U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISETTE R. LIBRIZZI and U.S. POSTAL SERVICE,
POST OFFICE, Ronkonkoma, N.Y.

Docket No. 97-1576; Submitted on the Record;
Issued April 14, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On June 14, 1991 appellant, then a 30-year-old carrier, filed a claim, Form CA-1, for a traumatic injury alleging that she injured her legs from the thigh to the shin including her knees when the wheels of a hamper she was pushing fell off causing her to flip over the hamper. The Office accepted appellant's claim for abrasion and contusion of both legs, and cervical and lumbosacral strains. Appellant initially resumed working part time, then resumed full-time work but sustained recurrences of disability on July 21, 1991 and August 13, 1993 and has not worked since August 13, 1993. Appellant was paid temporary total disability benefits.

Appellant's treating physician, Dr. Shlomo Piontkowski, a Board-certified orthopedic surgeon, completed several attending physician's reports, Form CA-20a, dated from October 11, 1993 through September 6, 1994. In the most recent report dated September 6, 1994, he diagnosed cervical sprain and derangement of the knee, checked the "yes" box that appellant's condition was related to the June 14, 1991 employment injury and stated that it was undetermined how long appellant's disability would last.

In a report dated March 22, 1995, Dr. William T. Stillwell, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and reviewed x-rays of the knees showing patella tilt. He also reviewed a magnetic resonance imaging (MRI) scan dated November 5, 1991 of the cervical spine showing straightening of the curvature with muscle spasm, an MRI scan dated November 6, 1991 of the lumbar spine showing degenerative changes at L4-5 and an MRI scan dated November 8, 1991 of the knee. Dr. Stillwell considered the results of a computerized axial tomography (CAT) scan of the surgical spine dated August 12, 1991 which were normal and of thermographic imaging of the face, cervical and thoracic spine which showed myofascial pain syndrome of the upper trapezius, cervical paraspinal posterior scalenus and splenius capitis muscles, bilaterally.

Further, he considered an electromyogram (EMG) dated October 19, 1992 which was abnormal and suggestive of a mild chronic denervating process affecting the C7 nerve root. Dr. Stillwell diagnosed right chronic cervical strain with possible radiculopathy, right-sided chronic lumbosacral strain, bilateral chondromalacia patellae and migraine headaches by history. He opined that appellant could not perform the duties of a letter carrier/postal worker and believed that she might be capable of limited sedentary activities, if back and neck support were provided. Dr. Stillwell stated that all of appellant's injuries he described appeared to date from and were due to appellant's June 14, 1991 employment injury.

In a report dated April 18, 1995, Dr. Thomas J. Dowling, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests Dr. Stillwell reviewed as well as an MRI scan of the cervical spine dated November 5, 1991 which showed no disc herniation but symptoms of muscle spasm. He also reviewed the somsatosensory tests dated September 17, 1993 which were consistent with an abnormality in terms of a right C6-7 radiculopathy and showed median nerve entrapment of the carpal tunnel. Dr. Dowling also found that the October 19, 1992 EMG was suggestive of a mild chronic denervating process affecting the C7 nerve root on the right. He diagnosed cervical and lumbosacral strains which dated from and were due to the June 14, 1991 employment injury. Dr. Dowling stated that appellant's injuries in general date from the 1991 employment injury. He opined that appellant was unable to perform the duties of a letter carrier and it was "questionable" as to whether appellant "would be even capable of carrying out limited sedentary activities." In a report dated May 26, 1995, Dr. Dowling stated that appellant could return to light-duty work, four hours a day with restrictions based primarily on her cervical and lumbar symptoms. He stated that appellant would need to be able to change her position frequently regarding sitting and standing, would have to avoid any type of repetitive lifting or repetitive bending and could not lift more than 20 pounds for overhead work or above shoulder work.

On July 28, 1995 the Office referred appellant to an impartial medical specialist, Dr. Kenneth S. Glass, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Piontkowski and Dr. Stillwell regarding appellant's continuing disability. In a report dated September 6, 1995, Dr. Glass considered appellant's history of injury, performed a physical examination and reviewed some of the diagnostic tests of record including the June 15, 1991 x-rays and the lumbar and cervical MRI scans. He noted that appellant had an EMG and electroencephalogram (EEG) of the upper extremities but did not note the results of those tests. Dr. Glass diagnosed contusion about the lower extremities with minimal chondromalacia patella and cervical and lumbar sprain. He opined that appellant had a partial disability about the cervical spine, lumbar spine and both knees and was not disabled from sedentary work. Dr. Glass stated that appellant could not lift more than 20 pounds and could work 8 hours a day.

The Office requested clarification of Dr. Glass' opinion, and in a report dated October 12, 1995, he stated that the etiology of appellant's partial disability was that of a sprain type injury of the cervical and lumbar spine and minimal chondromalacia. Dr. Glass stated that appellant had a partial disability about the cervical spine, lumbosacral spine and both knees and

that her injury was not temporary as it had been continuing since 1991. He anticipated that appellant's work restrictions would be permanent.

Appellant subsequently submitted a report dated October 6, 1995 from her treating physician, Dr. Donald Holzer, a Board-certified psychiatrist and neurologist. Dr. Holzer considered appellant's history of injury, reviewed diagnostic tests of record and performed a physical examination. He diagnosed cervical radiculopathy with associated myofascial pain dysfunction syndrome, post-traumatic syndrome with post-traumatic headaches and entrapment neuropathy of the right median and ulnar nerves. Dr. Holzer stated that these conditions were a direct result of her June 14, 1991 employment injury and resulted in appellant being permanently totally disabled.

By letter dated November 21, 1995, based on Dr. Glass' reports, the employing establishment offered appellant a position as modified carrier for 8 hours a day with lifting restrictions of no more than 20 pounds and intermittent working above the shoulder for 4 hours. The job description stated that appellant would be able to use a chair with back support and perform her job duties from one to eight hours as needed.

By letter dated December 4, 1995, appellant declined the offer based on the advice of her doctor and her physical disabilities. She stated that she suffered migraines frequently and daily suffered pain in her neck, back and shoulder which required that she frequently rest. She noted that the recent EMG showed nerve damage and that she had become worse since the last EMG performed two years ago. Appellant attached a disability note from Dr. Holzer dated November 29, 1995 stating that appellant was permanently, totally disabled. She also attached an EMG and nerve conduction study dated November 3, 1995 performed by Dr. Holzer showing a mild to moderate median nerve entrapment at the right carpal tunnel, a mild to moderate ulnar entrapment at the right cubital tunnel and chronic denervation affecting the right C6-7 nerve roots.

By letter dated December 6, 1995, the Office found that the job offer of modified carrier was suitable, still available and within appellant's medical restrictions. The Office stated that appellant's reasons for refusing the job offer presented in her December 4, 1995 letter were insufficient to change the determination that she could perform the job. The Office therefore gave appellant 15 days to accept the job offer and report to work.

By decision dated December 29, 1995, the Office terminated appellant's compensation on the grounds that appellant refused suitable work.

By letter dated May 2, 1996, appellant requested reconsideration of the Office's decision and additionally submitted medical reports from Dr. Holzer dated March 20, 1996 and from Dr. Shafi Wani, a Board-certified psychiatrist and neurologist, dated March 26, 1996, as well as medical reports from Dr. Glass, Dr. Stillwell and Dr. Dowling which were already in the record. In his March 20, 1996 report, Dr. Holzer reiterated his opinion that appellant was permanently totally disabled.

In his March 26, 1996 report, Dr. Wani considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests of record. Additionally, he

reviewed the November 3, 1995 EMG which showed mild to moderate entrapment of the median nerve at the right wrist and mild to moderate ulnar nerve entrapment at the right cubital tunnel and chronic C6-7 nerve root denervation. Dr. Wani diagnosed chronic post-traumatic recurrent right hemicranial vascular headache syndrome, chronic regional post-traumatic myofascial pain and dysfunction syndrome involving the right cervical shoulder and right upper extremity muscles, right cubital tunnel syndrome, mild myofascitis and chronic knee pain. He stated that appellant's conditions were directly caused by the June 14, 1991 employment injury. Dr. Wani opined that appellant could not return to work as a postal employee and that appellant's right cubital tunnel syndrome and right knee problems in addition to her chronic headache and myofascial pain syndrome would prevent her from performing any work.

By decision dated July 1, 1996, the Office denied appellant's reconsideration request.

By letter dated October 8, 1996, appellant requested reconsideration of the decision and submitted a medical report from Dr. Richard A. Pearl, a Board-certified psychiatrist and neurologist, dated October 8, 1996. In his report, Dr. Pearl considered appellant's history of injury, performed a physical examination, reviewed the lumbosacral MRI scan, and numerous medical reports of record. He diagnosed chronic pain syndrome including post-traumatic headaches, right ulnar neuropathy and chronic cervical and lumbosacral sprain. Dr. Pearl stated that appellant was disabled and her prognosis for recovery was poor.

By decision dated December 30, 1996, the Office denied appellant's reconsideration request.

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[1]

Under section 8106(2) of Federal Employees' Compensation Act,[2] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant

[1] *Henry W. Sheperd, III*, 48 ECAB _____ (Docket No. 96-814, issued March 3, 1997); *Shirley B. Livingston*, 24 ECAB 855 (1991).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Henry W. Sheperd, III, supra* note 1; *Patrick A. Santucci*, 40 ECAB 151 (1988).

[4] 20 C.F.R. § 10.124 (c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

of the consequences of refusal to accept such employment.[5] The Board has required that if an employee presents reasons for refusing an offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant one final opportunity to accept the position.[6]

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7] In the present case, when the Office referred appellant to Dr. Glass, to resolve the conflict in the evidence purportedly between Dr. Piontkowski and Dr. Stillwell, a conflict existed in the evidence but it was between Dr. Piontkowski and Dr. Dowling. In his March 22, 1995 report, Dr. Stillwell opined that appellant might be capable of limited sedentary activities if back and neck support were provided. His opinion as to the extent of appellant's disability was speculative and therefore did not conflict with Dr. Piontkowski's opinion that appellant was unable to work. In his most recent report dated May 26, 1995, Dr. Dowling opined that appellant could perform light-duty work four hours a day based on her cervical and lumbar symptoms. His opinion therefore conflicted with Dr. Piontkowski's opinion that appellant was unable to work and referral to an impartial medical specialist to determine whether appellant could work was appropriate.

Dr. Glass' opinion as expressed in his October 6 and October 12, 1995 reports, however, is not complete and therefore is not sufficiently rationalized to establish that appellant could work 8 hours a day with a lifting restriction of no more than 20 pounds. In his October 5, 1995 report, Dr. Glass did not address the thermographic imaging dated October 22, 1992 which showed, in part, myofascial pain syndrome of the upper trapezius, the October 19, 1992 EMG suggestive of a mild chronic denervating process affecting the C7 nerve root on the right, and the September 17, 1993 somatosensory tests showing right C6-7 radiculopathy and median nerve entrapment of the carpal tunnel. The doctors of record who considered these test results found they were related to appellant's June 14, 1991 employment injury and that appellant was either unable to work or could only work part time. In his April 18, 1995 report, Dr. Dowling considered the results of these tests, stated that appellant's injuries in general were related to the June 14, 1991 employment injury and, in his May 26, 1995 report, opined that appellant could work four hours a day with restrictions.

In his October 6, 1995 report, Dr. Holzer's diagnoses included cervical radiculopathy, myofascial pain syndrome and entrapment neuropathy of the right median and ulnar nerves which he stated were a direct result of the June 14, 1991 employment injury. He opined that appellant was permanently totally disabled. Dr. Holzer reiterated his diagnoses and his opinion that appellant was permanently totally disabled in his March 20, 1996 report. In his May 2, 1996 report, Dr. Wani considered all the diagnostic tests of record as well as the November 3, 1995

[5] *Karen L. Mayewski*, 45 ECAB 219 (1993).

[6] *Rosie E. Garner*, 48 ECAB _____ (Docket No. 95-74, issued December 6, 1996); Maggie *L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

EMG and diagnosed, *inter alia*, myofascial pain and dysfunction syndrome and right cubital tunnel syndrome which he stated were related to the June 14, 1991 employment injury. He stated that appellant's right cubital tunnel syndrome, right knee problems, chronic headache and myofascial pain syndrome would prevent her from performing any work. It is not clear which tests Dr. Pearl considered in his October 8, 1996 report, but his opinion in which he diagnosed, *inter alia*, myofascial pain syndrome and right ulnar neuropathy and opined that appellant was disabled corroborates the opinions of Drs. Dowling, Holzer and Wani.

The opinions of Drs. Dowling, Holzer, Wani and Pearl support that appellant had medical conditions, *i.e.*, the cervical radiculopathy, the myofascial pain syndrome, the entrapment neuropathy of the right median and ulnar nerves and the denervation of the C6-7 nerve root, which Dr. Glass did not consider and which were based on objective tests that were in the record prior to Dr. Glass' review of the claim. The reports of Drs. Dowling, Holzer and Wani also indicate that these conditions were related to the June 14, 1991 employment injury. Since Dr. Glass specifically based his opinion that appellant could return to full-time work solely on appellant's cervical and lumbosacral strains and knee condition, and failed to consider the thermographic imaging dated October 22, 1992, the results of the October 19, 1992 EMG, and the somatosensory tests dated September 17, 1993 which showed appellant had additional medical conditions which might be work related and disabling, his opinion is incomplete and not well rationalized.[8] It therefore does not constitute a sufficient basis on which to make appellant a full-time job offer.

As the burden is on the Office to justify the termination of benefits, and the opinion of Dr. Glass on which the Office relied in making appellant a full-time job offer is not well rationalized, the Office has not met its burden of proof to terminate benefits.

[8] *See Cleopatra McDougal-Saddler*, 47 ECAB 480, 488-89 (1996).

The decisions of the Office of Workers' Compensation Programs dated December 30 and July 1, 1996 are hereby reversed.

Dated, Washington, D.C.
April 14, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member