U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA CALDWELL and U.S. POSTAL SERVICE,
POST OFFICE, Jefferson, Wis.

Docket No. 96-221; Submitted on the Record;
Issued May 4, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's employment-related disability ceased by August 22, 1993, the date it terminated appellant's compensation benefits based upon a refusal of suitable work.

In May 1989 appellant, a 39-year-old mail clerk, began suffering swelling in the joints all over her body, and she commenced being treated by Dr. Arthur S. Marquis, a Board-certified family practitioner. Dr. Marquis diagnosed fibromyalgia syndrome on May 24, 1989 after appellant began complaining of stiffness in her neck.

On June 19, 1990 appellant allegedly sustained an injury to her right elbow while dumping and unloading mail sacks, and an injury to her neck and shoulder while carrying mail sacks. Appellant filed a Form CA-1 claim for benefits based on the employment incident of June 19, 1990, which the Office accepted by letter dated August 1, 1990.[1]

After examining appellant on August 1, 1990, Dr. Marquis concluded in a medical report dated August 2, 1990 that, appellant had an employment-related overuse injury; *i.e.*, that the heavy demands of her job *in addition to* the emotional stress associated with working in that position had caused a vicious cycle of muscle aches, sleep disturbance, tension and subsequently more muscle aches. Dr. Marquis opined that thus far medications had been unsuccessful and that the condition would probably persist for several years, with a very significant chance of recurrence if she returned to the same job.[2] (Emphasis added.) Dr. Marquis placed appellant on total disability as of June 19, 1990 based on both the acute strain to her right arm and for the fibromyalgia syndrome, which he expected to totally disable her for two to six months. With

[1] The record contains a brief separate case file, containing five pages, which pertains only to the June 19, 1990 traumatic injury claim.

[2] *Id.*

regard to a return to gainful employment, Dr. Marquis stated that if she had to sit in one position for any protracted periods of time, particularly if she were under pressure, her symptoms would return within a short period of time.

On August 9, 1990 appellant filed a Form CA-2 claim for benefits based on occupational disease, contending that the repetitive sorting and lifting of mail required by her regular duties resulted in fibromyalgia syndrome in her neck, shoulders, and back. In a letter dated September 5, 1990, the Office accepted appellant's claim for fibromyalgia.

Dr. Marquis referred appellant to Dr. Brad K. Grunert, a psychologist, who examined appellant on April 19, 1991 and in a report dated April 19, 1991 stated:

> "This woman is obviously experiencing a significant depressive disorder at the present time. I believe that this renders her incapable of gainful employment at the present. My clinical diagnosis would be one of adjustment reaction with anxiety and depression. I feel that she would require 3 [to] 6 months of psychotherapy in order to assist her in getting to the point where she is emotionally stable and able to return to work. I believe that it would be most helpful in this case to look at vocational alternatives as she appears to have a very profound reaction to the workplace in which she is presently employed. This would significantly decrease the emotional stress that would accompany reintegration into the work force as well as reducing the persistent emotional effects that she has experienced. I believe that if an alternative employment setting is obtained for this individual that permanent partial disability in a psychological sense can be reduce to [zero] [percent]. If this is not accomplished there is a reasonable chance that she could have some permanent residuals in a psychological sense as a result of exposure to her work setting."

Pursuant to an interoffice review of appellant's disability status dated May 8, 1991, the Office, in a letter dated May 21, 1991, referred appellant for a second opinion examination with Dr. Thomas J. Hirsch, Board-certified in internal medicine and a specialist in rheumatology, for June 17, 1991.

In a report dated June 20, 1991, Dr. Hirsch agreed that appellant was suffering from primary fibromyalgia syndrome, although he indicated there were no specific objective findings. Dr. Hirsch also indicated that some of her records suggested that she had adjustment reaction with anxiety and depression, although he stated he was not qualified to make such a diagnosis himself. Dr. Hirsch opined that appellant's fibromyalgic syndrome clearly preceded the alleged injury of July 19, 1990, and that there was no evidence from her statements or physical examination that this event significantly exacerbated or accelerated her illness. Although Dr. Hirsch agreed that appellant was suffering pain, he believed her condition had clearly not been improved by being off work, and that she was neither totally nor partially disabled. Dr. Hirsch concluded that appellant "certainly" could do clerical types of work but probably should have a lifting restriction of no greater than 50 pounds.[3]

[3] Dr. Hirsch completed a work restriction form dated July 15, 1991 in which he indicated that appellant could

On September 3, 1991 Dr. Marquis completed a work restriction form in which he indicated that appellant could work four hours per day within certain restrictions. Dr. Marquis stated that appellant could do the following intermittently: sit for four hours per day, walk and climb for one hour per day, squat less than an hour, and stand for half an hour per day. Dr. Marquis restricted appellant from kneeling or twisting and placed her on a lifting restriction of 20 pounds.

In a letter dated September 30, 1991, the employing establishment offered appellant a limited-duty position as a window relief clerk which, it asserted, was within the restrictions outlined by Dr. Marquis. The position required appellant to stand and/or sit at a public window selling stamps and other postage, and to accept from customers various types of mail including parcel post and registered mail. The letter stated that other duties might be assigned within her limitations.

In a report dated October 7, 1991, Dr. Marquis stated that he had examined appellant on October 4, 1991, at which time appellant showed him the job description submitted by the employing establishment on September 30, 1991. Dr. Marquis stated that appellant told him this was an inaccurate description of the job actually available; moreover, Dr. Marquis, after reviewing the job offer, commented that "whoever wrote that job description simply took the restrictions that I had placed and plugged those into the job description," and that based on his limited exposure to postal clerks, he agreed that the job could not be done within those restrictions either.

Dr. Marquis commented:

> "The emotional stress of working in an environment of that type is beyond what she is going to be able to tolerate. Stress is a major part of her current disability. The main source of stress right now, is her pain and fatigue. She sees this as resulting from her employment and in this she is probably correct. Further stress, however, causes more pain and more fatigue. The prospect of returning to the [employing establishment] is, in fact, making her worse."

Dr. Marquis further stated:

> "We have little hard information about fibromyalgia syndrome or chronic fatigue syndrome. This patient clearly has both. She clearly has an emotional component to both conditions. Both conditions clearly stem from her employment. The threat or prospect of returning to work at the [employing establishment] ... exacerbates her symptoms and will prolong her recovery. She will never get well if getting well means going back to work at the [employing establishment]."

On November 25, 1991 the case record was reviewed by an Office medical adviser. The Office medical adviser stated that the job requirements of the position of relief window clerk, as

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work eight hours per day and had reached maximum medical improvement.

indicated in the position description, were well within appellant's work tolerance limitations as outlined by Dr. Marquis in his September 3, 1991 work restriction form, and that in his opinion the job was medically suitable.

By letter dated November 20, 1991, an Office claims examiner informed Dr. Marquis that it was enclosing a copy of the limited-duty job offered by the employing establishment and requested that he provide the Office with his opinion as to whether the position, as described, was within the physical limitations appellant had as a result of her fibromyalgia. The claims examiner also advised Dr. Marquis that chronic fatigue syndrome and the stress of returning to work had not been accepted by the Office as employment related, and that appellant was obligated by law to seek some form of suitable work.

In a November 26, 1991 letter to the claims examiner, Dr. Marquis stated that he had reviewed his November 20, 1991 letter and the September 30, 1991 job description. Dr. Marquis reiterated his opinion that appellant was unable to perform the listed position, and stated that as of October 21, 1991, the date of his most recent examination of appellant, appellant was still experiencing considerable difficulty. Dr. Marquis stated that, in particular, appellant would have problems lifting and carrying 10 to 20 pound packages 10 times a day. Dr. Marquis also reiterated that there was an anxiety and stress-related component to her current disability caused by her employment environment at the employing establishment.

By letter dated February 4, 1992, the employing establishment again requested that Dr. Marquis review the limited-duty job description and opine whether or not appellant could physically perform the job, and, if not, to recommend any modifications to bring the job within her physical capabilities.

In a February 26, 1992 letter, responding to the employing establishment's February 4, 1992 inquiry, Dr. Marquis stated, "I reviewed the proposed position for appellant. I think I've discussed this problem with you in the past, that is that her pains are a combination of physical stress and psychological stress. If we could separate these two things she could function, that is if there were no psychological stress in her job, the physical demands of the position you described are within her capabilities. Inversely, if there were no physical demands of the job, she could psychologically manage. Given, however, that she must deal with both the stress related to working in what she considers a hostile environment, and the physical stresses of the job, even though they are minimal, it is my opinion that she can [not] do this job."

The Office offered the same position to appellant on July 25, 1992 and February 25, 1993; however, she and Dr. Marquis refused the offer on both occasions, indicating that she was both physically and emotionally unable to perform the duties as outlined.

In a letter dated May 18, 1993, appellant was advised that the position of window relief clerk offered by the employing establishment was found to be suitable and in accordance with the physical limitations imposed by the employment injury. Appellant was advised that 5 U.S.C. § 8106(c) provided that a partially disabled employee who (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to her is not entitled to compensation. Appellant was advised that she would have 30 days to either advise the Office or

the employing establishment in writing that she had accepted the job offer and report for duty, or she should submit any evidence or reasons for refusing to accept the position.

In support of her claim, appellant submitted a May 26, 1993 medical report from Dr. Marquis. Dr. Marquis noted that appellant's condition had not changed since he last saw her in March 1993, and that he had advised her to refuse the window relief clerk job offer. Dr. Marquis advised:

> "[I]t would exacerbate her condition, and ... she would be virtually totally disabled within one to two weeks after returning to this position. It is my carefully considered opinion that she will never be able to return to work in this particular post office, or probably any post office. In fact, I am skeptical about her ever returning to gainful employment. The only conceivable position I can think of her doing at this time is some kind of piecework that she could do at her own home, and at her own pace. She could possibly work an hour or two a day at something very light. I see no immediate prospects for improvement, and feel that this should be considered a permanent disability. I also consider this to be work related."

In a letter dated July 19, 1993, the Office informed appellant again that the position of window relief clerk offered by the employing establishment had been found suitable and within her work restrictions. The Office advised her that her treating physician, Dr. Marquis, had outlined the work restrictions upon which the September 30, 1991 job offer had been based, but that he had since indicated that she could not perform the job for a variety of reasons. The Office stated that these reasons were an insufficient basis on which to reject the window relief clerk position, and that it had received no objective evidence indicating she had sustained a change in her condition rendering her unable to perform the position. Appellant was advised that she had 15 days from the date of the letter to accept the position, which was still available as of the date of the Office's letter. Appellant did not respond to the Office's letter within 15 days.

In a decision dated August 16, 1993, the Office terminated appellant's compensation as of August 22, 1993 on the grounds that she had failed to accept suitable work offered to her and had failed to show sufficient cause for failure to accept the offered position.

Subsequent to its August 16, 1993 decision, the Office received reports dated August 4 and September 3, 1993 from Dr. Marquis which essentially summarized his earlier findings plus an August 9, 1993 report and treatment notes from February 16 through May 21, 1993 from

Dr. Grunert. In his medical report dated August 9, 1993, Dr. Grunert indicated that appellant was suffering from prolonged depressive reaction secondary to the fibromyalgia, and stated:

> "[I]t is my opinion at this time that it will be very difficult for her to return to employment for the [employing establishment]. This would be due to the combination of physical factors involved in her case which are better addressed by Dr. Marquis, as well as the emotional state that she has been in. This clearly has worsened over time rather than shown any significant improvement. I do not believe from a psychological standpoint that there will be any permanency associated with her condition; however, at the present time, I believe it would be difficult for her to be gainfully employed on an ongoing basis with [the employing establishment]."

In a letter dated September 9, 1993, appellant requested a hearing before an Office hearing representative, which was scheduled for May 18, 1994.

In a decision dated September 13, 1994, an Office hearing representative found that the Office properly terminated appellant's benefits on the basis that she refused to work after suitable work was made available to her. The hearing representative noted that appellant had rejected the window relief clerk job which the employing establishment found suitable and within the physical work restrictions outlined by her treating physician, Dr. Marquis. The hearing representative further noted that Dr. Hirsch, the referral physician, had indicated that appellant could return to light-duty work with restrictions on lifting no more than 50 pounds. The hearing representative stated that although Dr. Marquis continued to indicate that appellant was unable to perform the position of window relief clerk after discussing the offer with her, he failed to indicate how appellant's condition had changed since his completion of the work restriction evaluation form dated September 3, 1991 and failed to provide a rationale and objective evidence to support his opinion.

The hearing representative also noted that Dr. Grunert had stated in a report dated August 1, 1991 that appellant had no psychological restrictions that would prevent her from returning to work.

In a letter dated May 3, 1995, appellant requested reconsideration of the Office's September 13, 1994 decision. Appellant submitted medical evidence in support of her request, but the only evidence the Office had not previously considered was a narrative letter dated January 10, 1994, a medical restriction form dated January 8, 1994, and a supplemental physician's form from Dr. Marquis dated March 2, 1994.

Appellant also submitted copes from a medical journal article pertaining to fibromyalgia syndrome and some handwritten notes which apparently referred to her claim and her medical condition.

In a decision dated August 2, 1995, the Office denied reconsideration, finding that the evidence was insufficient to warrant modification of the previous decision. In a memorandum to the Director, the claims examiner stated that the evidence of record indicated appellant was

capable of performing the duties of a window relief clerk, and that she refused to accept the job offer and to report to work for unacceptable and unjustifiable reasons.

The Board finds that the Office improperly terminated appellant's compensation benefits, effective August 22, 1993, on the grounds that she neglected to work in a suitable position.

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.[4] 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."[5] However, to justify such termination, the Office must show that the work offered was suitable.[6] 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.[7]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[8]

In the present case, the Office accepted that appellant sustained an employment-related fibromyalgia condition on September 5, 1990, and the employing establishment formulated a suitable job offer for appellant as a window relief clerk on September 30, 1991. Although the employing establishment based its suitable job on the work restriction form Dr. Marquis completed on September 3, 1991, Dr. Marquis never assented to appellant's suitability for this position, and stated in his October 7, 1991 report that the job was not suitable because of the physical pain and emotional stress associated with fibromyalgia, both of which "clearly" stemmed from her employment. Dr. Marquis further stated in his November 26, 1991 report that, appellant would have problems lifting and carrying 10 to 20 pound packages 10 times a day, and reiterated there was an anxiety and stress-related component to her current disability caused by her employment environment at the employing establishment. In his August 4, 1993 report, submitted prior to the Office's August 16, 1993 termination decision, Dr. Marquis stated:

> "I have reviewed the job offers given to her at various intervals. It appeared to me that the job description was written on the basis of the work restriction evaluation that I did for her. That is, the job was described as being in compliance with work restrictions, but I have no way of knowing if that is an accurate description of the job. The reason that I kept advising her not to accept

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

[5] 5 U.S.C. § 8106(c)(2).

[6] *David P. Camacho,* 40 ECAB 267, 275 (1988).

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

[8] *Robert Dickerson,* 46 ECAB 1002 (1995).

> this job was that I didn't think she could do it. First of all, it is a scheduled job, in which you have a set time that you have to work and frankly, her fatigue level is so great that she has to be able to rest whenever she gets tired. She obviously can't do that when she is scheduled to work a certain shift, even if this shift is only four hours long. Secondly, even the prospect of going back to work in what she perceived as a hostile environment, was so threatening to her that even thinking about it was practically totally incapacitation for her. Thirdly, she has never recovered for the overuse injuries that she had in 1991. The pains shift around, that is, different tender points fluctuate in the intensity of the tenderness and pain, but her condition was not resolved at all. Therefore, I felt that at no point was she physically going to be able to tolerate that job."

Although appellant's case was reviewed by the Office medical adviser in his November 25, 1991 report and by the second opinion referral physician, Dr. Hirsch, in his June 20, 1991 report, neither of these reports can be considered probative or well rationalized. Both of these reports merely stated in summary fashion that appellant was not totally disabled, was able to return to work, and that there was no reason why she could not accept the limited-duty job offered by the employing establishment.

In addition, beginning with his initial medical report of August 2, 1990, which was submitted with appellant's August 9, 1990 occupational disease claim, Dr. Marquis clearly indicated that, in addition to appellant's physical limitations, there was a significant emotional component to her disability, stating that "the emotional stress associated with working in that position had caused a vicious cycle of muscle aches, sleep disturbance, tension and subsequently more muscle aches." Although the Office accepted appellant's claim for the condition of fibromyalgia syndrome, it never addressed this medical evidence indicating that her accepted condition contained an emotional element. The Office did state in its November 20, 1991 letter to Dr. Marquis that chronic fatigue syndrome and the stress of returning to work had not been accepted as employment-related; however, this assertion does not take into account Dr. Marquis' statement in his initial August 2, 1990 opinion, upon which the Office's acceptance was based, indicating there was a significant emotional element to appellant's fibromyalgia, the accepted condition. In fact, this brief notation by the claims examiner constitutes the only response by the Office to the considerable medical evidence of record indicating appellant's accepted fibromyalgia condition had a significant emotional component. Dr. Marquis continued to submit opinions over the next four years indicating that appellant also had an emotional condition causally related to her employment which was an additional impediment to her returning to work, particularly as a window relief clerk at the employing establishment.

In addition to Dr. Marquis' reports, the instant record contains reports from psychologists that appellant's accepted, employment-related fibromyalgia syndrome had an emotional component which was also employment related and which exacerbated her inability to return to employment at the job offered by the employment establishment. Dr. Marquis referred appellant to a psychologist, Dr. Grunert, who opined in an April 19, 1991 report that she was "obviously" experiencing a significant depressive disorder rendering her incapable of gainful employment, and diagnosed adjustment reaction with anxiety and depression. Dr. Grunert advised that appellant should consider vocational alternatives to returning to her work environment at the

employing establishment, as it appeared that she would have had a "very profound" reaction to her present workplace, which would significantly decrease the emotional stress that would accompany reintegration into the work force. Although Dr. Grunert did state in his August 1, 1991 report that appellant had no psychological restrictions preventing her from returning to work, as the hearing representative noted in his September 13, 1994 decision, the Office failed to consider an August 9, 1993 report from Dr. Grunert indicating a significant worsening of appellant's emotional condition, and that Dr. Grunert considered this condition related to her employment-related fibromyalgia. Dr. Grunert specifically stated that it would be "very difficult" for appellant to return to employment with the employing establishment due to the combination of physical factors and her emotional condition, which had "clearly" worsened over time.

The record also contains a May 26, 1994 medical report from Dr. Samuel Smith, a psychologist, who indicated that appellant's ability to function at the workplace would be extremely limited due to her chronic pain, low energy level and fatigue. Dr. Smith stated:

> "[Appellant] would not be able to withstand the stresses of a normal workday. Her ability to relate to supervisors and coworkers would be affected by her increased irritability. I do not believe that she would be capable of maintaining any regular employment given her current level of pain and depressive symptoms."

Even Dr. Hirsch, the second opinion physician who opined that her fibromyalgia was neither partially nor totally disabling, indicated in his June 20, 1991 report that some of appellant's records suggested she had adjustment reaction with anxiety and depression, and conceded that he was unqualified to make such a diagnosis.

Lastly, the Board notes Dr. Marquis' comments in his most recent report, dated September 3, 1993. Dr. Marquis reiterated his previous findings that appellant's employment-related, accepted condition of fibromyalgia was exacerbated by stress, particularly by working in the post office environment, then added that "there is a basic lack of understanding on the part of [the Office] regarding the relationship between emotional stress and fibromyalgia syndrome. Dr. Hirsch, your consultant, did not address this issue and had chosen to ignore the recommendation of Dr. Grunert. Perhaps you need another consultant, and perhaps, you need to review the basic literature on the subject."

Based on the above evidence, the Board finds that it was not appropriate for the Office to improperly invoke the penalty provision of section 8106(c) in this case. The record contains insufficient evidence to meet the Office's burden to show that the light-duty position which appellant was offered was suitable. From the outset of appellant's claim, there was considerable evidence of an emotional component to appellant's accepted fibromyalgia condition, as indicated by the reports of Drs. Marquis, Grunert, and Smith. The Office should have referred appellant's case for an independent medical evaluation when it became evident that there was a conflict in the medical evidence, but it neglected to do so. The Office therefore improperly terminated appellant's benefits as of August 22, 1993.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 2, 1995 is hereby reversed.

Dated, Washington, D.C.
May 4, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member