U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of DANETTA G. WRIGHT and DEPARTMENT OF DEFENSE, DEFENSE CONSTRUCTION SUPPLY CENTER, Columbus, Ohio

*Docket No. 96-927; Submitted on the Record;*
*Issued July 21, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish total disability on and after May 22, 1995 due to her May 2, 1990 employment injury; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation effective

On May 24, 1990 appellant, then a 35-year-old warehouse worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on May 2, 1990 she experienced sharp burning pain throughout her lower back due to her prolonged standing and lifting. On July 17, 1990 the Office accepted appellant's claim for lumbar strain/sprain.

On December 20, 1990 appellant filed a claim for recurrence of disability causally related to her May 2, 1990 employment injury. The Office accepted appellant's claim for a recurrence of disability on October 21, 1991.

On July 7, 1992 appellant filed a claim for recurrence of disability for November 12, 1991 and May 29, 1992 due to her accepted employment injury.

In a letter dated September 29, 1992, the Office accepted appellant's claim for a recurrence of disability on November 12, 1991 and May 29, 1992 due to her accepted employment injury of lumbar strain and sprain.

On September 23, 1994 appellant filed a claim for recurrence of disability commencing August 31, 1994 due to her accepted employment injury. The Office accepted appellant's claim for a recurrence of disability on January 13, 1995.

On March 3, 1995 appellant filed a claim for recurrence of disability alleging that on January 20, 1995 she had a recurrence of disability related to her May 2, 1990 accepted injury.

The Office accepted the claim on March 31, 1995. Appellant returned to work four hours per day effective May 1, 1995.

In a letter dated May 22, 1995, the Office accepted the condition of herniated nucleus pulposus L5-S1 to the accepted conditions.

In a report dated June 8, 1995, Dr. John E. Adams, an attending physician, opined that appellant's latest recurrence of May 10, 1995 was directly related to her May 1990 employment injury. Dr. Adams further noted that appellant worked from May 12 to May 19, 1995 and had not returned to work. Dr. Adams noted that appellant could not take her medication and work as she could not get out of bed with her medication. Dr. Adams opined:

> "[Appellant] cannot and will not be able to ever return to any job. Even with her four-hour light-duty job, I do not anticipate any significant improvement to allow her to return to work.
>
> "Sudden and or subtle incapacitation is very much a possibility. She has a herniated nucleus pulposis and degenerative joint disease. Due to her obesity, surgery is very unlikely in the near future."

On June 15, 1995 appellant filed a claim for recurrence of disability on May 22, 1995 related to her accepted May 2, 1990 employment injury. In a letter dated June 20, 1995, the Office requested additional information.

In a letter dated June 20, 1995, the Office referred appellant along with her medical record and statement of accepted facts to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for a second opinion.

In a report dated June 29, 1995, Dr. Adams noted:

> "[Appellant] returned to work for four hours a day at the request of the OWCP nurse. I feel that she should never have done this, but [appellant] was willing to try it. When she returned to work, she had sharp shooting pain on the left back and leg. This continued and progressed into numbness and loss of sensation in her toes and feet bilaterally. She continues with loss of sensation, feet and toe numbness and bilateral leg tingling and numbness all of which started after her return to work four hours a day."

In a report dated July 10, 1995, Dr. Rutherford opined that, based upon a review of the medical evidence, a statement of accepted facts and physical examination, appellant continued to have some low back pain and some right radiculopathy due to the accepted employment injury. Dr. Rutherford opined that appellant was capable of working eight hours within the set physical restrictions. Dr. Rutherford noted:

> "At the present time she can only [do] sedentary activities. She is capable of lifting but not carrying 10 pounds. She can do no stooping, bending or lifting below knee level. She can do no climbing. Concerning the claim under

consideration she has full use of her upper extremities. She would have some difficulty doing repetitive overhead work due to another industrial claim, apparently concerning her shoulders and neck. It is my medical opinion that [appellant] can walk for 5 minutes. She can stand for 15 minutes. She can sit for 50 minutes at a time. It is my medical opinion that she can drive for her own transportation and be away [from] home 8 hours per day doing sedentary activities with additional restrictions that I have described. She should not do any overtime."

In a decision dated July 20, 1995, the Office rejected appellant's claim for a recurrence of disability on May 22, 1995 causally related to the accepted employment injury of May 2, 1990. The Office found that the medical evidence submitted was insufficient to establish a causal relationship between appellant's claimed recurrence of disability on May 22, 1995 to the accepted injury of May 2,1990.

By letter dated August 21, 1995, the Office noted that appellant had not returned to her limited-duty position even though she had been notified that she was released to an eight-hour limited-duty day by Dr. Rutherford. The Office advised appellant that 5 U.S.C. § 8106 provided that any employee who refused or neglected to work after being offered suitable work was not entitled to compensation benefits. Appellant was advised that she had 15 days in which to accept the position.

In an undated letter, the employing establishment offered appellant the position of Automation Clerk and noted that the position requirements were within the restrictions set forth by Dr. Rutherford. The employing establishment noted that appellant was to report to duty on October 2, 1995.

In a letter dated August 29, 1995, appellant requested reconsideration of the July 20, 1995 decision denying her claim for recurrence of disability on May 22, 1995 and submitted evidence in support of her request. Appellant submitted an August 24, 1995 report from Dr. Adams and an electromyogram (EMG) report by Dr. Timothy J. Fallon, a Board-certified physiatrist.

In the August 24, 1995 report, Dr. Adams agreed with the findings and diagnosis made by Dr. Rutherford, but disagreed with his opinion that appellant was capable of performing sedentary work. Dr. Adams opined that appellant "cannot sit, stand or walk enough to do sedentary work." Dr. Adams noted the following:

"The August, 1995 EMG shows radiculopathy and suggests central disc herniation which was verified by the MRI. The pressure on the nerve is causing shooting pains to travel into the hips and tailbone, radiating into the thighs and down into her feet. This in turn causes her feet to burn and tingle with loss of sensation in her toes. The nerve damage is a direct result of the herniated nucleus pulposis which took place on the May 2, 1990 injury. Attempting to walk, stand or even bear weight puts pressure on the sciatic nerve. Most of the time this pressure causes acute pain, severe restriction of motion, numbness, tingling and burning of the legs and feet."

By letter dated September 21, 1995, the Office noted that appellant had been offered a position as an Office Automation Clerk with the Defense Logistics Agency which was found by the Office to be suitable to appellant's work capabilities and within her work limitations. The Office advised appellant that 5 U.S.C. § 8106 provided that any employee who refused or neglected to work after being offered suitable work was not entitled to compensation benefits. Appellant was advised that she had 30 days in which to accept the position or provide an explanation of his reasons for refusing it.

By decision dated October 17, 1995, the Office denied modification of the July 20, 1995 decision. The Office credited the opinion of Dr. Rutherford over the opinion of Dr. Adams as representing the weight of the medical evidence.

In a report dated September 22, 1995, Dr. Lawrence W. Serif, a Board-certified orthopedic surgeon, diagnosed low back pain, chronic in nature and radiculopathy, L5-S1, central. On physical examination Dr. Serif noted that appellant was "unable to heel and toe walk due to pain in her back" and that "straight-leg raising is positive for back pain bilaterally." Dr. Serif noted that a review of x-ray indicated a bilateral radiculopathy of the L5-S1 level." In conclusion, Dr. Serif opined that appellant could not do any carrying, lifting, climbing, stooping, crawling, kneeling or bending. Dr. Serif opined that appellant "could perform only sit down type of work at desk height with no heavy pushing or pulling activity at this height. Beyond this type of work, I do not feel she can perform her activities without having significant pain in her back."

By letter dated October 25, 1995, the employing establishment offered appellant a position as an Office Automation Clerk with the Product Receipt and Evaluation Division, Inspection Branch, Defense Depot. The employing establishment noted that the position complied with the restriction specified by Dr. Rutherford. The employing establishment informed appellant that if she accepted the offer, it must be returned by November 3, 1995.

On November 3, 1995 appellant declined the offered position.

In a decision dated January 11, 1996, the Office found that appellant had refused suitable employment and thus was not entitled to compensation pursuant to section 8106(c)(2) of the Act. The Office found that reports of Drs. Adams and Serif were insufficient to outweigh the report of Dr. Rutherford. The Office then found that appellant had abandoned/refused suitable employment and terminated her compensation benefits. The Office noted that further medical treatment was authorized, but that compensation pertaining to lost wages was terminated.

The Board finds that due to the conflict in the medical opinion evidence.

In the instant case, a conflict in the medical opinion exists between appellant's attending physicians, Drs. Adams and Serif, and the Office referral physician, Dr. Rutherford, a Board-certified orthopedic surgeon, on whether appellant was able to return to work in the limited-duty position assigned to appellant.[1] The opinions of Drs. Adams and Serif support a finding of total

[1] 5 U.S.C. § 8123(a) provides in part the following: "If there is disagreement between the physician making the examination for the United States and the physician for the employee, the Secretary shall appoint a third physician who shall make an examination."

disability due to the accepted condition of lumbar strain and sprain and herniated nucleus pulposus L5-S1, while Dr. Rutherford recommended appellant was capable of returning to work for eight hours per day with the restrictions he noted. Accordingly, there is a conflict in the medical opinion evidence as to whether appellant has any continuing disability due to her accepted employment injury.

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[2] The Board finds that as there is a conflict in the medical evidence between appellant's attending physicians, Drs. Adams and Serif, and the second opinion physician, Dr. Rutherford, to whom the Office referred appellant, the Office should refer appellant, together with a statement of accepted facts, to an impartial medical examiner.

The Board finds that because of the conflict in the medical opinion evidence with respect to the relationship of appellant's current condition to her accepted employment injury, the Office improperly terminated appellant's wage-loss compensation benefits effective January 11, 1996.

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 Act for refusing to accept suitable work or neglecting to perform suitable work.[3] Section 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] However, to justify such termination, the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[6]

In the instant case, a conflict in the medical opinion exists between appellant's attending physicians, Drs. Adams and Serif, and the Office referral physician, Dr. Rutherford, a Board-certified orthopedic surgeon, on whether the job offered to appellant was medically suitable. Dr. Adams opined that appellant "cannot sit, stand or walk enough to do sedentary work" and Dr. Serif opined that appellant could not do any carrying, lifting, climbing, stooping, crawling, kneeling, or bending which support she was unable to perform the job offered to her. Dr. Rutherford opined that appellant was capable of returning to work for eight hours per day within the physical restrictions he set forth. Accordingly, there is a conflict in the medical opinion evidence as to whether the position offered to appellant was medically suitable.

[2] 5 U.S.C. § 8123(a).

[3] *Henry P. Gilmore*, 46 ECAB 709 (1993); *Shirley Livingston*, 42 ECAB 885 (1991).

[4] 5 U.S.C. § 8106(c)(2).

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

[6] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

The decision of the Office of Workers' Compensation Programs dated January 11, 1996, is hereby reversed, the decisions of October 17, 1995 and July 20, 1995 are hereby set aside and the case remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 21, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member