U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA L. GLADNEY (EASLEY) and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, St. Louis, Mo.

Docket No. 96-1715; Submitted on the Record;
Issued November 13, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment; (2) whether appellant sustained recurrences of disability on July 29, 1994, February 6 and April 7, 1995; and (3) whether the Office abused its discretion in denying appellant's request for a hearing.

On October 3, 1993 appellant, then a 44-year-old radiologic technologist, sustained employment-related cervical and lumbar strains. She received appropriate compensation and, following further development by the Office, Dr. Kenneth W. Zehnder, appellant's treating Board-certified orthopedic surgeon, released her to return to work on January 4, 1994. She returned to regular duty on January 10, 1994 and was placed on limited duty on January 15, 1994, worked three days, stopped work on January 22, 1994, and filed a recurrence claim, effective January 24, 1994. Appellant underwent right knee arthroscopy on April 11, 1994, and by letter dated June 27, 1994, the Office accepted that she sustained an employment-related right knee condition and recurrence of disability on January 12, 1994. Knee surgery was authorized[1] and she received compensation through July 23, 1994. She returned to work on July 24, 1994 in a clerical position and again stopped work on July 29, 1994, at which time she filed a recurrence claim, stating that her legs hurt too much to work. She again returned to work on February 6, 1995 in a clerk-typist position, worked a few hours, and filed a recurrence claim, stating that she could not work due to pain. In a February 17, 1995 letter, appellant advised that when she returned to work on July 25, 1994 and February 6, 1995 she was unable to continue due to pain in her knee and back caused by the required prolonged walking, sitting, bending, lifting, pushing, pulling and rising from a sitting position. In a March 21, 1995 report, a rehabilitation nurse provided a copy of the job description for the clerk-typist position and advised that it was within

[1] The record indicates that the Office accepted that appellant sustained an employment-related right meniscal tear. At surgery, however, a tear was not identified and the postoperative diagnosis was abnormal patellar tracking of the patellofemoral joint.

the physical restrictions provided by Drs. Zehnder and Robert L. Pierron, who is also a Board-certified orthopedic surgeon. By letter dated June 8, 1995, the Office requested that appellant provide information concerning the February 6, 1995 claimed recurrence. The letter also informed appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2). Appellant retired on disability on August 1, 1995.

By decision dated August 1, 1995, the Office found that the medical evidence was insufficient to establish that appellant sustained a recurrence of disability beginning July 29, 1994 and terminated further compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she abandoned a suitable light-duty job. Medical benefits were not terminated. On September 6, 1994 appellant requested a hearing and stated that her request was untimely because she did not understand that she must "personally" request a hearing.[2] By decision dated September 30, 1995, an Office hearing representative denied appellant's request on the grounds that it was not timely filed.

The relevant medical evidence includes a July 1, 1994 report in which Dr. Zehnder advised that appellant could return to restricted light duty "to include desk work and no lifting for eight hours a day" on July 23, 1994. He also provided a July 12, 1994 report in which he enumerated specific restrictions on lifting, carrying, standing and walking. In an August 3, 1994 report, Dr. John D. Kenney, a Board-certified orthopedic surgeon, noted appellant's complaints of continued pain in the lumbar region and vague discomfort on straight leg raising with quadriceps atrophy. He advised that appellant could not work until a magnetic resonance imaging (MRI) was done. In a September 7, 1994 office note, Dr. Zehnder noted appellant's complaints of knee and back pain, made findings on examination and advised "no special treatment" for her knee. He stated that she would see a spine surgeon regarding her back. X-rays of the right hip and pelvis on November 4, 1994 were negative. In a November 4, 1994 report, Dr. Kenney again recommended an MRI and advised that he was "hard put" to make a determination regarding appellant's complaints of back pain. A November 10, 1994 MRI of the lumbar spine was negative for disc herniation or significant bulge. In a November 18, 1994 report, Dr. Kenney advised that he found no objective evidence for appellant's back pain, stating "I believe that since she has been ambulating on a hip and knee flexion contracture for some time that this may have contributed to some mechanical back pain." He concluded that he had no further recommendations for her back and did not believe it was her primary problem.

In December 12, 1994 reports, Dr. Pierron evaluated appellant's knee pain and advised that she should not work. In a January 3, 1995 report, he noted "dramatic sensitivity" of the knee with significant quadriceps atrophy and lateral riding patella with patellofemoral dysfunction "but pain out of proportion to the anatomical findings" and recommended a knee brace and referral to pain management. He advised that work would be acceptable where she was only required to walk into work and then be seated and provided a January 13, 1995 work restriction evaluation advising that appellant could sit continuously and intermittently walk with a knee brace and was not to bend the knee or bend to lift. Appellant could not use her foot to operate foot controls or for repetitive movement. In an April 3, 1995 report, Dr. Pierron advised

[2] The record indicates that appellant mailed correspondence to Congressman William Clay which was forwarded to the Office on August 15, 1995.

that appellant could work eight hours per day with restrictions on standing, walking and lifting, no squatting, climbing or kneeling. By report dated May 16, 1995, Dr. Jaime Aguinaldo, an internist, stated that appellant had tried to work but that she quit because her job required that she roll her chair from one place to another which caused pain. He listed Dr. Pierron's limitations and concluded that because of these and the persistence of back and knee pain, appellant was unable to work.

The record contains a job description for a clerk-typist position advising that the work is largely sedentary with prolonged periods of computer use, short periods of standing at the employee's discretion, and walks of short distances.

Initially, the Board finds that the Office abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on her abandonment of suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] 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.[5]

In the present case, while the record contains a job description for a clerk-typist position that a rehabilitation nurse advised was within appellant's medical restrictions, and that while the Office informed appellant on June 8, 1995 of the penalty provisions of 5 U.S.C. § 8106(c), in order to properly terminate appellant's compensation under this provision, 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.[6] There is nothing in the record in this case to indicate that the Office observed this procedural requirement. The Board therefore finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

The Board further finds that appellant failed to establish that she had any disability after July 29, 1994.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2).

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

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

employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[7]

Causal relationship is a medical issue,[8] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

The medical evidence in this case does not support that appellant sustained a recurrence of disability causally related to the accepted injuries. While the record contains medical reports from Dr. John D. Kenney, a Board-certified orthopedic surgeon, who advised on August 3, 1994 that appellant could not work until she underwent MRI examination, he did not identify any employment factors that caused appellant's disability. Likewise, Dr. Aguinaldo provided a May 16, 1995 report in which he advised that appellant could not work because of persistent pain, noting appellant's report that at work she had to continually roll her chair from one place to another which caused pain. Appellant's job description, however, indicates that the position was sedentary. As appellant failed to submit rationalized medical evidence that identified specific employment factors that caused her to stop work on July 29, 1994, February 6 and April 4, 1995, she failed to discharge her burden of proof, and the Board finds that she failed to establish a recurrence of disability.

Lastly, the Board finds that the Office properly denied appellant's request for a hearing as untimely.

In the present case, the Office denied appellant's request for a hearing on the grounds that it was untimely. In its September 30, 1995 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since her request had not been made within 30 days of its August 1, 1995 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether she sustained a recurrence of disability could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary

[7] *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

[8] *Mary J. Briggs*, 37 ECAB 578 (1986).

[9] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

authority in deciding whether to grant a hearing.[10] In the present case, appellant's request for a hearing on September 6, 1995 was made more than 30 days after the date of issuance of the Office's prior decision dated August 1, 1995 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its September 30, 1995 decision that appellant was not entitled to a hearing as a matter of right because her request was not made within 30 days of the Office's August 1, 1995 decision.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its September 30, 1995 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether she sustained a recurrence of disability could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[11] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The decision of the Office of Workers' Compensation Programs dated September 30, 1995 is hereby affirmed. The decision dated August 1, 1995 is affirmed in part and reversed in part, consistent with this opinion of the Board.

Dated, Washington, D.C.
November 13, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[10] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[11] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).