U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANN M. SAUER and U.S. POSTAL SERVICE,
POST OFFICE, Brookfield, CT

Docket No. 00-1821; Submitted on the Record;
Issued May 13, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant refused suitable work and thus was not entitled to continuing compensation.

On August 5, 1997 appellant, then a 38-year-old rural carrier, filed a traumatic injury claim alleging neck injuries sustained in an automobile accident. She stopped work on August 5, 1997. The Office accepted the claim for cervical strain and placed her on the rolls for temporary total disability, effective March 5, 1998.

In a February 19, 1998 report, Dr. F. Scott Gray, a second opinion Board-certified orthopedic surgeon, diagnosed "chronic cervical strain pattern with mechanical soft-tissue pain." Dr. Gray concluded that appellant was capable of performing a sedentary position with activities "such as answering the telephones and recording messages, doing general clerical work, assigning mail to carriers, etc." In the attached work restriction form dated February 18, 1998, he indicated that appellant was not capable of working eight hours per day. He noted physical restrictions on sitting, walking, standing and no lifting over 10 pounds.

Appellant underwent a functional capacity evaluation (FCE) on February 19 and 23, 1998 which found that she would not be able to perform the duties of her occupation, but that she was capable of performing sedentary work with restrictions on lifting, sitting and standing.

In a March 12, 1998 report, Dr. Thomas P. Nipper, an attending Board-certified orthopedic surgeon, noted that he had reviewed the March 6, 1998 FCE and concluded that appellant was capable of working a sedentary position for four hours per day. He released appellant to sedentary work on March 13, 1998.

On March 23, 1998 appellant filed recurrence of disability (Form CA-2a), alleging that her heart palpitations were caused by her August 5, 1997 employment injury.

In a progress note dated April 2, 1998, Dr. Nipper indicated that appellant could return to a sedentary position on May 1, 1998.

On April 15, 1998 the Office offered appellant the position of modified clerk with a 9:30 a.m. to 1:30 p.m. shift, with Sundays off. Duties of the position included answering the telephone, assigning "accountable mail, *i.e.*, certified and registered mail to carriers," retrieving the empty buckets/trays of mail, hanging empty mail sacks, weighing no more than one pound, on the parcel post rack, gathering color codes and returning them to the appropriate place and maintaining a from rack in the lobby.

On April 15, 1998 the Office advised appellant that it had reviewed the offer of employment, compared it with the medical evidence concerning her ability to work and found the offer to be suitable. The Office advised appellant that a partially disabled employee who refuses suitable work is not entitled to further compensation. The Office gave appellant 30 days to accept the job or provide a reasonable, acceptable explanation for refusing the offer.

On April 16, 1998 Dr. Nipper reviewed the offered position and concluded that she was capable of performing the duties described.

On May 1, 1998 the Office offered appellant the position of modified clerk with the duties of "[r]etrieval of empty trays/buckets; (sic) maintaining of lobby rack, verification of mark-up mail, review of letter mail for carriers and gather color codes" omitted. The hours of the position were listed as 9:30 a.m. to 1:30 p.m. shift, with Saturdays and Sundays as nonschedule days.

In a May 4, 1998 work restriction (Form OWCP-5c), Dr. Nipper concluded that appellant was capable of working three hours per day, five days per week with restrictions on sitting, standing, reaching, walking and twisting.

On May 8 and 9, 1998 appellant was offered a position working three hours per day, five days per week within the physical restrictions set by Dr. Nipper and included revisions discussed on April 22 and May 1, 1998. The employing establishment changed the hours to three hours per day instead of four hours per day, five days a week with Saturdays and Sundays as nonschedule days. Duties included answering the telephone, assigning accountable mail with no lifting more than 10 pounds and hanging empty mail sacks on the rack.

Appellant returned to a light-duty job on May 12, 1998 where she worked three hours which she stopped on May 12, 1998 and has not returned to work.

In a letter dated May 13, 1998, appellant advised the Office that she attempted to perform the offered position on May 12, 1998. However, she "experienced severe migraine headache and excrusiating (sic) neck pain to the extent of 18 hours without sleep forbidding me to return to work the next day."

By letter dated May 15, 1998, the Office advised appellant that it had reviewed the offer of employment, compared it with the medical evidence concerning her ability to work and found the offer to be suitable. The Office advised appellant that a partially disabled employee who

refuses suitable work is not entitled to further compensation. The Office gave appellant 30 days to accept the job or provide a reasonable, acceptable explanation for refusing the offer.

In a June 2, 1998 letter, the Office informed her that the evidence of record was insufficient to support her contention that she sustained a consequential injury in the form of heart and/or anxiety condition due to her August 5, 1997 employment injury. The Office advised appellant as to the type of evidence required to support her claim.

By facsimile dated June 16, 1998, appellant submitted a report from Dr. Randolph L. Trowbridge, a Board-certified physiatrist, in support of her contention that the job was not suitable and that she was totally disabled. In a report dated June 6, 1998, Dr. Trowbridge diagnosed chronic neck, head and shoulder pain which did "not appear to have a primary neurological origin." He indicated that appellant's symptoms were "aggravated by prolonged sitting, standing and other excessive activities" and that "[l]ight general activity seems to make her feel better as well as resting in a recliner." Dr. Trowbridge noted that appellant "tried to return to work but after three hours was unable to tolerate it due to her pain."

In a June 22, 1998 letter, the Office found that the evidence of appellant was insufficient to change its determination that the job offer was within the restrictions set forth by Dr. Nipper that Dr. Trowbridge's report was insufficient to establish that she was medically incapable of performing the offered position. The Office reminded appellant of the penalty provisions for refusing suitable work and afforded her 15 days in which to accept the position or her benefits would be terminated pursuant to 5 U.S.C. § 8106(c).

By decision dated August 12, 1998, the Office found that appellant was not entitled to continuing compensation as she had abandoned suitable work and terminated wage-loss compensation benefits effective August 12, 1998.

Appellant's counsel requested reconsideration by letter dated July 19, 1999 and submitted evidence in support. She also argued that she sustained a recurrence of total disability on May 13, 1998 and that the Office had not accepted all injuries appellant had sustained due to her August 5, 1997 employment injury.

In a report dated December 24, 1998, Dr. Trowbridge opined that appellant's "chronic pain and headaches are clearly related to the job-related accident that occurred on August 5, 1998." He stated:

> "[T]his type of condition involving myofascial tightness and pain, malalignment of vertebral segments in the cervical region as well as the pelvis and general joint laxity usually causes chronic symptoms of the nature that [appellant] is reporting and would disable her from her usual job responsibilities. Unless treated properly, she would not recover and certainly could have great difficulty with even the light-duty position presented to her. Certain posturing and repetitive movement using the upper limbs and extremities could exacerbate the condition and cause incapacitating headaches. This is a common occurrence in patients with this type of problem."

Dr. Trowbridge stated that appellant had been doing well until she was involved in an automobile accident on August 12, 1998 and that he had no opinion as to current status since he had not seen her during the past few months.

By merit decision dated February 1, 2000, the Office denied appellant's request on the basis that the evidence was insufficient to warrant modification of its prior decision. The Office noted that appellant alleged that she sustained a recurrence of total disability on May 13, 1998, but that she failed to file any recurrence claim referencing May 13, 1998 as the date of her recurrence. Regarding appellant's alleged recurrence, the Office found the medical evidence insufficient to support a change in her medical condition as well as no evidence supporting a change in the nature and extent of appellant's light-duty job duties.

The Board finds that the Office did not properly determine that appellant refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that "a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him [or her], is not entitled to compensation."[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[3]

In cases where appellant ceases work after reemployment and the Office has not issued a formal loss of wage-earning capacity (LWEC) determination, the Office's procedure manual provides as follows:

> "If no formal LWEC decision has been issued, the CE [claims examiner] must ask the claimant to state his or her reasons for ceasing work and make a suitability determination on the job in question. If the job is considered suitable, the CE then advises the claimant that he or she has the burden of proving total disability … after return to work and invite the claimant to submit a Form CA-2a.
>
> (1) *If the reasons stated by the claimant* amount to an argument for a recurrence, the CE should develop and evaluate the medical and factual evidence upon receipt of Form CA-2a…."[4] (Emphasis in the original.)

In the instant case, appellant attempted to work the offered position. She worked three hours on May 12, 1998 and indicated that she was unable to return to work the next day because

[1] 5 U.S.C. § 8106(c)(2). *David P. Camacho*, 40 ECAB 267 (1988).

[2] *Alfred Gomez*, 53 ECAB ___ (Docket No. 00-1817, issued October 9, 2001).

[3] 20 C.F.R. § 10.517; *see Gloria J. Godfrey*, 52 ECAB ___ (Docket No. 00-502, issued August 27, 2001); *Catherine G. Hammond*, 41 ECAB 375 (1990).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.b and 9.b(1), respectively (December 1995).

of a severe migraine headache. In its decision, however, the Office terminated appellant's compensation based on its finding that she had abandoned suitable work without considering whether she sustained a recurrence of total disability. According to the Office's procedures, as appellant stopped work after returning to employment and the Office had not issued a wage-earning capacity decision, the Office should have adjudicated the case as a claim for a recurrence of disability.

On remand the Office should further develop the claim as a recurrence of disability as set forth in the Federal (FECA) Procedure Manual and consistent with Board precedent.[5] After appropriate development of the evidence, the Office should issue a *de novo* decision on whether appellant has established that she sustained a recurrence of disability on or after May 13, 1998 causally related to her accepted August 5, 1997 employment injury.

The decision of the Office of Workers' Compensation Programs dated February 1, 2000 is hereby set aside and the case is remanded for further consideration pursuant to the above decision.

Dated, Washington, DC
May 13, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] *See William M. Bailey*, 51 ECAB ___ (Docket No. 98-1215, issued December 6, 1999).