U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERETHA NEWMONES and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Miami, FL

Docket No. 02-1343; Submitted on the Record;
Issued October 17, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits for refusal to accept a suitable job offer.

On November 24, 1980 appellant, then a 39-year-old mess attendant, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that she slipped and fell after stepping on a wet mat on the floor at the door and injured her back, knee and arm. The Office accepted the claim for a lumbar strain, left knee contusion, right arm contusion and facial laceration. The Office subsequently accepted the conditions of lumbar radiculitis L5 left and left knee derangement and approved an arthroscopic surgery on appellant's left knee. Appellant stopped work on November 24, 1980 and has not returned.

On January 25, 2000 the employing establishment offered appellant a position as a clerk. On February 16, 2000 appellant refused the position stating her physical condition was such that she cannot work.

In a letter dated February 29, 2000, the Office requested appellant's attending physician, Dr. Melvyn H. Rech, an osteopath, to review the proposed job offer. Dr. Rech was requested to review the job offer and to indicate whether he felt the job was medically within her physical capabilities or whether modifications should be made to the offered job. Dr. Rech was further requested that if he believed that appellant was not physically capable of performing the job, then his medical opinion needed to be supported with current objective findings. Dr. Rech was also asked to provide appellant's work capacity. In a March 20, 2000 report, he related that appellant's symptomatology has become more severe as she has also experienced several falls secondary to the initial industrial accident. Dr. Rech advised that he treats and examines appellant on a periodic basis, but stated that treatment at this time was palliative as appellant is obese and definitive treatment such as total knee replacement would not be practical. Dr. Rech related that appellant utilizes a walker for ambulation and he has recommended the use of a scooter. He noted that, on appellant's examination of March 14, 2000, appellant's symptoms

have continued to be progressive and disabling to appellant. Dr. Rech opined that appellant is unable to perform any gainful occupation due to the multiple injuries sustained in her initial accident of November 24, 1980. Sitting, standing, bending, etc. were stated to be a severe difficulty for appellant.

By letter dated June 2, 2000, the Office again sent a letter to Dr. Rech, requesting him to review the proposed offered job, provide any comments and offer modification suggestions and to provide current objective findings to support his medical opinions and to provide work capacity. No response was received.

In a letter dated October 27, 2000, the Office informed appellant that a second opinion evaluation was necessary to address her current work tolerance limitations and the residuals of the accepted conditions. Appellant was referred to Dr. Arnaldo V. Lopez, a Board-certified orthopedic surgeon. In a November 14, 2000 report, Dr. Lopez noted the history of injury, provided his examination findings and results from x-rays taken of the right shoulder, lumbosacral spine and left knee and advised that he had reviewed the records. Dr. Lopez opined that residuals of lumbosacral strain sustained on November 24, 1980 should have resolved a long time ago, but because of appellant's obesity and chronic limping due to the condition in the left knee, the symptoms in the lumbosacral spine have persisted. He stated that the severe osteoarthritis of the left knee which most probable has occurred without injury to the left knee, but, unfortunately, is a very symptomatic situation because of the persistent pain compounded with the weight of appellant any time she puts any weight on her left lower extremity. Residuals of the right shoulder sprain should have been resolved a long time ago, but appellant still complains of pain in this area. Dr. Lopez stated that there were no objective findings regarding the right shoulder expect for the pain appellant refers to. Dr. Lopez stated that appellant does not complain of probable laceration in her mouth; therefore, it has resolved. Dr. Lopez stated that, since appellant had left knee arthroscopy about 15 years ago, if at the time of the surgery the articular surface of the femur and tibia were damaged by the instruments, they could have precipitated development of degenerative change of osteoarthritis in this area, but this is not always the case. He advised that appellant has painful limited range of motion of the left knee, with local tenderness, compatible with severe osteoarthritis shown in the x-rays. Dr. Lopez opined that appellant has disabling residuals of the injuries she sustained to the lumbar area, left knee and right shoulder, which are out of proportion of the initial injury, but have been compounded because of appellant's weight and the subsequent surgery to the left knee. He opined that he did not see any evidence of lumbar radiculitis on examination and, thus, that condition has been resolved. Dr. Lopez opined that appellant could perform sedentary work where there were no repetitive bending, stooping or lifting more than 20 pounds; there was freedom to stand and walk around the area; a special chair provided, if needed; periods of rest taken as necessary; a room available to lie down, if needed; appellant should not be expected to sit down for more than 30 minutes at a time without standing or walking around; no pushing, pulling, lifting, squatting, kneeling or climbing required; and appellant not be required to operate a motor vehicle.

In a January 16, 2001 letter, the employing establishment offered appellant the position of clerk. It noted that the position would require her to be stationed at one of the entrances of the medical center, to check the identity of all persons who enter the hospital to see if they have a

badge on their person and, if they do not, courteously ask them to identify themselves and their business there. The position was sedentary, with no repetitive bending, stooping, pulling, pushing, lifting more than 10 pounds, squatting, kneeling, or climbing required. Appellant would not be required to operate a motor vehicle. She would be allowed the flexibility to sit, stand, or walk around the immediate area as needed or desire arises. If needed, a room will be made available for appellant to lie down. A special chair will also be provided, if needed.

On February 1, 2001 appellant refused the job offer stating that she was unable to work and medical reason would follow. In a February 1, 2001 letter, Dr. Rech stated that appellant continues to demonstrate evidence of severe chronic lumbosacral strain and sprain and severe degenerative arthritis of the knees and obesity. He stated that appellant is unable to ambulate without assistant device such as a walker and frequently requires a wheelchair for mobilization. Dr. Rech further stated that appellant is unable to perform her occupation duties at this time due to her marked restrictions in motion due to the aforementioned problems.

In a revised job offer of February 9, 2001, the employing establishment offered appellant the same position of clerk with the previously stated duties and requirements and added the fact that all entrances were wheelchair accessible.

By letter dated February 13, 2001, the Office informed appellant that it found the position of clerk to be suitable to her work capacities. Appellant was given 30 days to either accept the position or provide an explanation of the reasons for refusal. She was further advised that if she did not accept the offered position and did not show that the failure was justified, her compensation would be terminated under section 5 U.S.C. § 8106(c)(2). Appellant was further informed of the penalty consequences of section 8106(c)(2) in regard to future compensation benefits from the program, including schedule awards or future recurrences of injury compensation.

In an undated letter, appellant declined the offered position. The reasons offered were: "See [Dr. Rech's] [l]etter, [he] will not release me for this job position. Pt cannot sit in one position for more than 30 minutes. Also needs help with ambulation also using the bathroom." A copy of Dr. Rech's February 1, 2001 letter was provided with a hand-printed note at the bottom which stated: "Patient also need physical assistance with ambulation and using the bathroom."

In a February 23, 2001 letter, the employing establishment added that both public and local transportation companies which service the Miami-Dade area are wheelchair accessible.

In a letter dated February 27, 2001, the Office requested that Dr. Rech provide current objective findings, which support the statement that "[appellant] also needed physical assistance with ambulation and using the bathroom," which was written on the bottom of his letter. Dr. Rech was also requested to provide current objective evidence to support his statement that appellant was unable to use the bathroom by herself. The Office received no response to this letter.

In a letter dated March 22, 2001, the Office informed appellant that Dr. Rech had failed to respond to its letter of February 27, 2001 and, thus, her reasons for refusal of the job offered

have not been found acceptable. Appellant was given 15 days to accept the offered job of clerk without penalty. She was further informed that failure to accept the job within the 15-day period would result in termination of compensation payments, including scheduled awarded payments. Appellant did not respond.

By decision dated April 10, 2001, the Office terminated appellant's compensation benefits as she refused an offer of suitable work within her medical limitations after it was offered to her by her employing establishment.[1]

Appellant thereafter secured the representation of counsel and requested an oral hearing, which was held November 28, 2001. By decision dated February 21, 2002, an Office hearing representative affirmed the Office's termination of benefits as the job offer provided by the employing establishment was within the restrictions as established by the weight of the medical evidence as represented by Dr. Lopez.

The Board has duly reviewed the case on appeal and finds that the Office has met its burden of proof in terminating appellant's compensation benefits for refusal to accept a suitable job offer.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[2] This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[3]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[4] 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.[5] Section 10.517(a) of Part 20 of the Code of Federal Regulations[6] 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 showing before a determination is made with respect to termination of entitlement to compensation.[7] To justify termination, the Office must show that the work offered

[1] Appellant remained entitled to medical benefits for her accepted work-related conditions.

[2] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] *See Leonard W. Larson*, 48 ECAB 507 (1997).

[4] 5 U.S.C. § 8106(c)(2).

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

[6] 20 C.F.R. § 10.517(a).

[7] *Camillo R. DeArcangelis*, *supra* note 5; *see* 20 C.F.R. § 10.517(a).

was suitable[8] and must inform appellant of the consequences of refusal to accept such employment.[9]

In this case, the Office had accepted appellant's claim for a lumbar strain, left knee contusion, right arm contusion and facial laceration. Subsequent conditions of lumbar radiculitis L5 left and left knee derangement and arthroscopic surgery on appellant's left knee were also approved. On numerous occasions and most recently by letter dated March 22, 2001, the Office sent appellant notification that the employing establishment had offered suitable employment. On these occasions the Office provided 30 days followed by 15 additional days for appellant to accept or reject the position and advised appellant that, if she refused to accept the offered position and demonstrate that her refusal was justified, her compensation would be terminated. The Board, therefore, finds that the Office properly notified appellant of the consequences of her refusal to accept suitable work.

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.[10] In assessing the 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.[11]

In this case, the Office found that the job offered to appellant adhered to the restrictions the second opinion physician, Dr. Lopez, a Board-certified orthopedic surgeon, recommended and that the position was suitable. Dr. Lopez opined that appellant could perform sedentary work where there were no repetitive bendings, stoopings or lifting more than 20 pounds; there was freedom to stand and walk around the area; a special chair provided, if needed; periods of rest taken as necessary; a room available to lie down, if needed; appellant should not be expected to sit down for more than 30 minutes at a time without standing or walking around; no pushing, pulling, lifting, squatting, kneeling or climbing required; and, appellant not be required to operate a motor vehicle. He further completed a work capacity evaluation stating such. Dr. Lopez based his opinion on a proper factual and medical history as evidenced by the statement of accepted facts, his review of the pertinent evidence in appellant's medical record and his own examination findings of appellant and the objective tests taken. Dr. Lopez further provided medical rationale as to why appellant's symptoms have persisted and took appellant's

[8] *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (July 1997).

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

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

current condition into consideration when rendering his opinion regarding appellant's work capacity. Contrary to appellant's assertions, Dr. Lopez's detailed examination findings contradicts appellant's contention that Dr. Lopez failed to examine her. The Board notes that Dr. Rech failed to support his opinions regarding appellant's work capacity with objective evidence or medical rationale, even after the Office informed him of the necessity of providing such. Dr. Rech's opinion is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.[12] Thus, Dr. Rech's reports are insufficient to overcome the weight accorded to Dr. Lopez's opinion, which the Office properly found represented the weight of the medical evidence. Moreover, the record supports that the offered position of clerk was vocationally suitable to appellant.

Accordingly, the Office properly met its burden of proof in establishing that appellant refused a suitable position without reasonable justification. Because the Office properly followed the appropriate procedures for reaching its suitability determination, the Board concludes that the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

The February 21, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 17, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *William C. Thomas*, 45 ECAB 591 (1994).