U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALINE G. BIRMINGHAM and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sepulveda, CA

Docket No. 03-2131; Submitted on the Record;
Issued February 18, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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 refused to work after suitable work was procured for her.

On August 5, 1994 appellant, then a painter's worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that, on August 5, 1994, when lifting heavy furniture, she sustained weakness of both arms, tender shoulders causing her hand to fall asleep on occasion. By letter dated June 6, 1995, appellant's claim was accepted for bilateral forearm strains. On March 11, 1998 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that, from constantly using her hand and arms as part of her federal employment, she sustained a recurrence of carpal tunnel syndrome. Appellant's supervisor indicated that appellant stopped worked on March 6, 1998. By decision dated February 1, 1999, the Office accepted appellant's claim for bilateral carpal tunnel syndrome.

Dr. J. Randall Davis, an orthopedic surgeon, performed a carpal tunnel release on appellant's left wrist on April 1, 1999, and a carpal tunnel release on her right wrist on May 27, 1999. Dr. Davis reported that appellant made very slow progress after her surgeries. In his medical report dated September 22, 1999, he noted that appellant was temporarily disabled. In a report dated November 5, 1999, Dr. Davis noted that appellant's carpal tunnel was resolved, but indicated that her symptoms were more consistent with a proximal median nerve compression. He noted that appellant was able to work if there was work without use of the upper extremities. In a work capacity evaluation, also dated November 5, 1999, Dr. Davis noted that appellant could work modified duty with reaching above the shoulder limited to one hour a day, and repetitive movements of the wrists and elbows, pushing, pulling and lifting prohibited.

In a report dated December 28, 1999, Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, diagnosed bilateral carpal tunnel syndrome, status post left and right median nerve decompressions of the

carpal tunnel, and proximal median nerve compression, which he noted were directly related to appellant's employment. He indicated that appellant could currently work zero hours a day, but that within six months she would be able to work eight hours a day.

In a January 19, 2000 report, Dr. Davis indicated that appellant had probable nerve entrapment of the median nerve of the forearm. He further noted resolution of carpal tunnel compression by electrical studies but with residual pain over the carpal tunnel incisions. In an April 24, 2000 report, Dr. Davis stated his belief that appellant could continue to work with the restriction of no repetitive use of the hands.

By letter dated September 27, 2000, the Office referred appellant to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for another second opinion. In an October 19, 2000 report, Dr. Bleecker diagnosed bilateral carpal tunnel syndrome and status post surgical releases with poor result. He opined:

> "She cannot likely return to her previous employment, either her regular work or on a modified basis. She is a candidate for vocational rehabilitation, but again, one must understand that she cannot use her hands or fingers in any type of retraining program, *i.e.*, she cannot use her hands; she cannot operate a motor vehicle; she is unable to perform repetitive movements of her wrists and elbows, and she has limitations for pushing, pulling and lifting of 25 pounds."

In an October 30, 2000 report, Dr. Davis noted that it was unlikely that appellant would return to her job as a painter and stated that it would be reasonable for vocational rehabilitation to start.

By letter dated March 16, 2001, the employing establishment offered appellant a position as a clerk in their West Los Angeles Office, effective April 23, 2001. Appellant's duties were listed as calling patients to remind them of scheduled appointments using a telephone headset, updating means test information using computer voice-activated software, conducting customer service surveys, answering and directing telephone calls using a telephone headset and limited computer data entry and retrieval using computer voice-activated software. The employing establishment noted that appellant could sit or stand, would lift one to two pounds, would walk two to six hours during an eight-hour shift, and would do no pushing, pulling or repetitive movements.

On March 26, 2001 appellant filed a claim for a schedule award.

By letter dated April 2, 2001, appellant indicated that she could not accept the job offer. She contended that she was still experiencing severe pain due to her carpal tunnel syndrome, for which she was taking medication and that this medication made her drowsy and usually required her to lie down and take a nap for one to two hours. Appellant also noted that the medication made it difficult for her to concentrate. She noted Dr. Bleecker's restrictions. Finally, appellant indicated that, since she could not operate a motor vehicle, the only available means for her to get to work would be bus, and that the bus would require 4 hours per day in commuting, specifically 30 minutes to walk 4 blocks to the nearest bus stop from her home, 60 minutes to commute to work on the bus, and 30 minutes to walk to the work facility; she noted the trip

would need to be repeated to return home. By letter dated April 3, 2001, appellant stated that she could not accept or decline the employing establishment's job offer, because she did not concur that the position would accommodate her physical disabilities.

By letter dated June 14, 2001, the Office advised appellant that the position of clerk with the employing establishment was suitable to her work capabilities, and that she had 30 days to accept the position or provide an explanation for refusing it.

Appellant, through her attorney, responded in a letter dated June 19, 2001, by indicating that the job was unreasonable because public transportation was unworkable in that it would involve commuting four hours per day and would require extensive walking, which she cannot do.

In a note dated June 27, 2001, Dr. Debra Gutierrez, a family practitioner, noted:

> "[Appellant] is a patient who has come under my care recently. She has required multiple specialist consultations, treatments (including surgery), and pain medications for severe, chronic bilateral carpal tunnel syndrome. She reports to me that secondary to her condition, she is unable to drive her car effectively."

By letter dated August 30, 2001, the Office informed appellant that her refusal of the position was not justified. The Office explained that, although it was documented that appellant could not operate a motor vehicle, her reluctance to take public transportation cannot be used as a reason to refuse the job offer. Appellant was given 15 days to accept the position without penalty.

By another letter dated August 30, 2001, appellant was referred for a second opinion evaluation with regard to her permanent partial impairment. In a report dated October 22, 2001, Dr. Joseph Culverwell, a Board-certified orthopedic surgeon, diagnosed status post bilateral carpal tunnel releases. He stated that "the patient's treatment is unexplained and without evidence from electromyogram, did not reveal the nature of her problem. It is difficult to give a diagnosis at the present time under the circumstances. The patient also indicates that she did not have any studies done of the cervical spine, which might contribute to the diagnosis."

On November 7, 2001 the Office issued a decision terminating monetary compensation on the grounds that appellant had without good cause or reason refused an offer of suitable limited-duty employment.

By letter dated December 7, 2001, appellant, through her attorney, requested a hearing. At the hearing, held on August 13, 2002, appellant testified that her pain was getting worse and that she has been on pain medication and has not worked since 1998. She stated that about two hours after taking her medication she needs to lie down because the medication makes her tired, and noted that the medication made it difficult to concentrate, and that this would make her unable to do the proposed job. Appellant further noted that the job that she held when injured was located about five minutes or eight blocks from where she lived, and to get to that job she would drive or walk. She contrasted with the job she was offered which was about 20 miles from her house. Since she has been unable to drive since 1998, she testified that she would need to take the bus. Appellant's husband testified that he researched the bus situation, and that the

bus would take at least an hour, maybe as much as two hours to transport appellant from the area of her home to the area of the hospital. He testified that appellant would then have to walk another 30 to 45 minutes to get from the bus stop to the hospital. He noted that, if appellant walks too much, it intensifies the pain in her hands. Attached to the hearing transcript were maps appellant submitted of the commute from her house to the offered job site. In a post-hearing brief, appellant's attorney argued that a six-hour per day commute to and from work was medically contraindicated and accordingly, the job was not suitable.

By decision dated October 4, 2002, the hearing representative affirmed the November 7, 2001 decision of the Office. The Office noted that there was nothing in the Office procedure manual indicating that acceptable reasons for refusing a job offer include a long commute, and that the claimant has submitted no medical evidence indicating that she could not make this commute.

The Board finds that the Office properly terminated appellant's compensation benefits.

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant neglected work after suitable work was secured for her. Section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulation[3] 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

In the instant case, the employing establishment offered appellant a position in its West Los Angeles office, which was further from appellant's home than the office where appellant had worked when injured. The position offered, that of a clerk, required to perform the job utilizing a telephone headset and voice-activated software. Appellant could sit or stand, would lift one or two pounds, and would do no pushing, pulling or repetitive movements. This position was within the restrictions listed by the physicians of record. Dr. Davis indicated that appellant was able to work with restrictions of no repetitive use of the arms. Dr. Bleecker, in his October 19, 2000 report, indicated that appellant could not use her hands or fingers, was unable to perform repetitive movements of her wrist and elbows, and indicated that she had limitations for pushing, pulling and lifting of 25 pounds. He also noted that appellant could not operate a motor vehicle.

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.517(a).

[4] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

Both of these doctors limitations are accommodated by the position offered with the employing establishment. Appellant also contends that the medication she takes for her injury causes her to be unable to concentrate, and require naps. However, there is no medical evidence confirming this.

The question remains, however, as to whether appellant will be able to handle the daily commute to and from the job. The Board notes that the offered job is considerably further from appellant's house than the job she held when she was injured. Prior to appellant's injury, she could walk or drive the approximately eight blocks to her place of employment. Pursuant to Dr. Bleecker's report, appellant can no longer drive a vehicle. Appellant and her husband testified to the fact that it would take appellant at least 4 hours a day to commute to and from the new location, allowing for 1 hour or 2 each way on the bus and 30 minutes walking to the bus from her home and 30 minutes to walk from the bus stop to her place of employment. The employing establishment has submitted no evidence that appellant's estimates of her commuting time were incorrect. Under the Office's procedures, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[5] Dr. Bleecker's report establishes that appellant would not be able to drive to the new place of employment. However, no physician offers any opinion that appellant would be unable to commute by public transportation. Furthermore, although appellant's husband testified that, if appellant walks too much the pain in her hand intensifies, no medical reports support this allegation. Without medical evidence establishing that appellant is unable to commute to work, appellant has failed to establish that the position offered by the employing establishment is unsuitable.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996).

The decision of the Office of Workers' Compensation Programs dated October 4, 2002 is hereby affirmed.

Dated, Washington, DC
February 18, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member