U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GENEVA C. HANCOCK and U.S. POSTAL SERVICE,
POST OFFICE, Georgetown, SC

Docket No. 99-49; Submitted on the Record;
Issued August 10, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI:

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective October 24, 1997, on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a hearing.

On April 4, 1997 appellant, then a 52-year-old rural mail carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained injuries to her lower back and legs as a result of a motor vehicle accident she was involved in during the performance of her duties on April 1, 1997. She ceased work on the date of her motor vehicle accident. On April 18, 1997 appellant's treating physician, Dr. Gregory M. Jones, Board-certified in physical medicine and rehabilitation, diagnosed myofascial neck pain, lower back pain and sciatica, and advised appellant not to return to work until further notice. On May 1, 1997 the Office accepted her claim for lumbar strain. Appellant received continuation of pay through May 16, 1997 and on July 8, 1997 the Office authorized disability compensation beginning May 17, 1997.

On July 1, 1997 the employing establishment offered appellant a limited-duty position as a telephone operator, which involved answering the telephone and filing.[1] Appellant, however, declined the position on July 11, 1997. She noted leg and back pain and weakness in her legs as a basis for her refusal. She further noted that her hips hurt when she sits. On August 27, 1997 Dr. Jones reviewed the July 1, 1997 limited-duty job offer and concluded that the position was suitable for appellant. He further indicated that appellant had reached maximum medical improvement on August 8, 1997. The Office informed appellant on September 8, 1997 that it found the telephone operator position to be suitable for her work capabilities and allowed appellant 30 days to either accept the position or provide an explanation for refusing the position. Appellant did not respond to the Office's September 8, 1997 notice and, therefore, the Office advised appellant on October 9, 1997 that she had an additional 15 days within which to

[1] The employing establishment had previously offered appellant a similar position on a temporary basis, which appellant declined on April 15, 1997.

accept the position. On October 16, 1997 the Office received a letter from appellant explaining that she was not returning to work because she was not physically or mentally able to do so. Appellant further noted that her back, legs, buttock and feet "hurt too bad." The Office also received a September 16, 1997 report from Dr. Henry Bowens, a Board-certified family practitioner, noting a diagnosis of neck, shoulder and lumbar pain, bilateral sciatica and radiculopathy. Dr. Bowens further noted that appellant was "indefinitely" totally disabled and that her prognosis was poor.

In a decision dated October 24, 1997, the Office terminated appellant's compensation based upon her failure to accept suitable employment. In an accompanying memorandum, the Office explained that Dr. Jones had reviewed the July 1, 1997 limited-duty job offer and agreed that it was suitable. The Office further noted that while appellant continued to insist that she was not physically able to return to work, she "had not provided any medical evidence to support [her] opinion that [she was] totally disabled…."

Appellant subsequently filed a request for review of the written record. In a decision dated December 12, 1997, the Office found that appellant did not submit her request for review within 30 days of the Office's October 24, 1997 decision and, therefore, she was not entitled to a review of the written record as a matter of right. Additionally, the Office considered the matter in relation to the issue involved, and denied appellant's request on the basis that the issue of suitable employment could equally well be addressed through the reconsideration process.

The Board has duly reviewed the case record in the present appeal and finds that the Office improperly terminated appellant's disability compensation effective October 24, 1997, 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.[2] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] To justify termination of compensation, the Office must show that the work offered was suitable,[5] and must inform appellant of the consequences of refusal to accept such employment.[6]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[7] In the instant case, while Dr. Jones indicated in August 1997 that appellant could perform the duties of a telephone operator, Dr. Bowens, in his September 16, 1997 report, indicated that appellant was totally disabled "indefinitely" and that her prognosis was poor. Although Dr. Bowens' opinion was

[2] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[5] *Arthur C. Reck*, 47 ECAB 339 (1996).

[6] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

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

date-stamped as being received in the Office on October 16, 1997, the October 24, 1997 decision makes no reference to his opinion. The Office appears to have overlooked this report inasmuch as the Office specifically stated that subsequent to its October 9, 1997 notice, appellant did not provide any "medical evidence to support [her] opinion" of total disability. Dr. Bowens' disability assessment appears to call into question the suitability of the limited-duty position offered to claimant on July 1, 1997. In view of the Office's failure to consider all of the relevant medical evidence available at the time it issued its decision on October 24, 1997, the Office has failed to meet its burden, and accordingly, the decision to terminate compensation is reversed.[8]

The decision of the Office of Workers' Compensation Programs dated October 24, 1997 is hereby reversed.[9]

Dated, Washington, D.C.
August 10, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *See William A. Couch*, 41 ECAB 548, 553 (1990) (the Board held that it is crucial that all relevant evidence which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office).

[9] Given the Board's disposition of the merit issue in the present case, it is not necessary for the Board to specifically address the nonmerit issue of whether the Office, by decision dated December 12, 1997, properly denied appellant's request for a hearing.