U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELORIS MAYNARD and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

Docket No. 98-1896; Submitted on the Record;
Issued June 19, 2000

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation benefits as of December 8, 1996.

On October 28, 1995 appellant, then a 38-year-old casual distribution clerk, injured her right hand while reaching for a parcel on a traverse belt. She filed a claim for benefits on the date of injury, which the Office accepted for right hand contusion and laceration of the right little finger. Appellant, a temporary employee of the employing establishment, was paid compensation by the Office for temporary total disability for appropriate periods and was placed on the periodic rolls.

In a report dated February 26, 1996, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, stated that he initially treated appellant on October 30, 1995 for complaints of pain and swelling in her right hand, right arm, right finger, right shoulder and neck pain. Dr. Shade had diagnosed contusion and abrasion in appellant's right hand, and right index, middle ring and small fingers; carpal tunnel syndrome in the right hand and tendinitis in the right hand. He stated that appellant's symptoms were causally related to October 28, 1995 employment injury and indicated that appellant could, at some future date, return to limited duty with restrictions on prolonged repetitive use of the right hand and on lifting exceeding 20 pounds. Dr. Shade stated, however, that appellant had not yet reached maximum medical improvement.

At the behest of Dr. David Taylor, a Board-certified plastic surgeon and appellant's treating physician, appellant underwent a functional capacity evaluation at Baylor University Medical Center on July 10 and 11, 1996. The report summarizing the evaluation indicated that appellant did not exert a maximum consistent effort on the various tests, finding that the test results were invalid and that her performance was not a reflection of her actual functional capabilities. Notwithstanding this finding, however, the report concluded that appellant was capable of performing a job classified by the Department of Labor *Dictionary of Occupational*

Titles (DOT) as light to medium work and stated that she should return to her primary physician, Dr. Taylor, for further recommendations.

Appellant was examined on July 24, 1996 by Dr. Evangeline Cayton, Board-certified in physical medicine and rehabilitation, who released appellant to return work in a report dated July 29, 1996. Dr. Cayton advised that most of appellant's problems appeared to be psychological and concluded that she had reached maximum medical improvement with no impairment as of July 20, 1996.

In a work capacity evaluation completed by Drs. Taylor and Cayton on July 23, 24 and 30, 1996, appellant was restricted from lifting more than 25 pounds with her right hand or reaching with the right upper extremity. These physicians advised that appellant could work an eight-hour day and would not be restricted from performing repetitive motions of the wrist or elbow.

By letter dated August 15, 1996, the employing establishment offered appellant a modified job as a casual clerk, for eight hours per day. The job involved working mail from a cart consisting of small bundles weighing less than five pounds and placing the mail in a receptacle. The physical requirements of the job entailed intermittent walking, standing and sitting. The employing establishment noted that Dr. Cayton, in her July 24, 1996 work capacity evaluation, had restricted appellant from lifting more than 25 pounds with her right hand and had permitted appellant to work an 8-hour day.

On August 22, 1996 the Office conducted a telephone conference with appellant in order to discuss the suitable job offer and establish a date and time for her to return to work. The Office indicated that, although appellant was reluctant to accept the job offer, she was advised that she could accept the offer immediately and begin the reemployment process while the new medical evidence was being considered by the Office. The Office noted that appellant accepted the job offer under the conditions stated above and indicated that the target date for her reemployment would be August 31, 1996.

Appellant responded to the employing establishment's job offer on August 22, 1996. Although appellant checked a box on the offer form indicating that she declined the position, she submitted a handwritten, annotated statement on the offer form in which she asserted:

> "I am not declining this position, I [a]m not able to do any job as of right now. I have a statement [dated] August 22, 1996 ... from [my] doctors stating I can[no]t perform these [tasks]."

Appellant further stated on this form that, "after a telephone conference with [the Office and the employing establishment], I have decided to accept this offer and will begin to return to duty [and begin] the reemployment process. I am waiting for approval from the pain management [clinic]."

In a telephone call dated September 27, 1996, the Office was informed that appellant had failed a preemployment drug test. In a letter to the Office dated October 9, 1996, the employing

establishment requested that appellant's compensation be terminated on the grounds that she had failed the test.

On October 18, 1996 the Office issued a notice of proposed termination to appellant. The Office stated that the weight of the medical evidence indicated appellant could physically perform the duties of the modified assignment offered to her by the employing establishment and found that the requirements of the position were well within appellant's physical restrictions. The Office stated, however, that the employing establishment was prohibited from hiring appellant because she had failed the drug test and that were it not for this incident, she would have returned to work with the employing establishment. The Office further found that the reason for her current nonemployment was her inability to meet the administrative requirements of the employing establishment, which was unrelated to her employment injury and that she was, therefore, not entitled to further compensation for wage loss due to disability.

A report received by the Office on October 23, 1996 from the Baylor Center for Pain Management indicates that appellant underwent vocational testing there for the purpose of formulating a vocational plan. The report summary states:

> "Based on [appellant's] overall performance in the pain management program, it appears that she is able to initiate a vocational plan at this time. Results of the evaluation were described as "invalid" and 'not a reflection of [appellant's] true functional capacities'. The FCE [functional capacity evaluation] report did indicate that despite self-limitation, she would be capable of performing a job classified by the DOT [*Dictionary of Occupational Titles*] as 'light to medium work.' Based on her subsequent performance during the comprehensive pain management program and taking into consideration her general level of inactivity prior to the program, it appears that her current work tolerances would be more compatible with 'light work.'"

In a report dated October 29, 1996, Dr. Taylor stated:

> "Please be advised that [appellant] is released to her date-of-injury job. She is restricted to no more than 25 pounds weight lifting to her right hand. This is based on a nonwork-related condition of mild carpal tunnel syndrome."

By letter dated November 7, 1996, appellant responded to the proposed termination by stating that she had agreed to the employing establishment's job offer pending her release to work by her treating physician, Dr. Taylor, but that she had been terminated prior to receiving Dr. Taylor's report. Appellant stated that she would never recover from the October 1995 work injury and challenged the validity of her failed drug test.

By decision dated December 4, 1996, the Office found that appellant was not entitled to compensation benefits, effective December 8, 1996, on the grounds that the weight of the medical evidence established that she could have returned to work with no wage loss had she not failed the drug test, which was unrelated to her employment injury.

By letter dated January 3, 1997, appellant requested an oral hearing.

In a report dated February 13, 1997, Dr. Taylor noted that he had examined appellant on February 13, 1997 and stated:

> "[Appellant] questions her release to return to work dated [October 29, 1996]. She is advised that this release is based on the vocational plan from the Baylor Center for Pain Management which I received on October 25, 1996, advising that she may return to work under the DOT classification of light work. Additionally, the October 29, 1996 report is clarified such that [appellant] is advised that her work restrictions are the result of her initial injury on October 28, 1995 and secondary to the chronic pain syndrome/myofascial pain syndrome that she sustained as a result. The restrictions are not related to right carpal tunnel syndrome."

By decision dated March 3, 1998, an Office hearing representative affirmed the Office's December 4, 1996 termination decision. The hearing representative, however, modified the prior Office decision, finding that appellant's entitlement to compensation had ceased because the weight of the medical evidence of record established that appellant was able to perform the suitable job offered by the employing establishment and, therefore, had no continuing residual disability. Thus, the hearing representative found that appellant's entitlement to continued compensation had ceased regardless of the failed drug test.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant's compensation benefits 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 benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[1] 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.[2] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[3] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

[1] 5 U.S.C. §§ 8101-8193.

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

[3] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[4] *See John E. Lemker*, 45 ECAB 258 (1993).

The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.[5] The July 1996 work capacity evaluation completed by Drs. Taylor and Cayton indicated that appellant could work an eight-hour day as long as she was restricted from lifting more than 25 pounds with her right hand or reaching with the right upper extremity and would not be restricted from performing repetitive motions of the wrist or elbow. In addition, Dr. Taylor released appellant to return to work in a his October 29, 1996 report, restricting her from lifting no more than 25 pounds with the right hand. He, however, did not specifically approve the employing establishment's offer of a casual clerk job and noted in his February 13, 1997 report, that appellant's work restrictions resulted from her October 28, 1995 employment injury, secondary to the chronic pain syndrome/myofascial pain syndrome that she sustained as a result; Dr. Taylor also stated in this report that these restrictions were not related to carpal tunnel syndrome. Therefore, Dr. Taylor, appellant's treating physician, did not indicate in his February 13, 1997 report that residuals from the October 28, 1995 employment injury had ended and opined that appellant still had work restrictions stemming from the employment injury. Thus, the Office did not meet its burden of proof to support a finding that the offered position was within appellant's physical limitations; *i.e.*, that the position was suitable.

In addition, the Board finds that the hearing representative erred in finding that appellant refused an offer of suitable work. Based on the restrictions outlined by Drs. Taylor and Cayton, the employing establishment offered appellant a modified job as a casual clerk, for eight hours per day, on August 15, 1996. Appellant accepted the job, pending the completion of her vocational testing and the approval of Dr. Taylor, during the August 22, 1996 telephone conference with the Office,[6] which advised her that she could accept the offer immediately and begin the reemployment process while the new medical evidence was being considered by the Office and tentatively scheduled her to begin work on August 31, 1996. Although appellant checked the box indicating that she declined the position, she specifically stated in her annotated statement, dated August 22, 1996, that "I am not declining this position, I [a]m not able to do any job as of right now. I have a statement [dated] August 22, 1996 ... from [my] doctors stating I can[no]t perform these [tasks]." Appellant also stated on this form that following the August 22, 1996 telephone conference with the Office and the employing establishment she had decided to accept the job offer and asserted that she would begin to return to duty to commence the reemployment process, pending approval from the pain management clinic. Appellant did not report to work, but only because she was subsequently terminated due to her failed drug test. Further, appellant indicated in her November 7, 1996 letter, responding to the Office's proposed termination by stating that she had agreed to the employing establishment's job offer pending her release to work by her treating physician, Dr. Taylor, but that she had been terminated prior to receiving Dr. Taylor's report.

[5] *Robert Dickinson*, 46 ECAB 1002 (1995).

[6] Appellant testified at the hearing that she accepted the employing establishment's modified job offer during the August 22, 1996 telephone conference.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106. A review of the above evidence indicates that there is not sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. Further, the Office did not meet its burden of proof to establish that appellant refused a suitable position in this case.[7]

The decision of the Office of Workers' Compensation Programs dated March 3, 1998 is hereby reversed.

Dated, Washington, D.C.
June 19, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[7] *Barbara R. Bryant*, 47 ECAB 715 (1996).