U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE E. WESLEY and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Salisbury, N.C.

Docket No. 97-2106; Submitted on the Record;
Issued April 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits because she refused an offer of suitable employment; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for a merit review on March 4, 1997.

On April 25, 1994 appellant, then a 40-year-old nurse, filed a notice of traumatic injury alleging that on April 23, 1994 she injured her right upper back when positioning a patient in bed in the performance of her federal employment. The Office accepted the claim for a cervical strain and approved compensation. The Office later accepted the claim for a herniated nucleus pulposus C6-7 and authorized a discectomy. Appellant continued to receive compensation for total temporary disability.

On July 21, 1995 Dr. William R. Brown, appellant's treating physician and a Board-certified neurological surgeon, indicated that appellant could return to work on July 31, 1995 with limited bending, crawling and twisting; limiting reaching or overhead work; and limited lifting of 25 pounds maximum. He stated that appellant could return to normal activity in six weeks.

Appellant returned to limited duty on July 30, 1995. Following a visit to an emergency room on August 9, 1995, appellant stopped working.

On September 9, 1995 Dr. Brown examined appellant for pain in her right shoulder and neck. He also noted some right facial numbness and right-sided hearing loss. Dr. Brown indicated that the symptoms began after appellant's return to work. His examination revealed neck stiffness, but no Spurling's sign and normal neurological findings. Dr. Brown stated that appellant's fusion developed at the superior endplate of C7, but had not completely developed at the interior endplate of C6. He stated alignment and other disc spaces was normal. Dr. Brown opined that appellant had some continued cervical strain stemming from her injury and

aggravated by her return to work. He stated that appellant should continue to be out of work. Appellant again began receiving compensation for total temporary disability.

On October 24, 1995 Dr. Brown treated appellant for pain in her head, neck and right arm. He stated that her physical examination failed to reveal any new neurological deficit. Dr. Brown suggested appellant undergo a functional capacities evaluation.

On October 26, 1995 Dr. Daniel S. Gonzales, a psychologist, diagnosed an adjustment disorder with depressed mood and status post injury to C6-7.

On November 3, 1995 Dr. Brown recommended a transcutaneous electrical nerve stimulator for appellant's pain.

On November 13, 1995 Dr. Brown diagnosed a cervical strain and a herniated nucleus pulposus, C6-7. He referred to a functional capacities evaluation performed on November 1, 1995. The evaluation stated that appellant was not able to work, but that there were indications of submaximal effort rendering the test invalid. Nevertheless, the evaluation indicated that appellant could perform limited lifting to 10 pounds, overhead lifting to 5 pounds, sitting up to 8 hours, occasional standing, walking, bending, reaching, climbing, squatting and kneeling; and no crawling.

On December 26, 1995 Dr. Brown indicated that appellant had reached maximum medical improvement and that she had a 15 percent permanent disability of her back. He indicated that appellant could return to sedentary work.

The employing establishment subsequently submitted a light-duty description which excluded lifting over 10 pounds, bending, stooping and pushing/pulling. The description included a list of duties.

On February 2, 1996 Dr. Brown reviewed the light-duty description and stated that appellant could perform the tasks.

On February 16, 1996 the employing establishment offered appellant the limited-duty position.

On February 21, 1996 Dr. Brown signed a disability slip indicating that appellant should remain out of work from that date until March 13, 1996.

On February 22, 1996 the Office wrote appellant indicating that she had 30 days within which to accept the limited-duty position offered or provide an explanation for refusing it. The Office advised appellant that 5 U.S.C. § 8106 provided that a partially disabled employee who refused or neglected to work after suitable work was offered to, procured by, or secured for him was not entitled to compensation. Appellant was advised that if she failed to accept the offered position and failed to demonstrate that her failure to accept was justified, her compensation would be terminated.

On March 13, 1996 Dr. Brown signed a disability slip indicating that appellant should remain out of work from that date until March 25, 1996.

On March 25, 1996 Dr. Brown diagnosed neck pain, secondary to cervical strain. He stated that he was unaware of any other underlying process. Dr. Brown stated that he could not explain appellant's continued problems other than muscle spasms. He stated that appellant informed him she could not work. Dr. Brown stated appellant should continue out of work during the evaluation.

By decision dated March 27, 1996, the Office terminated appellant's compensation on the grounds that she refused suitable employment pursuant to 5 U.S.C. § 8106(c)(2). In an accompanying memorandum, the Office indicated that appellant's treating physician approved the limited-duty assignment on February 2, 1996.

On April 8, 1996 Dr. Thomas H. Milner, a Board-certified radiologist, diagnosed a bulging disc centrally at C5-6.

On April 8, 1996 Dr. Brown diagnosed minimal disc bulge, C5-6 and postmyelogram headache. On April 10, 1996 he repeated these diagnoses.

On April 24, 1996 appellant requested reconsideration.

By decision dated June 4, 1996, the Office reviewed the case on its merits and denied modification. In an accompanying memorandum, the Office indicated that the record was devoid of rationalized medical reports submitted prior to the limited-duty job offer indicating that appellant was incapable of performing the duties listed.

On January 23, 1997 appellant requested reconsideration. In support, she argued that she could not accept the limited-duty position due to disability slips signed by Dr. Brown indicating that she could not return to work.

Appellant resubmitted Dr. Brown's disability slips dated February 21 and March 13, 1996 which together indicated that appellant should remain out of work from February 21 through March 25, 1996. Appellant also submitted a disability slip dated February 12, 1996 from Dr. Brown indicating that appellant was disabled from that date until February 21, 1996. Appellant also resubmitted Dr. Brown's April 10, 1996 report, his March 25, 1996 report, his December 26, 1995 report and Dr. Milner's April 8, 1996 report. Appellant also submitted an electrophysiologic study from Dr. Dennis L. Hill diagnosing mild bilateral carpal tunnel syndrome and no evidence of cervical radiculopathy.

Appellant submitted notes from Dr. Mark A. Lyerly, a neurological surgeon, indicating that she was disabled through July 22, 1996. He diagnosed C5 and C6 radiculopathy on May 22, 1996. On June 25, 1996 Dr. Lyerly diagnosed C5-6 herniated nucleus pulposus, C6-7 pseudoarthritis and bilateral carpal tunnel syndrome due to appellant's injury. He indicated that appellant could intermittently lift/carry 10 pounds for 2 hours per day; that she could sit, stand, or walk 4 hours per day; that she could kneel, bend/stoop and twist 2 hours per day; reach above

the shoulder 1 hour per day and that she should not climb. On August 1, 1996 Dr. Lyerly amended his report to reflect that appellant should not push a medicine cart.

On May 30, 1996 Dr. Deborah M. Lucas, a Board-certified radiologist, diagnosed increased uptake at the C6-7 level suggestive of probable pseudoarthritis.

Appellant submitted reports from Dr. H. Dale Richardson dated September 30 and October 8, 1996 diagnosing a herniated disc at C5-6. On September 19, 1996 he diagnosed pseudoarthritis of C6-7 with degenerated and possibly herniated disc, C5-6.

By decision dated March 4, 1997, the Office denied the application for review because the evidence submitted in its support was repetitious, irrelevant and immaterial.

The Board finds that the Office properly terminated appellant's benefits on the grounds that she refused suitable work.

Section 8106 of the Federal Employees' Compensation Act provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation.[1] Under 5 U.S.C. § 8106(c)(2) 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 her.[2] However, to justify such termination, the Office must show that the work offered was suitable.[3]

In this case, the Office established by a preponderance of the evidence that the work offered was suitable. Dr. Brown, appellant's treating physician and a Board-certified neurological surgeon, provided the only medical opinion addressing whether appellant could perform the limited-duty job position. He reviewed the job description, which excluded lifting over 10 pounds, bending, stooping and pushing/pulling, and determined, on February 2, 1996, that appellant could perform the tasks. Inasmuch as no medical evidence contradicted the conclusions of the treating physician, the Office properly terminated appellant's compensation on the grounds she refused suitable employment.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on March 4, 1997.

Under section 8128(a) of the Act,[4] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines

[1] 5 U.S.C. § 8106(c)(2).

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

[3] *Id.*

[4] 5 U.S.C. § 8128(a).

set forth in section 10.138(b)(1) of the implementing federal regulations,[5] which provides that a claimant may obtain review of the merits of the claim by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law; or
>
> "(ii) Advancing a point of law or a fact not previously considered by the Office; or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[6]

In support of her request for reconsideration appellant urged that the disability slips submitted by Dr. Brown established that she could not perform the limited-duty position. Dr. Brown's disability slips, however, failed to address whether appellant is capable of performing the limited-duty position and, therefore, are not relevant to the issue of whether appellant rejected suitable employment. Appellant also submitted additional medical evidence in support of her request for reconsideration. In this regard, appellant resubmitted Dr. Brown's disability slips dated February 21 and March 13, 1996, his reports dated April 10 and March 25, 1996 and December 26, 1995 and Dr. Milner's April 8, 1996 report. Inasmuch as this evidence was previously considered, it is insufficient to reopen the case. Appellant also submitted numerous medical evidence which failed to address whether appellant was capable of performing the limited-duty position. This evidence included: Dr. Brown's disability slip dated February 12, 1996, Dr. Hill's electrophysiologic study, Dr. Lucas' May 30, 1996 report, Dr. Richardson's September 30 and September 19, 1996 reports and Dr. Lyerly's disability notes and report dated May 22, 1996. This evidence is not relevant to the issue at hand and is insufficient to warrant a merit review.

The only new evidence appellant submitted which addressed whether appellant was capable of performing the limited-duty position offered was provided by Dr. Lyerly in his June 25, 1996 report in which he indicated that appellant could intermittently lift/carry 10 pounds for 2 hours per day; that she could sit, stand, or walk 4 hours per day; that she could kneel, bend/stoop and twist 2 hours per day; reach above the shoulder 1 hour per day and that she should not climb. On August 1, 1996 Dr. Lyerly amended his report to reflect that appellant should not push a medicine cart. His limitations provided in his June 25, 1996 report and August 1, 1996 amended report, however, are within the restrictions supplied by the employing establishment and, therefore, are not relevant to establishing that appellant cannot perform the limited-duty job. Accordingly, as appellant failed to submit any new relevant and pertinent evidence prior to the Office's March 4, 1997 decision, the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review.

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated March 4, 1997 and June 4, 1996 are affirmed.

Dated, Washington, D.C.
April 28, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member