U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RHODA L. TILLER and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, Okla.

Docket No. 99-118; Submitted on the Record;
Issued June 25, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she abandoned suitable work.

In the present case, the Office accepted that appellant, an instrument mechanic, sustained bilateral carpal tunnel syndrome on or about November 18, 1987 in the performance of her federal employment. She underwent several surgical procedures for treatment of the accepted condition. Appellant worked intermittently in light-duty positions until May 17, 1989, when she stopped work. Based upon the reports of her treating physicians, Dr. Houshang Seradge, a Board-certified hand surgeon, dated January 19, 1994 and Dr. Stephen W. Mihalsky, a hand surgeon, dated May 18, 1994 the Office offered appellant a position as a supply clerk. On July 28, 1994 appellant accepted the temporary supply clerk position. Appellant returned to work in this position on August 8, 1994. On September 2, 1994 the Office determined appellant's loss of wage-earning capacity based upon her actual earnings in the supply clerk position.

On September 27, 1994 Dr. Grover Harrison, a Board-certified general practitioner, reported that due to appellant's chronic pain, he recommended that appellant work only six hours a day. On September 28, 1994 appellant commenced working six hours a day.

On November 30, 1994 the Office advised appellant that the supply clerk position, eight hours a day, had been determined to be suitable and that the position remained available. She was advised that she would have 30 days to accept the position or advise why she would not accept the position, for eight hours a day. The Office also advised appellant that pursuant to 5 U.S.C. § 8106(c)(2) if a claimant refused suitable work, compensation for wage loss and schedule award would be terminated.

On May 10, 1995 the Office terminated appellant's compensation benefits, effective May 28, 1995, on the grounds that appellant neglected to work eight hours a day after suitable work was offered to her. An Office hearing representative affirmed the Office's March 28, 1995 decision on April 18, 1997. The Office denied modification of the prior decision, after merit review, on October 3, 1997.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] Pursuant to section 8106(c)(2) of the Act,[2] 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] To justify termination, the Office must show that the work offered was suitable[4] and must inform appellant of the consequences of refusal to perform such employment and must provide appellant a reasonable opportunity to respond.[5]

In the present case, appellant did accept the suitable work position and worked in the position for eight hours a day until September 27, 1994. On September 28, 1994 appellant commenced working six hours a day, as of February 1995 she worked four hours a day. The record indicates that appellant retired in March 1995. The issue in the case is not whether appellant refused the suitable work position, but rather whether appellant abandoned the position once she commenced working less then eight hours a day.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits for abandonment of suitable work.

In the present case, the Office found that a supply clerk position, eight hours a day, was suitable based upon the report of the impartial medical specialist, Dr. Ghazi M. Rayan, a Board-certified hand surgeon, dated November 1, 1994. While the Office referred to Dr. Rayan as an impartial medical specialist and found that his report was entitled to special weight, the Board finds that Dr. Rayan was not an impartial medical specialist in this case. The issue in this case is whether appellant abandoned suitable work as of September 28, 1994 when she reduced her hours from eight hours of work a day, to six. Appellant submitted reports from Dr. Harrison and Dr. Seradge which stated that appellant had attempted to work eight hours a day, but could not, and that therefore as of September 28, 1994 she was only to work six hours a day. Dr. Rayan, however, was the first physician to whom the Office referred appellant after she returned to the suitable work position in August 1994 and after she reduced her work hours in September 1994. At the time that the Office referred appellant to Dr. Rayan, there was no conflict in the medical opinion evidence regarding appellant's ability to work eight hours a day as Dr. Rayan was the first physician to whom appellant was referred after she returned to work in August 1994 and

[1] *Patricia A. Keller,* 45 ECAB 278 (1993).

[2] 5 U.S.C. § 8106(c)(2).

[3] *Michael I. Schaffer,* 46 ECAB 845 (1995).

[4] *See* 20 C.F.R. § 10.124(e).

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

attempted to work in the position for eight hours a day. The Board also notes that in referring appellant to Dr. Rayan and in advising Dr. Rayan of appellant's evaluation, the Office stated that he was to provide a second opinion evaluation, not an impartial medical evaluation. Therefore as there was no conflict in the medical opinion evidence at the time the Office referred appellant to Dr. Rayan, and as Dr. Rayan was selected as a second opinion physician, the Board finds that Dr. Rayan was a second opinion physician, not an impartial medical specialist and that his report was not entitled to special weight.

In his report dated November 1, 1994, Dr. Rayan concluded that appellant had residual symptoms and weakness from bilateral carpal tunnel release, but that she had no evidence of cubital tunnel syndrome. He also indicated that appellant may have irritation of the ulnar nerves to the elbow, but with no neurological deficits. Dr. Rayan concluded that appellant could continue performing the supply clerk position, for eight hours a day.

On October 12, 1994 Dr. Seradge reported that when he last examined appellant on August 1, 1994 her condition had stabilized. However, on current examination, appellant had informed him that she had attempted to return to work, but was unable to perform the work assigned to her. Dr. Seradge stated that on clinical examination appellant had some evidence of her carpal tunnel syndrome, and that upon his review of appellant's medical file, it was documented that appellant also had thoracic outlet syndrome. He opined that appellant's syndromes at the thoracic outlet and at the wrist were such that appellant may not be suited for gainful employment. Dr. Seradge also completed a work status report on October 12, 1994 wherein he indicated that appellant could work six hours a day, with restrictions. On November 14, 1994 appellant was examined by Gary L. Massad, a treating physician. Dr. Massad concluded that appellant remained symptomatic and had continued to be symptomatic from 1988 through 1994, as documented by various objective studies. He related that he had reviewed the duties of the supply clerk position, and opined that appellant would need restrictions to medically manage her condition and would probably not be able to inventory equipment in a timely manner due to her bilateral upper extremity problems.

A conflict therefore existed in the medical opinion evidence as of November 30, 1994, the date upon which the Office advised appellant that the supply clerk position was suitable, as to whether appellant could perform the supply clerk position, for eight hours a day.

Dr. Seradge continued to submit reports to the record wherein he indicated that appellant had undergone a functional capacity evaluation in December 1994, during which appellant exhibited symptom exaggeration, and inappropriate illness behavior, but that appellant should be considered for medical retirement as she "may not be suited for gainful employment" due to her long-term medical problems and residual problems of her upper extremities. The Office never requested that Dr. Seradge clarify whether appellant could return to work in the supply clerk position, for eight hours a day, before terminating her compensation benefits. The Office therefore never resolved the conflict in the medical opinion evidence regarding appellant's ability to work eight hours a day in the supply clerk position.

The Board also finds that the Office did not provide appellant due process prior to terminating her compensation benefits.

The Board has clarified that in cases where compensation is terminated pursuant to 5 U.S.C. § 8106(c), the essential requirements of due process "notice and an opportunity to respond," apply not only where an employee refuses suitable work, but also apply in the same force to those cases where an employee abandons suitable work.[6] In the present case, the Office advised appellant on November 30, 1994 that the position to which she returned was "suitable work." The Office granted appellant 30 days in which to advise why she was not working in the position eight hours a day. On May 10, 1995 the Office terminated appellant's compensation benefits for neglect of suitable work. The Board has explained in *Maggie Moore*, that the Office must not only inform each claimant of the provisions of section 8106(c)(2), but also that a specific position is suitable; the consequences of refusal of the position; and allow the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted. The Board clarified that if the claimant submits evidence or reasons or both, the Office must evaluate the new evidence or reasons submitted and must inform the claimant as to whether the evidence or reasons submitted were accepted or rejected. The Office must also inform the claimant at that time of its final intentions, and the Office must give a reasonable period of time for the claimant to make a decision as to whether to accept or reject the position.[7] In the present case, the Office did not provide appellant the required due process. After the Office advised appellant that the position was suitable at eight hours a day, appellant submitted additional medical evidence to the Office. The Office did not, however, advise appellant that it had considered the additional evidence, did not advise appellant of its intentions, and did not provide appellant a final opportunity to return to the position for eight hours a day, before termination of her compensation benefits on May 10, 1995.

As the Office did not establish that appellant abandoned suitable work and as the Office did not provide appellant due process prior to termination of her compensation benefits, the Office did not meet its burden of proof in this case.

[6] *Mary A. Howard*, 45 ECAB 646 (1994).

[7] *Maggie L. Moore, supra* note 5.

The decision of the Office of Workers' Compensation Programs dated October 3, 1997 is hereby reversed.

Dated, Washington, D.C.
June 25, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member