U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA A. McCONNELL and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, Ga.

Docket No. 98-1505; Submitted on the Record;
Issued November 3, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act; and (2) whether the Office properly terminated appellant's compensation effective August 9, 1996 based on her refusal of suitable work.

On May 1, 1989 appellant, then a 42-year-old distribution clerk, filed a traumatic injury claim alleging that, while on limited duty from an injury sustained October 26, 1988, she sustained an injury while rewrapping a bag that was heavier than it appeared.[1] Appellant's claim was accepted for herniation of the nucleus pulposus of the L4 to L5 and subluxation of the C5 to T3 spine. Appellant received appropriate compensation for temporary total disability. In a letter dated January 11, 1996, the employing establishment offered appellant a limited-duty position as a modified clerk, requiring intermittent sitting, standing, and walking 8 hours a day, no lifting over 20 pounds and other duties as assigned by the supervisor within the physical limitations. In a letter dated May 22, 1996, the Office advised appellant that the offered position was suitable and within her work capabilities and notified appellant that if she refused the position without reasonable cause, her compensation could be terminated pursuant to 5 U.S.C. § 8106(c) of the Act. The Office allowed appellant 30 days to provide an explanation if she refused the offer. In a letter dated June 17, 1996, appellant refused the position offered on the grounds that she had been involved in a car accident in March 1995 and was physically unable to perform the duties required in the modified-clerk position. In a letter dated July 24, 1996, the Office advised appellant that she had 15 days to accept the modified-clerk position, finding that her reason for refusal was unacceptable as she had not provided any medical documentation to support it. By decision dated August 9, 1996, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. In merit decisions dated November 6, 1996 and

[1] Appellant stopped work in relation to her October 26, 1988 injury on November 3, 1988 and returned to work on April 1, 1989.

August 27 and October 24, 1997, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of its prior decision. By decision dated April 21, 1997, the Office found appellant's request for reconsideration *prima facie* insufficient to warrant review of the case. In a decision dated November 27, 1997, the Office denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration in the case. In merit decisions dated February 23 and March 30, 1998, the Office denied appellant's request for reconsideration on the grounds that no basis for modification was established.

The Board finds that the Office properly denied appellant's request for a hearing.[2]

Section 8124(b)(1) of the Act provides: "Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[3] Thus, appellant must request a hearing within the provided time limitation before she requests reconsideration or she is not entitled to a hearing as a matter of right.[4] In this case, appellant requested and a decision was issued in relation to her four requests for reconsideration prior to her filing a request for a hearing. Therefore, appellant is not entitled to hearing as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered her request in relation to the issue involved, and the hearing was denied on the basis that she could address this issue by submitting evidence which showed that modification of the Office's prior decisions was warranted. Appellant was advised that she may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clear unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[5] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The Board further finds, however, that the Office improperly terminated appellant's compensation effective August 9, 1996 on the grounds that she refused an offer of suitable work.

[2] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on April 9, 1998, the only decisions before the Board are the Office's April 27, August 27, October 24 and November 27, 1997 and February 23 and March 30, 1998 decisions; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[3] 5 U.S.C. § 8124(b)(1).

[4] *See Mary G. Allen*, 40 ECAB 190 (1988).

[5] *Daniel J. Perea*, 42 ECAB 214 (1990).

Under the Act,[6] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[7] After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[8]

Section 8106(c)(2) of the Act 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."[9] However, to justify such termination, the Office must show that the work offered is suitable.[10] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.[11]

In the present case, the initial issue to be resolved is whether the position offered was suitable within the meaning of the Act and regulations. The regulations governing the Act provide several steps that must be followed prior to the determination that the position offered is suitable. Section 10.124(b) of the Office's regulation states in pertinent part:

> "Where an employee has been advised by the employing establishment in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties."[12]

The Office terminated appellant's compensation on the grounds that she refused an offer of suitable work; however, the Office did not follow the regulations in effect at the time of its August 9, 1996 decision in reaching this decision. A review of the record reveals that there is no contemporaneous medical opinion with physical restrictions that correspond to the position offered to appellant by the employing establishment. The last medical report of record prior to this offer was written by Dr. Gropper, who diagnosed degenerative disc disease of the lumbar spine and noted that appellant's condition had been aggravated by a motor vehicle accident on March 24, 1995. He did not provide an opinion concerning appellant's physical restrictions. At the time the Office was attempting to determine whether the offered position was suitable, appellant's treating physician was Dr. Richard M. Klaus, a Board-certified orthopedic surgeon. There is no report in the record by Dr. Klaus which supports the restrictions set forth in the offered position. Moreover, appellant submitted a report dated August 19, 1996 by Dr. Klaus

[6] 5 U.S.C. § 8101 *et seq.*(1974).

[7] *William Kandel,* 43 ECAB 1011 (1992).

[8] *Carl D. Johnson,* 46 ECAB 804 (1995).

[9] 5 U.S.C. § 8106(c)(2).

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

[11] 20 C.F.R. § 10.124; *see Catherine G. Hammond,* 41 ECAB 375 (1990).

[12] 20 C.F.R. § 10.124(b).

with a request for reconsideration in which he specifically indicated that he had reviewed the rehabilitative job offer and opined that appellant could not perform the duty of rewrapping, one of the required functions of the position. Moreover, in reports dated March 15 and May 1, 1996, Dr. Harold A. Alexander, a Board-certified orthopedic surgeon and an Office referral physician, diagnosed chronic lumbosacral strain with degenerative disc disease and noted that appellant's condition had been aggravated by her accident of March 1995. Dr. Alexander did not provide a specific duty status report for appellant. Thus, there was no evidence in the record at the time the position was deemed suitable which supported the medical limitations set forth therein. Furthermore, contrary to the Office's finding that appellant's reason for refusing the offer of a modified position was not supported by medical documentation, both the reports by Drs. Gropper and Alexander substantiated appellant's contention that she was reinjured in a motor vehicle accident in March 1995. The Federal (FECA) Procedure Manual provides that "[i]f medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related).[13] The Office did not meet its burden of proof in terminating appellant's compensation on the grounds that she refused an offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated November 27, 1997 is hereby affirmed. The decisions of the Office dated March 30 and February 23, 1998 and October 24, August 27 and April 21,1997 are reversed.

Dated, Washington, D.C.
November 3, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (December 1993).