U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TINA M. VANGUNDY and U.S. POSTAL SERVICE,
POST OFFICE, Columbus, OH

Docket No. 98-2624; Submitted on the Record;
Issued December 22, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 16, 1998 on the grounds that she refused an offer of suitable work.

On December 16, 1994 appellant, then a 36-year-old distribution clerk, filed a notice of traumatic injury and claim, alleging that she injured her lower back as she was putting her unfinished mail into a "U" cart. The Office accepted appellant's claim for lumbar strain, herniated nucleus pulposus L5-S1 central and laminotomy/discectomy surgery. The record reflects that at the time of injury, appellant was working full time, limited duty from an occupational disease claim beginning on April 13, 1990.[1] The record reflects that appellant returned to work for intermittent periods of light duty and eventually resigned on June 6, 1995. Appellant received compensation for all appropriate periods prior to her resignation.

In a May 22, 1996 Form OWCP-5c, Dr. Charles Lowrey, appellant's orthopedic surgeon, released appellant to full-time modified work. Appellant was referred for vocational rehabilitation services in hopes of returning her to employment with the employing establishment. In a letter dated October 28, 1996, the employing establishment offered appellant a limited-duty position as a modified mail processor, requiring fine manipulation, simple grasping, pinching, bending, pushing and pulling on an intermittent basis. Lifting was not to exceed 5 to 10 pounds, with a restriction imposed of lifting no greater than 30 pounds. The position was based on Dr. Lowrey's May 22, 1996 work restrictions. However, appellant did not accept this position. A December 4, 1996 letter from Dr. Lowrey indicated that appellant should be kept off work until December 20, 1996.

[1] The record reflects that appellant incurred an occupational disease beginning on April 13, 1990 for subluxation C7 resolved; cervical strain and cervical fibrositis. The Office combined that claim with appellant's current claim to arrange a job offer which accommodates all of appellant's restrictions.

In a report dated April 9, 1997, Dr. Gerald S. Steiman, a Board-certified neurologist and an Office referral physician, noted the history of injury, appellant's medical history and current complaints. Dr. Steiman presented his findings upon examination and stated that he reviewed appellant's medical records and job description. He stated that there was objective evidence of cervical fibrositis, lumbar strain and herniated nucleus pulposus L5-S1. In addition, there are residuals of the operative procedure of March 14, 1996 suggesting arachnoiditis/fibrositis and chronic right nerve root irritation at L5. Dr. Steiman opined that the current work-related disability and the residuals were due to the work injuries as described and not due to mental illness or supratentorial factors. He opined that appellant was capable of performing a light job activity, but was unable to return to the job activity outlined within the statement of accepted facts, which involved the full duties of a distribution clerk. An April 9, 1997 OWCP-5 work capacity evaluation form was submitted outlining the restrictions with which appellant may work. On May 12, 1997 Dr. Lowrey indicated his agreement with Dr. Steiman's restrictions.

In a letter dated June 30, 1997, the employing establishment reoffered appellant a limited-duty position as a modified mail processor, requiring fine manipulation, simple grasping, pinching, bending, pushing and pulling on an intermittent basis. Lifting not to exceed 15 pounds. The restrictions noted were: lifting not to exceed 15 pounds 30 minutes at a time 3 to 4 times a day, maximum. Walk/stand one hour at a time, three to four hours per tour. Bending, stooping should be rare. The position was based on Dr. Steiman's April 9, 1997 and Dr. Lowrey's May 12, 1997 work restrictions. Appellant, however, rejected the job offer. By letter dated September 10, 1997, 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 Federal Employees' Compensation Act. The Office allowed appellant 30 days to provide an explanation if she refused the offer.

On October 10, 1997 the Office received a statement from appellant explaining the reason for refusing the offer. Appellant chronicled her injuries, medical care received, the alleged harassment she endured with the employing establishment, and advised that she was under psychiatric care. She stated that despite what the doctor's say, her back is not fixed and provided a list of some of the everyday activities she has problems with. Appellant also stated that she would rather "flip burgers at Burger King before going back to the madness at the [employing establishment]." A September 22, 1997 status report from Dr. Lowery found appellant to be stable status post L5-S1 lami.

In a letter dated November 19, 1997, the Office advised appellant that she had 15 days to accept the modified position, finding that her reason for refusing the position was not acceptable. A December 8, 1997 status report from Dr. Lowrey diagnosed status post lumbar laminectomy with lumbar degenerative disc disease and requested a second opinion evaluation and lumbar epidural steriod (LES) injections. No follow-up reports were provided.

By decision dated March 16, 1998, the Office terminated appellant's compensation effective on the close of business the same day on the grounds that she refused an offer of suitable work. In a decision dated June 30, 1998, the Office denied modification on the grounds

that the arguments and evidence appellant submitted were either irrelevant to the case, already considered or insufficient to warrant modification of the prior denial.

The Board finds that the Office properly terminated appellant's compensation effective March 16, 1998.

Under the Act,[2] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[3] 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.[4]

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."[5] However, to justify such termination, the Office must show that the work offered is suitable.[6] 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.[7]

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. The Office properly requested information from appellant's treating physician, Dr. Lowrey, concerning whether appellant was capable of performing light duty in accordance to Dr. Steiman's April 9, 1997 restrictions. In a May 12, 1997 letter, Dr. Lowrey indicated his agreement that appellant was able to perform light duty in accordance to the restrictions set forth by Dr. Steiman. Earlier, appellant had been referred to an Office referral physician, Dr. Steiman, a Board-certified neurologist, for a second opinion and examination. In a report dated April 9, 1997, Dr. Steiman had indicated the restrictions upon which appellant could perform light duty, which were more stringent than the restrictions Dr. Lowrey had originally imposed on May 22, 1996. Accordingly, both physicians were in agreement that appellant was capable of light-duty work within the restrictions specified. The June 30, 1997 job offer was based on Dr. Steiman's April 9, 1997 and Dr. Lowrey's May 12, 1997 work restrictions and was a more restrictive version of the original October 28, 1996 job offer, which Dr. Lowrey had approved. As the physicians of record reported that appellant could work in the specified limited-duty position and there was no objective evidence to suggest that she could not function in this

[2] 5 U.S.C. §§ 8101-8193.

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

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

[5] 5 U.S.C. § 8106(c)(2).

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

[7] 20 C.F.R. § 10.124; *see Catherine G. Hammond,* 41 ECAB 375 (1990).

position, the Office properly determined that the position was suitable work. Consequently, the Office permissibly terminated appellant's compensation based on her refusal of the position.

On reconsideration, appellant submitted a June 15, 1998 letter reiterating her refusal to be reemployed by the (employing establishment) and reiterating why she could not mentally work at the (employing establishment) by rehashing the mental anguish she went through with the employing establishment while undergoing the claim process. Appellant stated that in November 1994, her doctor requested approval for a second opinion and for three LES injections, but the Office had not responded. She stated that she wants her back to be reevaluated because it still is not correct and that she wants to have somewhat of her life back to normal as much as it can be. Appellant asserted:

> "And no I still refuse to going back to the [employing establishment] for employment. I [ha]ve said it once and I say it again, 'I [woul]d go to work for McDonald's' before I would go back to the [employing establishment]. Mentally, I can[no]t afford to go back to the [employing establishment]. And right now I [a]m not physically either. I just want to get back on my feet and have a[n] active life once again."

Appellant submitted a list of her limitations and described how her back affects her in her everyday life. She stated that she just wants to have some relief from the pain and numbness, and to be able to sleep through the nights. She additionally stated that she was a recovering addict to pain medication. Appellant resubmitted copies of July 25, 1996 correspondence from the rehabilitation consultant pertaining to postal and nonpostal placement which were previously considered. Additionally submitted were new evidence.

A May 11, 1994 letter from the Office indicated that appellant's claims for recurrences on November 10, 1993 and the period beginning January 18, 1994 had been approved and that authorization for recommendations for treatment of appellant's addiction to Fiorinal had been approved. This letter, however, is irrelevant to the current issue of whether appellant has shown just cause for refusing the job offer.

A May 23, 1995 letter of the employing establishment to appellant placing her on an emergency off-duty status and a subsequent June 2, 1995 letter rescinding the emergency off-duty status is also irrelevant to the issue at hand.

An April 16 and March 30, 1998 letters from Dr. Lowrey addressed why he was requesting approval for appellant to undergo a course of LES injections and a second opinion with Dr. Alan Longert. Inasmuch as Dr. Lowrey did not address whether appellant has the ability to perform the limited-duty job offer, these reports are irrelevant.

A May 5, 1998 report from Dr. Michael Kassur, a psychiatrist, stated that appellant's psychiatric condition was of a chronic nature, but he believed that in the future, appellant would be able to return to some form of gainful employment with an intervention from the Bureau of Vocational Rehabilitation. However, as Dr. Kassur failed to discuss how the June 30, 1997 job offer would impact appellant mentally, his report has no bearing on the issue at hand.

The Board notes that within her June 15, 1998 letter, claimant presented a number of arguments which have no bearing on her ability to perform the offered position. Appellant stated that she resigned from the employing establishment; she attempted suicide due to an addiction of pain medicine she was taking for an accepted condition; and that she was harassed from management and put on an off-duty nonpay status. As none of these unfortunate conditions which appellant suffered from affect her ability to perform the offered position, these arguments are, unfortunately, irrelevant to the issue at hand. Her frustration with the claims process and documentation appellant received from the Office regarding the potential for job placement with the employing establishment again has no bearing on appellant's ability to perform the limited-duty job. Appellant's contention that she is in discomfort and that her everyday lifestyle is affected also has no bearing on her ability to perform the duties of the job offer, which is a medical determination. Moreover, appellant clearly refuses to work for the employing establishment pursuant to her comment she would rather "work for McDonald's before [going] back to the [employing establishment]."

Inasmuch as the evidence of record clearly indicates that appellant could work in the specified limited-duty position and there is no objective evidence to suggest otherwise, the decisions of the Office of Workers' Compensation Programs dated June 30 and March 16, 1998 are hereby affirmed.

Dated, Washington, D.C.
December 22, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member