U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRELL MILES and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

Docket No. 97-358; Submitted on the Record;
Issued November 6, 1998

DECISION and ORDER

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

The issues are: (1) whether appellant is entitled to compensation for total disability for August 23 and 24, 1994; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on June 13, 1996 for refusal of suitable work.

The Office accepted that factors of appellant's employment resulted in an aggravation of the tendinitis of her right foot. Pursuant to this acceptance of appellant's claim, the Office paid appellant compensation for temporary total disability from February 19 to August 21, 1994. Appellant returned to work on August 22, 1994, did not work on August 23 or 24, 1994, and again returned to work on August 25, 1994. The Office denied appellant's claim for compensation for August 23 and 24, 1994 by decision dated February 6, 1996. By decision dated June 13, 1996, the Office terminated appellant's compensation for refusal of suitable work.

The Board finds that appellant is not entitled to compensation for total disability for August 23 and 24, 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 establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

In the present case, appellant returned to light duty on August 22, 1994, consistent with the opinion of her attending physician, Dr. Leslie Low, a podiatrist, that she was "able to return to work in a sedentary capacity." By letter dated October 24, 1994, the Office advised appellant

[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

that it needed medical evidence that she was unable to work on August 23 and 24, 1994. Appellant did not submit any such evidence, and the Office's denial of compensation for these two days was proper, as appellant did not meet her burden of proof.

The Board finds that the Office improperly terminated appellant's compensation on June 13, 1996 for refusal of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2] To justify termination of compensation, the Office must establish that the work offered was suitable.[3]

In its June 13, 1996 decision terminating appellant's compensation for refusal of suitable work under 5 U.S.C. § 8106(c), the Office found that the position of modified letter carrier offered to appellant by the employing establishment was suitable since it was within the work tolerance limitations set forth by Dr. Edward O. Leventen, a Board-certified orthopedic surgeon, who the Office considered an impartial medical specialist resolving a conflict of medical opinion. There was, however, no conflict of medical opinion at the time of the Office's referral to Dr. Leventen, since the Office's second opinion physician, Dr. David Thordarson, a Board-certified orthopedic surgeon, in a September 5, 1995 report, agreed with appellant's attending physicians that appellant was totally disabled and that this disability was related to her employment. In a report dated October 11, 1994, Dr. Milton E. Ashby, a Board-certified orthopedic surgeon to whom the employing establishment referred appellant for a fitness-for-duty examination, concluded that appellant was "an obvious malinger," but a physician performing a fitness-for-duty examination for the employing establishment cannot create a conflict of medical opinion.[4]

As Dr. Leventen was not functioning as an impartial medical specialist resolving a conflict of medical opinion, his opinion is not entitled to special weight. It is entitled to no more weight than the opinion of appellant's attending physician, Dr. Bradley Steele, a Board-certified orthopedic surgeon. Unlike Dr. Leventen, Dr. Steele actually reviewed the description of the light-duty offer. On March 11, 1996 Dr. Steele disapproved of the job offer, and indicated he could approve of it only if standing was added to the activities for which appellant's tolerance was limited.

In addition, by the time the Office determined that the offered position was suitable, Dr. Leventen's report of appellant's work tolerance limitations was almost five months old; the examination on which it was based was undertaken more than seven months before the Office's determination. In the interim, appellant had accepted a different, part-time job offer from the

[2] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9b (March 1995).

employing establishment on February 13, 1996 for a short period until Dr. Steele considered him totally disabled again. Because of this intervening job offer, it is also unclear which of the two offers the employing establishment was addressing when it indicated in an April 17, 1996 telephone conversation with the Office that the job was still available. The Office has not established that appellant refused suitable work.

The decision of the Office of Workers' Compensation Programs dated June 13, 1996 is reversed.

Dated, Washington, D.C.
November 6, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member