U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN E. ODOL and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Brooklyn, NY

Docket No. 98-304; Submitted on the Record;
Issued December 23, 1999

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation benefits on the grounds that she refused an offer of suitable work.

The Board finds that this case must be reversed.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[3] The Office, however, did not meet its burden of proof in this case to establish by the weight of the medical evidence that appellant was partially disabled and could work light duty.

In a March 8, 1994 report, Dr. David Biddle, a Board-certified neurologist, noted that appellant had definitive paraspinous cervical and lumbar spasms and restricted ranges of motion

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[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

with positive mechanical signs, and opined that she was totally disabled. In a work restriction evaluation that date, he indicated that appellant was totally disabled. In a March 10, 1994 work restriction evaluation, Dr. Irving Lustrin, a Board-certified orthopedic surgeon, noted that appellant was totally disabled, and opined by narrative report that date that appellant could not do any heavy lifting, sudden twisting, bending or prolonged standing and walking, and could not sit for any prolonged periods of time and even sedentary type of work would not be beneficial. In a March 2, 1995 report, Dr. Biddle noted that appellant had a significant amount of paraspinous spasm symptomatic from the neck and lower back, and was in need of neck and back therapy. In a work restriction that date, Dr. Biddle indicated that appellant continued to be totally disabled. In a March 7, 1995 work restriction evaluation, Dr. Lustrin indicated that appellant was totally disabled. Appellant continued to be treated during the fall of 1995 by these physicians.

By letter dated January 10, 1996, the Office referred appellant to Dr. Paul Kleinman, a Board-certified orthopedic surgeon, for a second opinion. The Office provided Dr. Kleinman with a statement of accepted facts and questions to be answered. The statement of accepted facts omitted any mention of appellant's accepted conditions of cervical and lumbar sprain, lumbar myositis and traumatic neuropraxia and bilateral carpal tunnel syndrome, as detailed on the nonfatal summary and the questions only referred to the sprains offhandedly.

By report dated January 23, 1996, Dr. Kleinman noted appellant's complaints, listed but failed to comment upon the medical reports of record, noted that upon range of motion examination appellant had "slight paravertebral [?] on the extreme of motion," and diagnosed "chronic cervical and low back strain with MRI [magnetic resonance imaging] evidence of cervical disc herniation, [and] bilateral carpal tunnel syndrome, by history, status post right carpal tunnel release." Dr. Kleinman opined that if appellant's history was accurate, then her current condition was causally related to the accident of record, that she had reached maximum medical improvement and did not need further orthopedic treatment, physical therapy or testing, and that she had a moderate partial disability. Dr. Kleinman opined that appellant could do full-time sedentary work with frequent changes of position, and should avoid squatting, frequent bending or lifting more than five pounds. He did not, however, discuss what led him to this conclusion or provide any medical rationale supporting it, particularly in light of his diagnosis of continued chronic cervical and low back strain. Dr. Kleinman further did not discuss appellant's need for further neurologic treatment, or discuss the medical reports of record which demonstrated that periodic physical therapy was beneficial for improving and maintaining appellant's mobility. He further did not provide any work restrictions relating to appellant's accepted condition of bilateral carpal tunnel syndrome, or discuss whether appellant's accepted conditions of lumbar myositis and traumatic neuropraxia were still disabling appellant, or whether work restrictions were necessary regarding these conditions. The Board, therefore, finds that as Dr. Kleinman's report was based upon an incomplete statement of accepted facts, and by inference, an incomplete history, was not rationalized, did not address all of the medical evidence of record, and did not address all of the accepted conditions, it cannot constitute the weight of the medical opinion evidence of record.

Thereafter, by report dated April 4, 1996, Dr. Lustrin noted that appellant had for the past three weeks had increased low back pain, and was getting more incapacitated. By report dated

April 11, 1996, Dr. Lustrin noted that appellant continued with unimproved back pain in the dorsal and lumbar spine.

The Office advised the employing establishment that appellant could work eight hours per day sedentary duty, and the employing establishment offered appellant the "full-time sedentary duty" position of internal revenue agent.

By letter dated April 11, 1996, appellant advised the employing establishment that she was declining the job offer on the advice of her case manager. Appellant also submitted an April 25, 1996 report from Dr. Lustrin.

By letter dated April 17, 1996, the Office reviewed the offer, found it suitable and advised her of the penalty if she refused it without reasonable cause.

By letter dated May 20, 1996, the Office advised appellant that her reasons for refusal were insufficient,[4] and that the Office would consider no further reasons.

By report dated May 23, 1996, Dr. Lustrin stated, "I do not feel that [appellant] should be sitting for prolonged periods of time, especially eight hours at a time at her job which also requires frequent bending over which she cannot do."

By decision dated June 7, 1996, the Office terminated appellant's monetary compensation benefits on the grounds that she refused an offer of suitable work. The Office did not discuss or consider any of appellant's treating physicians' reports in its decision analysis and merely assumed that Dr. Kleinman's report constituted the weight of the medical opinion evidence.

By letter dated May 19, 1997, appellant, through her representative, requested reconsideration. By decision dated August 6, 1997, the Office denied this request finding that the evidence submitted in support was insufficient to warrant modification of the termination decision.

As the Board is finding that the Office failed to meet its burden of proof to establish by the weight of the medical evidence that appellant could indeed work, this reconsideration decision becomes moot.

The Board finds that the Office did not establish by the weight of the probative and rationalized medical evidence that appellant could work, due to an unresolved conflict in medical opinion evidence between appellant's treating physicians, Drs. Lustrin and Biddle, who found appellant disabled and unable to do sedentary work eight hours per day, and the Office second

[4] The Office selectively quoted from an April 25, 1996 report from Dr. Lustrin which stated that appellant was "somewhat improved since last seen," as proof that she could work, when she had been seen two days prior on April 23, 1996 by Dr. Biddle with a CC: to Dr. Lustrin, where he noted significant increase in symptoms from lumbar spinal stenosis with claudication and "almost rock-hard-like paraspinous cervical spasm with marked restriction of range of motion." It was improvement from this symptomatology to which Dr. Lustrin was most likely referring.

opinion specialist, Dr. Kleinman, who conclusorily opined that appellant could do sedentary work eight hours per day, which required resolution by referral for impartial medical opinions to specialists appropriate for appellant's several accepted conditions.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 6, 1997 and June 7, 1996 are hereby reversed.

Dated, Washington, D.C.
December 23, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member