U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHERINE BOCKO and U.S. POSTAL SERVICE,
MAIL SORTING CENTER, While River Junction, Vt.

Docket No. 97-77; Submitted on the Record;
Issued December 28, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On June 28, 1989 appellant, then a 29-year-old distribution clerk, filed a claim for back pain which she related to repetitive motion in sorting mail. She used sick and annual leave from July 29 through August 14, 1989. She sought compensation for the period July 24, 1989 through March 9, 1990. In a July 27, 1989 report, Dr. Cheryl Hennigan stated that repetitive motion and prolonged standing in one position were the cause of appellant's back pain. She diagnosed a lumbar strain. The Office of Workers' Compensation Programs accepted appellant's claim for dorsolumbar strain and authorized buy back of leave for the period July 24 through August 14, 1989. It began payment of temporary total disability compensation effective August 15, 1989.

In a November 13, 1990 letter, the employing establishment offered appellant a full-time position as a human resources clerk which it described as a clerical position with duties such as operating a telephone switchboard, filing, entering data into a computer, and operating a copying machine. The employing establishment stated that appellant would stand ten to fifteen minutes at a time and standing requirements would not exceed two to two and a half hours a day. It indicated that she would walk intermittently up to one to one and a half hours a day with no distance longer than one hundred feet. She would be allowed to sit to file and would sit three hours a day. Her lifting would be limited to papers to file, a ream of paper for the copying machine, and empty mail trays weighing less than 10 pounds. On January 4, 1991 appellant accepted the position and returned to work on January 7, 1991.

In a July 2, 1993 letter, the employing establishment indicated that it was reorganizing and considering an alternate position for appellant. The Office sent appellant's personal physician, Dr. Seddon Savage, an anesthesiologist, a job description with the physical requirements for the

job and requested his review.[1] In a July 6, 1993 report Dr. Savage commented that the physical demands appeared reasonable for appellant. He stated, however, that any repetitive reaching appellant did should be done below the shoulder level, either at the waist or lower rib level. He noted that extension of appellant's back while reaching had consistently increased appellant's symptoms and working at shoulder level put a tonic, mild extension on the back, with concurrent contraction of the paraspinous muscles. He commented that the lower thoracic facets and the paraspinous muscles were thought to be the origin of her symptoms. He opined that appellant would have a recurrence of pain if she were to work at shoulder height on a regular basis. He recommended that she not perform such duties for more than two to three hours a day. He noted that job description set forth other tasks that appellant might do within her limitations. He indicated that if appellant did repetitive motion at waist level, she could do so for four to five hours a day. He cautioned, however, that because repetitive reaching was etiologically associated with the onset of appellant's symptoms, the more frequently she did the activity, the more likely she would have a debilitating recurrence of symptoms. He stated that the second area of the new job description which was incompatible with appellant continuing to work on a long-term basis was the radical change in her hours. He stated that the proposed working schedule of Saturday, Sunday, Monday, Thursday and Friday evenings would necessarily result in very significantly increased life stress and increased muscular tension which would very likely result in appellant being out of work on the basis of increased thoracic pain quite rapidly. He recommended that appellant continue to work stable daytime hours during the week.

In a September 1, 1993 letter, an official for the employing establishment informed the Office that the employing establishment was undergoing a reorganization which had resulted in the "excessing" of employees from current positions to alternate positions within the same facility. It noted that appellant had been identified as one of the employees to be excessed. The employing establishment commented that it had informed appellant that no changes would be made to her current working restrictions or work schedule until it received approval from the Office and appellant's physician, following a job side analysis by a physical therapist.

In an October 14, 1993 letter, the employing establishment offered appellant a position as a modified clerk with hours from 11:00 a.m. to 7:30 p.m. with Tuesday and Wednesday as nonscheduled days. The employing establishment stated that the position would include sorting manual letters into a modified letter case, requiring minimal twisting and bending. It indicated that the sorting duties would be for a period of no more than an hour at a time, four hours a day. Appellant would be allowed to alternate sitting or standing and may take an occasional walk if necessary. She would also be given other duties including clerical tasks within her restrictions such as density studies on automation, mechanization and manual operation, mail preparation reviews and maintaining the tracking system. The employing establishment stated that appellant would sit 4 hours a day intermittently, walk 4.5 to 5 hours intermittently, stand 4 hours a day intermittently, lift 10 to 18 pounds a maximum of 3 to 4 times an hour, minimal twisting, and reaching between shoulder and waist level. The Office indicated that bending, squatting, kneeling and driving were not required.

[1] This letter is not in the record submitted on appeal but its contents are inferred from the July 6, 1993 report of Dr. Savage.

In a November 30, 1993 letter, the Office indicated that it found that job offered by the employing establishment to be suitable for appellant. The Office informed appellant that she had 30 days to either accept the position or provide an explanation of the reasons for rejecting it. The Office commented that it did not understand what life stresses would be caused by an hour and a half of evening work would be sufficiently severe to cause disabling thoracic spasms. The Office warned appellant that refusal of an offer of suitable employment with failure to demonstrate the refusal was reasonable was justified would jeopardized her further right to compensation.

In a January 25, 1994 report, Dr. Savage stated that appellant had a low thoracic motion segment abnormality with pain, which derived from two interrelated components, one spinal articular and one myofascial. He indicated that both components were sensitive to certain physical activities which was the basis of previously recommended physical restrictions. He commented that the myofascial component was responsive to tension and stress which may result in spasm which may in turn aggravate the underlying spinal component of pain. He stated that, because of this, work hours which significantly increase stress would likely aggravate her condition and result in increased disability. He related that it was appellant's expectation that the proposed changes in work hours would introduce multiple life stresses including after school and evening child care problems, the need to renegotiate visitation hours with her estranged husband, problematic timing of her back-care program, and reduced time with her children. Dr. Savage commented that these concerns seemed reasonable and would likely increase the level of stress. He stated that since appellant had a stress component to her problem, it was logical that her back pain and associated disability would likely increase under these conditions.

In a January 27, 1994 letter, appellant noted that she had received two job offers, one in July 1993 and one in January 1994 with the first proposing working times of 3:30 p.m. to 12:00 a.m. and the second proposing working times of 11:00 a.m. to 7:30 p.m. She noted that Dr. Savage's documentation was applied to both job offers. She stated that, on the basis of Dr. Savage's January 24, 1994 report, she concluded that the second job offer was in violation of her physician's recommendation and restrictions.

In an April 5, 1994 decision, the Office terminated appellant's compensation for refusal to accept suitable employment.

Appellant requested a hearing before an Office hearing representative. In a May 13, 1994 report, Dr. Savage noted that appellant was the mother of an infant and a teenager which would make it difficult to make child care arrangements for the evenings and weekends and to supervise a teenager at home. He also noted that the weekend hours of work would deprive appellant of time to spend with her children. He stated that this situation would increase the stress on appellant which would affect the level of autonomic, sympathetically maintained pain and thereby increase the chronic back pain. In an October 4, 1994 decision, issued without a hearing, the Office hearing representative found that the Office, in its April 5, 1994 decision, had found appellant's reasons for rejecting the position to be unreasonable but had proceeded to terminate her compensation without affording her an opportunity to accept the job which conflicted with policy of the Office. He therefore reversed the Office's April 5, 1994 decision.

In a November 18, 1994 letter, the Office informed appellant that the position of modified clerk was still available. It noted that Dr. Savage had indicated that the proposed work

schedule would necessarily result in very significant increase in life stress and increased muscle tension. The Office commented that, although it sympathized with appellant's concerns regarding child care and after school care, it found that they had no relation to her employment-related condition. The Office gave appellant 15 days to accept the job and stated that failure to accept the position would result in the denial of her claim and no further reason for refusal would be considered. In a December 2, 1994 letter, received by the Office on December 5, 1994, appellant stated that she was "forced to accept this offer under duress."

In a December 6, 1994 decision, the Office terminated appellant's compensation finding that she refused suitable employment," finding that appellant had not responded to the November 18, 1994 job offer.

In a December 27, 1994 letter, appellant requested a hearing before an Office hearing representative. She stated that she had been removed from a rehabilitation position and forced into another position against her physician's recommendations. She indicated that another junior employee had been given her previous position.

In a January 27, 1995 report, Dr. Savage stated that appellant had low thoracic pain and right upper quadrant pain which increased in intensity with activity. He related that appellant indicated that the pain increased over the course of the day whether she was at home or at work. Dr. Savage reported that appellant's symptoms were more greatly provoked by her inability to pace at work and recent work which required repetitive use of the right arm. He noted that appellant was only able to work 11:00 a.m. to 2:30 p.m. due to the increase of pain and was not able to work on the weekend. He indicated that on examination appellant appeared in no acute distress with some focal tender points and pain on palpation along the lower and mid-thoracic spine. He diagnosed low thoracic strain related to repetitive rotation in the past and right upper quadrant myofascial syndrome.

At the May 24, 1995 hearing appellant described her former job duties and the job duties that were assigned to her. She noted that part of the new position involved repetitive tasks which caused her pain within 20 minutes of beginning work.

In an August 25, 1995 decision, the Office hearing representative found that the restrictions of the position offered to appellant were within appellant's restrictions as set forth by Dr. Savage. He stated that appellant had not provided any support for her allegation that the employing establishment violated those restrictions. The hearing representative noted Dr. Savage's findings concerning the scheduled hours of the position. He concluded that the stressors cited by appellant and Dr. Savage did not arise from appellant's work injury but from an aspect of her personal life and therefore could not be considered as a justifiable reason for refusal of the position. He therefore affirmed the Office's December 6, 1994 decision.

The Board finds that the Office improperly terminated appellants' compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[2] An employee who refuses or

[2] 5 U.S.C. § 8106(c)(2).

neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

The Office, in its December 6, 1994 decision, terminated appellant's compensation on the grounds that as appellant had not responded to the November 18, 1994 offer, she had refused suitable work. However, in a December 2, 1994 letter, received by the Office on December 5, 1994, appellant indicated that she would accept the position under duress. As appellant had stated that she would accept the position, the Office improperly terminated her compensation at that point on the grounds that she had refused the position. Under this circumstance the Office would have to wait until appellant did not appear to work at the offered position on the date set by the employing establishment or abandoned the position shortly after taking it before it could terminate her compensation for refusal to accept the position. The evidence submitted prior to the hearing and at the hearing showed that appellant was continuing to work at the position although at reduced hours. The Office therefore erred in terminating appellant's compensation for refusal to accept suitable employment.

Appellant and Dr. Savage stated that appellant would be unable to work at the second offered position at the hours set by the employing establishment because the hours would increase appellant's stress in making child care arrangements which in turn would cause an increase in appellant's back pain. This chain of causation from appellant's work hours to her personal life to the effect on her employment-related condition is highly speculative. The evidence is insufficient to show that the effect on appellant's personal life would increase her employment-related symptoms and therefore make the job unsuitable for her. The reports by Dr. Savage on this point of appellant's argument have little probative value and therefore do not present a justifiable reason for the refusal to accept the position.

The decision of the Office of Workers' Compensation Programs, dated August 25, 1995, is hereby reversed

Dated, Washington, D.C.
December 28, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] 20 C.F.R. § 10.124.