U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH HANCOCK and U.S. POSTAL SERVICE,
POST OFFICE, Bangor, Maine

Docket No. 96-1919; Submitted on the Record;
Issued July 27, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment.

The Board has duly reviewed the case on appeal and finds that the Office met its burden to terminate appellant's compensation benefits.

On September 25, 1989 appellant, then a 50-year-old clerk, sustained an employment-related torn meniscus of the left knee that required multiple surgeries. She stopped work on March 21, 1991 and received appropriate compensation. Following further development by the Office, appellant's treating Board-certified orthopedic surgeon, Dr. H. Gary Parker, provided a report dated February 26, 1993 in which he advised that appellant could work four hours per day with restrictions.[1] On May 20, 1993 the employing establishment offered appellant a limited-duty distribution clerk position, based on Dr. Parker's restrictions, which she rejected on May 21, 1993.[2] On July 7, 1993 appellant elected civil service retirement benefits. By decision dated July 14, 1993, the Office terminated appellant's wage-loss compensation on that day on the grounds that she declined an offer of suitable work. Appellant, through counsel, on August 10, 1993, requested a review of the case on the written record, and submitted additional medical evidence. In a February 14, 1994 decision, an Office hearing representative affirmed the prior decision. On January 31, 1995 appellant filed a recurrence claim, contending that she continued to have problems with her knee. Appellant, through counsel, requested

[1] Dr. Parker stated that appellant was capable of performing a four-hour per day sedentary or light-duty position which required no lifting, continuous walking or standing.

[2] The position description indicated that the job was for four hours per day as a modified distribution clerk. It was described as sedentary, using a rest bar or chair, requiring repetitive motion of both hands.

reconsideration of the February 14, 1994 decision,[3] and by decision dated July 12, 1995, the Office denied modification. Appellant's counsel again requested reconsideration, and by decision dated March 21, 1996, the Office again declined to modify the prior decision. The instant appeal follows.

Section 8106(c)(2) of the Federal Employees' Compensation Act[4] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[5] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[6]

In the present case, the record reflects that on May 20, 1993 the employing establishment offered appellant reemployment in a modified-duty position, four hours per day. There is nothing in the medical restrictions provided by Dr. Parker in his February 26, 1993 report, or any other medical opinion at that time, that would preclude appellant from performing the offered position. Accordingly, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[7]

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position,[8] and the record in this case indicates that the Office properly followed the procedural requirements. Following the May 21, 1993 rejection of the job offer, by letter dated May 28, 1993, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable, and allotted her 30 days to either accept or provide reasons for refusing the position. By letter dated May 30, 1993, appellant stated that she could not return to work because she continued to have disabling pain. By letter dated June 29, 1993, the Office advised appellant that the reason given for not accepting the job offer was unacceptable. She was given an additional 15 days in which to respond but submitted nothing further. There is no evidence of a procedural defect in this case as the Office, provided appellant with proper notice. The record, therefore, establishes that

[3] Appellant also requested authorization for additional knee surgery which Dr. Parker performed on June 16, 1994. The Office determined that a conflict in the medical evidence existed between Dr. Parker and the Office medical adviser regarding the necessity for further surgery, and referred appellant, along with a statement of accepted facts, the medical record and a set of questions, to Dr. James F. Lawsing, a Board-certified orthopedic surgeon, for an impartial evaluation. Based on Dr. Lawsing's report, the Office authorized the June 16, 1994 surgery.

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8106(c)(2).

[6] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[7] *See John E. Lemker*, 45 ECAB 258 (1993).

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

appellant was offered a suitable position by the employing establishment and such offer was refused. Under 5 U.S.C. § 8106(c) her compensation was properly terminated on July 14, 1993.

Given that the Office has shown that the limited-duty position offered to appellant was suitable based on her work restrictions at that time, the burden then shifted to appellant to show that her refusal to work in that position was justified.[9] Subsequent to the termination, appellant submitted additional medical reports from Dr. Parker who, in a report dated July 27, 1993, advised that appellant could work only two hours per day. He continued to submit reports,[10] and in a report dated October 6, 1995 advised that, in retrospect, appellant had not been capable of performing limited duty in February 1993, stating:

> "At the time, in February 1993, I thought she was capable of limited activity, but subsequently it was proven that even short walks caused a lot of pain.... In my opinion, the job offered in February 1993 would not have been possible."

In advising that, in retrospect, he believed that appellant was not capable of performing the limited-duty position, Dr. Parker advised that short walks caused pain. The limited-duty job offer, however, was for a sedentary position, four hours per day, using a rest bar or chair. As appellant presented no rationalized evidence supporting her refusal of the modified position, she failed to demonstrate that the termination of compensation on July 14, 1993 for refusal of suitable work was not justified.[11]

[9] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

[10] Appellant also submitted additional medical evidence that is not probative regarding the issue of the termination of her compensation benefits in July 1993.

[11] Regarding appellant's recurrence claim, the Board notes that section 8106(c) serves as a bar to receipt of further compensation under section 8107 of the Act for a disability arising from the accepted employment injury. 5 U.S.C. §§ 8106-8107; *see Merlind K. Cannon*, 46 ECAB 581 (1995).

The decisions of the Office of Workers' Compensation Programs dated March 21, 1996 and July 12, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 27, 1998

Michael J. Walsh
Member

David S. Gerson
Member

Willie T.C. Thomas, Alternate Member, dissenting:

I must respectfully dissent from the decision of the majority that appellant herein, Deborah Hancock, refused an offer of suitable employment based on the opinion of Dr. H. Gary Parker.

In a report dated February 26, 1993, Dr. Parker stated:

"This note is written in response to a letter from the U.S. Department of Labor.

"The first question to be addressed is whether or not the left knee injury sustained on September 25, 1989 is still causing any disabling residuals. She is in fact still experiencing the residuals and has undergone a total knee replacement arthroplasty. The disability is partial and permanent.

"The second question asks about activity level. She is capable of performing sedentary or light-duty work which requires no lifting, continuous walking or standing. I think she could work four hours a day."

Based on the foregoing medical report, appellant was offered a limited-duty distribution clerk position on May 21, 1993. Appellant declined the limited-duty position, stating:

"As per our conversation on May 21, 1993, I am declining this offer as I am going to have more surgery on the knee and also as suggested by attending physician to start paper work for disability retirement."

On May 30, 1993 appellant again wrote the Office and stated, in pertinent part, the following:

> "I continue to have disabling pain and last [doctor's] visit suggested the possibility of further surgery."

On July 7, 1993 appellant again wrote the Office the following:

> "On July 21, 1993 I will be seeing the attending physician and surgery date will be made for the upcoming knee surgery I told you about."

On July 14, 1993, by decision, the Office terminated appellant's benefits under section 8106(c) of the Act for refusing suitable work.

On July 27, 1993 Dr. Parker submitted a medical report advising the Office that appellant could only work two hours per day.

On June 17, 1994 Dr. Parker again performed surgery on appellant's left knee in the form of a curettage of cystic lesion and bone grafting and replacement of tibial insert. Appellant requested payment of medical benefits and approval of the surgery.

The Office referred the record to its medical adviser, Dr. Robert Y. Pick, an orthopedic surgeon, as to whether the surgery was warranted.

Dr. Pick strongly questioned any additional surgical procedures. In a memorandum dated June 24, 1994, Dr. Pick stated in pertinent part:

> "In reviewing what I assume to be Dr. Parker's evaluation of claimant's left lower extremity, that Dr. Parker provided the following findings: 'Ortho: she has a slight limp favoring the left knee. There is a well-healed proximal lateral tibial plateau region scar. There is no heat, redness, or swelling. There is full extension and flexion to beyond 120. She is mildly tender along the proximal lateral jointline and tibial plateau. Stability is good. Radiographs show the components which consist of press-fit femoral component and cemented metal-backed tibial component and an all-poly patella cemented and seen well positioned and seated. There is no sign of polyethylene wear. There is a large lucent area under the proximal lateral tibial component. Knee aspiration: No growth, fluid clear. Sed rate 30. Bone scan negative.'
>
> "In this description of clinical findings and other diagnostic testing performed, the only substantive finding is the radiographic description of a 'large lucent area under the proximal lateral tibial component.'
>
> "With all due respect to Dr. Parker, … he fails to compare this radiographic finding with previous radiographic findings of the left knee to compare and see the extent and magnitude of any change in this lucency, if any.

"I will again emphasize that there is neither clinical description of significant findings and certainly no objective diagnostic testing – other than finding on x-ray to substantiate the presence of prosthetic component loosening and/or infection.

"Let me again emphasize rather clearly for the record that I find it very disturbing that in a time frame of less than two years [April 9, 1990 through December 10, 1991] Dr. Parker has already performed four operative procedures on claimant's left knee – Dr. Parker's initial arthroscopy on April 9, 1990 – and the occupational incident of September 25, 1989 as well, since each operative procedure has built on the previous surgery.

"I will again emphasize, however, that each operation was perhaps done too quickly without giving the more conservative, noninvasive approach a chance – with the records clearly indicating that the treatment in this case, specifically Dr. Parker's operative procedures – primarily addressed claimant's subjective complaints.

"At the very least, prior to authorizing any additional invasive procedure in this case, that claimant should have an impartial referee evaluation of both her knees and should undergo a structured physical therapy program to maximally rehabilitate her extremities."

The Office declared a conflict in the medical evidence between the opinion of Dr. Parker and Dr. Pick, and referred the entire medical record, appellant, a statement of accepted facts and specific questions to be answered to Dr. James F. Lawsing, III, for an impartial evaluation pursuant to section 8123(a) of the Federal Employees' Compensation Act.

Following his examination, Dr. Lawsing reported on January 12, 1995 the following:

"IMPRESSION:

1. Status post left total knee replacement post pro-osteon bone graft lateral tibial plateau with residual pain syndrome, rule out sympathetic dystrophy.

2. History osteoporosis low back pain, rule out L5 radiculopathy left.

3. Status post multiple surgeries left knee, initial arthroscopy, partial menisectomy, patella debridement and lateral release, subsequent arthroscopy and debridement, subsequent closing wedge valgus lateral tibia and osteotomy with infected staple and removal.

4. Crest syndrome with esophageal dysmotility, skin calcinosis.

5. Primary biliary cirrhosis.

"QUESTIONS TO REFEREE SPECIALIST:

1. Based on the exam[ination] and review of the entire medical history the surgery of June 17, 1994 was medically necessary to oblate the cyst as a possible cause of pain.

2. The June 17, 1994 surgery was related to her work injury of September 25, 1989 because of the subsequent cascade of events ongoing in her knee subsequent to the meniscectomy, increased progression of the existing arthritic changes necessitating subsequent surgeries in a step wise and conservative fashion.

3. I do not feel she should require any surgery in her left knee in the immediate future, however, joint prostheses are mechanical devices and subject to wear, loosening and revision.

"DISCUSSION: The patient is presently in the pain clinic which is appropriate and should undergo evaluation of her back to clarify any contribution of an L5 radiculopathy to her pain syndrome.

"WORK CAPACITY EVALUATION FORM:

1. Patient is limited in kneeling, prolonged standing greater than two hours, repetitive bending of the left knee, twisting. She is not limited in reaching. Could lift up to 10 pounds.

2. I think she could lift 10 pounds, 10 times an hour, 3 hours a day.

3. Sitting she could work four hours a day alternate sitting and standing with regards to her knee.

4. There are no limitations to the fine motor movements of the upper extremities.

5. She could perform repetitive motions of the wrist and elbow.

6. Limitations with regard to her employment injury are all related to her left knee. I do not feel any of the limitations described above are due to any preexisting or nonwork-related conditions.

7. Restrictions apply indefinitely.
8. Other medical factors to be ruled out should be her low back syndrome and possible L5 radiculopathy.

9. Maximum medical improvement from work injury should be reached and evaluated one year following her most recent surgery of June 17, 1994."

Dr. Parker submitted an additional medical note on October 6, 1995. He stated:

> "This note is written in response to a letter from Mr. Watson. At his request, I reviewed all of [appellant's] records, including the opinion rendered by the independent government examiner as well as the report submitted by Dr. Lawsing. The question raised whether or not in my opinion [appellant] was capable of performing a limited activity job at the post office in February 1993. In retrospect, I [would] say she was not. At the time, in February 1993, I thought she was capable of limited activity, but subsequently it was proven that even short walks caused a lot of pain. In fact, she underwent further surgery on June 17, 1994 for a large cyst in the proximal lateral tibia of the involved leg. In my opinion, the job offered in February 1993 would not have been possible."

The ultimate issue before this Board is whether appellant was capable of performing a four-hour per day sedentary or light-duty position offered to her by the employing establishment on May 20, 1993.

From a perusal of the total evidence of record, the only medical opinion addressing that question was the opinion of Dr. Parker, appellant's treating physician. Although Dr. Parker stated that appellant could perform the offered position for four hours a day on February 26, 1993, he subsequently disavowed his February 26, 1993 report after reviewing the report of the impartial specialist, Dr. Lawsing. Thus, the record as it currently stands does not contain a single opinion that supports appellant could have performed the four-hour limited-duty position in 1993. For the foregoing reasons, I am persuaded that section 8106(c) of the Act was improperly invoked and the subsequently received evidence should have resulted in a reversal of that initial decision at every level of appeal, including this appeal to the Board. Because I believe appellant herein has been the victim of blind adherence to early medical reports even after such reports have been disavowed, I feel compelled to record this dissent. I would reverse the decisions of the Office dated March 21, 1996 and July 12, 1995.

Willlie T.C. Thomas
Alternate Member