failed to provide any reasoning that would support that the degenerative process was made worse by the April 3, 1986 work incident.

The Board finds that appellant no longer suffers from residuals of her consequential ankle injury. Appellant's treating physician, Dr. Fowler opined, in his January 14, 1993 report, that appellant had fully recovered from her right ankle injury and was able to work at her usual job. As the record contains no contrary medical evidence pertaining to appellant's right ankle, the Board finds that the Office has met its burden of proof.

The Board further finds that the Office failed to meet its burden of proof in denying authorization for the proposed surgery.

Section 8103 of the Act [16] provides that the Office shall provide a claimant with the service, appliances, and supplies prescribed or recommended by a qualified physician which are likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation. In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.[17]

Dr. Rabbitt explained in his report that surgical treatment was not warranted as the source for appellant's complaints was not clearly established based on his physical examination and the MRI, which revealed no evidence of radiculopathy.

Dr. Marselas's most recent report of November 14, 1996 is insufficient to overcome the weight of Dr. Rabbit's impartial report as she fails to provide a reasoned medical opinion to support the need for the proposed surgery. Dr. Marselas constantly maintained that as no other modalities of treatment has worked, surgery appears to be the only other option available. Furthermore, Dr. Marselas has expressed that such surgery is not likely to cure or provide appellant relief.

Dr. Jackson, however, in his medical reports of March 1 and October 29, 1996 maintains that appellant is a surgical candidate based on the significant pathology seen on x-rays taken on March 10, 1995 and the fact that the July 1986 MRI was not "essentially normal and that an asymmetric bulge of a disc fits under the usual category of a rupture/herniation of a disc." Dr. Jackson reasoned that appellant is a surgical candidate as "we are seeing [10 years later] the late sequela of the injury of April 3, 1986." He also opined that surgery would benefit appellant's pain, increase her function and improve the quality of her life.

The Board finds a conflict in medical opinion is now created between Dr. Rabbitt and Dr. Jackson on the issue of whether surgery should be authorized. Accordingly, we remand for an impartial medical examination to resolve this conflict.

The decision of the Office of Workers' Compensation Programs dated March 11, 1997 is hereby affirmed in part and vacated in part. The case is remanded for proceedings consistent with this decision.

Dated, Washington, D.C.
August 20, 1999

[16] *See supra* note 2, § 8103.

[17] *Daniel J. Perea,* 42 ECAB 214, 221 (1990).

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
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