U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN HUNT and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, N.Y.

Docket No. 96-700; Submitted on the Record;
Issued April 3, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On March 19, 1991 appellant, then a 59-year-old cashier, sustained a lumbosacral strain in the performance of duty. Appellant was subsequently placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

By letter dated April 9, 1993, Lynne Tomlinson, R.N., of the Office Claimant Advocacy Program, advised appellant that the employing establishment would be offering appellant a part-time light-duty position and that transportation would be provided. She noted that she had discussed with appellant her travel distance to work and the difficulty she had negotiating stairs and stated that transportation would be provided so that appellant could avoid having to travel by subway.

By letter dated May 25, 1993 to Dr. Ramon Valderama, a Board-certified neurologist, Ms. Tomlinson noted that she was concerned about appellant's falling episodes. She enclosed a job description which she asked Dr. Valderama, to review after he had examined appellant. Ms. Tomlinson noted that the employing establishment would be providing transportation assistance to appellant and that she could work part time at first. She stated that she would contact Dr. Valderama for his recommendations after he had examined appellant.

In a report dated July 2, 1993, Dr. Irving H. Parnes, a Board-certified surgeon, provided a history of appellant's condition and findings on examination and stated that appellant could perform light-duty work but could not perform any lifting or bending or prolonged standing or sitting. He stated that appellant should be allowed to get up and move about and needed to continue medical and rehabilitative therapy. Dr. Parnes noted that appellant had been referred back to Dr. Valderama to correlate neurological clinical findings with an electromyogram

(EMG) performed in May 1993 and stated that "any idea of [appellant's] returning to work must be held in abeyance pending the additional findings of Dr. Valderama."

In a report dated July 20, 1993, Dr. Valderama provided a history of appellant's condition and findings on examination and recommended further testing to include a magnetic resonance imaging (MRI) scan or a computerized axial tomography (CAT) scan. He provided no opinion as to appellant's capability for work.

By letter dated October 4, 1993, Ms. Tomlinson stated that Dr. Parnes's July 2, 1993 report was sufficient to authorize the employing establishment to make a light-duty job offer to appellant.

By letter dated October 7, 1993, the employing establishment offered appellant a light-duty position which it stated was in conformance with Dr. Parnes's July 2, 1993 report. The employing establishment stated that the position was that of a food service worker with duties that could be performed either sitting or standing subject to appellant's comfort and frequent breaks could be taken. The employing establishment stated that the duties of the light-duty position did not involve any lifting, bending or prolonged standing or sitting. The employing establishment did not state that any transportation assistance was being provided to appellant.

By letter dated October 21, 1993, the Office advised appellant that it had found the light-duty position offered by the employing establishment to be suitable as it was consistent with the physical limitations set forth by appellant's physician and was located within her commuting area.

On November 18, 1993 appellant accepted the light-duty position.

By letter dated November 19, 1993, appellant asked the employing establishment if it had made arrangements for her transportation to and from work.

In a memorandum of a telephone conference with the employing establishment, an Office claims examiner noted that appellant had told the employing establishment that she would not report for work unless she was provided with transportation.

By letter dated January 11, 1994, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that appellant had failed to report for duty to her light-duty position which had been found to be a suitable job offer. The Office noted that appellant had stated that she would not report to work until she was provided with transportation but the Office stated that the medical evidence did not establish that appellant needed assistance with transportation and that appellant had therefore improperly refused suitable work.

By decision dated February 2, 1994, the Office terminated appellant's compensation benefits effective February 6, 1994 on the grounds that she had refused an offer of suitable work. The Office noted that it had determined that appellant's reason for refusing the job, because transportation had not been provided for her, was not a valid reason for refusing the job as the medical evidence did not establish that she needed assistance with transportation.

By letter dated February 9, 1994, appellant requested a hearing and submitted additional evidence.

In a note dated January 14, 1994, Dr. Parnes stated that he had examined appellant on that date and determined that she could return to work but could not use public transportation, including the subway.

By letter dated July 18, 1995, Dr. Parnes stated that appellant was totally disabled. He stated that appellant could not sit, stand or walk for long periods of time and that she could not lift or bend, could not climb stairs and could not use public transportation, particularly the subway system. Dr. Parnes stated that appellant needed a cane to ambulate. He stated that appellant's condition had worsened in spite of medication, treatment and home rehabilitative exercises. Dr. Parnes stated that during his examination of appellant in the 4 weeks preceding his report, appellant had discernible low back spasms with right sciatica, flattening and contractures of the lumbar musculature, restricted straight leg raising bilaterally, a 20 percent restriction of movement of the trunk on the pelvis and instability of the right leg.

On July 19, 1995 a hearing was held before an Office hearing representative at which time appellant testified.

In a report dated August 21, 1995, Dr. Parnes stated that appellant had been under his continuing care for a severe low back derangement with spasms and right sciatica which had led to instability of her right leg and that she had recently fallen and needed a cast on her right ankle. He opined that appellant was totally disabled and "therefore, the question of use of public transportation is no longer an issue."

By decision dated September 27, 1995, the Office hearing representative affirmed the Office's February 2, 1994 decision.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits and this includes cases in which the Office terminates compensation under section 8106(c) of the Federal Employees' Compensation Act for refusing to accept suitable work or neglecting to perform suitable work.[1] Section 8106(c)(2) provides in pertinent part, "a partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[2] However, to justify such termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to

[1] *Shirley B. Livingston*, 42 ECAB 855, 860-61 (1991).

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

work was justified[4] and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[5] To justify termination, the Office must show that the work offered was suitable[6] and must inform appellant of the consequences of refusal to accept such employment.[7] The Office failed to meet its burden of proof here.

In this case, appellant sustained a lumbosacral strain in the performance of duty on March 19, 1991 and was placed on the periodic compensation rolls to receive temporary total disability benefits.

By letter dated May 25, 1993 to Dr. Valderama, a Board-certified neurologist, Ms. Tomlinson, of the Office Claimant Advocacy Program, noted that she was concerned about appellant's falling episodes and enclosed a job description for Dr. Valderama to review after he had examined appellant. Ms. Tomlinson noted that the employing establishment would be providing transportation assistance to appellant and that she could work part time at first. She stated that she would contact Dr. Valderama for his recommendations after he had examined appellant. However, in his July 20, 1993 report, Dr. Valderama did not address appellant's capability for work. In fact, he recommended further testing regarding appellant's condition.

In a report dated July 2, 1993, Dr. Parnes, appellant's attending Board-certified surgeon, specifically stated that "any idea of [appellant's] returning to work must be held in abeyance pending the additional findings of Dr. Valderama." However, as noted above, Dr. Valderama did not provide a report approving the position offered to appellant.

By letter dated October 7, 1993, the Office offered appellant a light-duty position which it stated was in conformance with the medical restrictions provided by Dr. Parnes. However, as noted above, Dr. Parnes indicated that approval of the job offer was dependent upon Dr. Valderama's recommendations. Also, in its letter, the employing establishment did not indicate that transportation assistance would be provided to appellant as it had previously warranted to her.

In a note dated January 14, 1994, Dr. Parnes stated that he had examined appellant on that date and determined that she could return to work but could not use public transportation, including the subway.

By letter dated July 18, 1995, Dr. Parnes stated that appellant was totally disabled. He stated that appellant could not sit, stand or walking for long periods of time and that she could not lift or bend, could not climb stairs and could not use public transportation, particularly the subway system.

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[4] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[5] *See Catherine Hammond*, *supra* note 4.

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

[7] *Kathy M. Webb*, 36 ECAB 242, 244 (1984).

The Board finds that the Office improperly determined that appellant refused an offer of suitable work. Appellant initially accepted the light-duty position but the employing establishment had failed to make arrangements for transportation as it had promised to do, a promise which apparently induced appellant to accept the position as suitable. Dr. Parnes stated in several reports that appellant was not able to use public transportation. He also indicated that approval of the job offer was contingent on Dr. Valderama's recommendation. The evidence of record shows that neither of appellant's physicians had determined that she was capable of performing the position which the employing establishment offered. Therefore, the job offer cannot be deemed to constitute suitable work. Additionally, all of appellant's permanent impairment, whether work related or not, must be considered in assessing the suitability of the position.[8]

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 8.814.4(b)(4) (December 1993).

The September 27, 1995 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
April 3, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member