U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNICE P. WASHINGTON and U.S. POSTAL SERVICE,
POST OFFICE, Charleston, SC

Docket No. 99-847; Submitted on the Record;
Issued December 6, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

In April and May 1995 appellant, a transitional employee, filed claims asserting that her left and right hand conditions were causally related to her federal employment. Accepting her claims for a left hand contusion and bilateral carpal tunnel syndrome, the Office approved a surgical release and paid compensation benefits.

On December 13, 1995 Dr. L. William Mulbry, Jr., appellant's attending hand surgeon, reported that getting appellant back to work and doing unrestricted activities might be unrealistic. There was no question, he stated, that any repetitious use of her hand was going to aggravate her carpal tunnel syndrome and unless a fairly restrictive job could be found, this would remain a problem and require permanent job limitations. In a clinic note dated January 17, 1996, Dr. Mulbry noted that appellant's surgical release had healed well but she presented with persistent numbness and tingling. He spoke with appellant about trying a job at the employing establishment answering telephones and that she would contact the employing establishment to see if such a job was available. "She is awfully numb in her fingers," Dr. Mulbry reported, "and this is going to make it difficult to do most activities." In a patient status report, also dated January 17, 1996, Dr. Mulbry reported that appellant was partially disabled. Work limitations included a splint or cast requirement as instructed and no repetitive use of the hands with a one-pound weight limitation for each. Dr. Mulbry indicated that appellant "may answer phones."

On February 9, 1996 Dr. Mulbry reported as follows:

> "EMG [electromyogram] and nerve conduction velocity show a generalized sensory motor neuropathy. [Appellant] is in the process of being worked-up by Dr. Bumgartner including apparently an MRI [magnetic resonance imaging]

> [scan], the results of which we do not have. I will see her back in a month. We are trying to come to some resolution about [appellant's] job. She clearly is a person at a terribly high risk for recurrence and, having recurred on the right, it is very clear that she should not return to any repetitious jobs. I think we have to leave the decision about whether or not she returns to work and the job is repetitious, to her, as she clearly is at a high risk for recurrence. In fact, [appellant] is not really gaining good resolution from her previous surgeries. I will see her back in one month."

On February 20, 1996 the plant manager at the employing establishment wrote to Dr. Mulbry about the creation of a duty assignment for appellant, as follows:

> "The duties that I propose consist of answering the telephone. [Appellant] will not be required to handle a receiver because I have obtained a headset for her use. A large button on the telephone will activate or terminate each call. This button can be activated by any finger or thumb and very little pressure is required. The mitten and wrist splints should not present a problem. The work will be performed in an office type environment so there will be no temperature extremes that might aggravate her circulatory problem. The work schedule I propose is Monday through Friday from 0800 to 1700 with lunch from 1200 to 1300. Saturday and Sunday would be non-scheduled days.
>
> "Please let me know if you think this proposal is workable."
>
> On February 27, 1996 Dr. Mulbry replied, as follows:
>
> "I appreciate your letter. We did try two or three times to get in touch with you, but have not been able to do so. The job that you outlined sounds reasonable. There may be details that I do not know about, but if [appellant] uses a handset and does not do any repetitious work and is allowed to wear her wrist splints, this should take care of it. I do not think that she needs to wear the mittens, other than to keep her hands warm."

On February 29, 1996 appellant accepted the limited-duty position as an administrative clerk answering the telephone with the use of a headset to minimize the use of the hands.

In a memorandum dated March 1, 1996, the plant manager stated that appellant began her limited-duty assignment that morning at 8:00 a.m. He stated that when appellant returned from lunch at 1:00 p.m. she worked until about 2:05 p.m., at which time she came to his office to advise that she could not do it, that she was in too much pain. The plant manager stated:

> "I asked [appellant] if her pain was related to anything that she was required to do and she said no. [Appellant] said that there was nothing wrong with the work assignment or the environment but that she was in constant pain and that her hands were numb and she would have to go home.

"I reminded her that she had accepted the temporary limited-duty job offer and that, if she refused to work, she would not be paid. She said yes, I know about that but I can [no]t stay here. I [a]m going to have to go home."

On March 5, 1996 Dr. Mulbry reported as follows:

"[Appellant] has tried multiple times to return to work. Apparently these attempts have all been unsuccessful, significantly aggravating her symptoms. This is not unexpected, considering that she has both diabetes and carpal tunnel syndrome and the combination makes virtually any activities of the upper extremity likely to reaggravate and to worsen her carpal tunnel syndrome.

"There have been some significant attempts to return [appellant] to work. One of the jobs described, as I understand it, involves simply pushing a button. This job, in and of itself, would not be likely to reaggravate her carpal tunnel syndrome and I have released her [to] this activity specifically. However, this should not involve any repetitive movements of the fingers or wrist, as any job that requires repetitive use of fingers or wrist will aggravate her symptoms. I hope this is helpful."

On March 12, 1996 the Office advised appellant that it found the limited-duty position suitable to her work capabilities, that the position was currently available and that she still had the opportunity to accept the position with no penalty. The Office advised that she had 30 days either to accept the position or to provide an explanation of the reasons for refusing it. The Office then advised her of the penalty provision of 5 U.S.C. § 8106.

On April 8, 1996 the employing establishment sought final approval of the offered position from Dr. Mulbry. The employing establishment submitted for Dr. Mulbry's review a description of the position and physical requirements as well as a form to indicate whether the duties were in compliance with appellant's work restrictions. The physical requirements of the position were described as follows: "Sitting or standing with some walking to possibly deliver messages. Pushing one button to answer calls. Uses a headset to minimize use of hands."

Appellant advised the employing establishment that she would accept the offer and attempt to perform the required duties.

In a memorandum dated April 19, 1996, the acting manager at the employing establishment stated that appellant returned to work that day at 8:00 a.m. and worked her assigned duties until 12:00 p.m., when she came into his office and stated that she was going home as she was in too much pain to work. Appellant explained that this was the second time she had tried to work the agreed upon duties assigned to her but that she experienced too much pain to continue. The acting manager stated that appellant left work indicating that she would not return.

On April 9, 1997 appellant filed a claim asserting that she sustained a recurrence of disability causally related to her accepted employment injury.

In a decision dated May 21, 1997, the Office terminated appellant's monetary compensation effective March 1, 1996 on the grounds that she refused a suitable job offer without justified reasons.

On April 29, 1997 Dr. Mulbry reported that he had discharged appellant from treatment and that she was to return as needed. He indicated that she was permanently partially disabled for work beginning March 31, 1995 and was able to resume light duty at that time.

Appellant requested a hearing and testified before an Office hearing representative on July 22, 1998. She described the duties she attempted to perform: "It was a phone -- head phone set-up system. I did have to push buttons, you know and to get calls and one at the office at the time, in his office, I would have to try to write [messages], you know." Appellant explained that to transfer an incoming call she would have to push the employee's three-digit extension. She was not able to push the buttons without pain and sometimes she just had to let the telephone ring until she could finally bear to get it. If the employee was not there, she would have to write a message, which she was not able to do. Appellant testified that the phones were fairly busy all the time.

In a decision dated October 20, 1998, the Office hearing representative affirmed the decision to terminate appellant's monetary compensation.

The Board finds that the Office improperly terminated appellant's monetary compensation on the grounds that she abandoned suitable work.

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 is not entitled to compensation.[1]

In the case of *Maggie L. Moore*, the Board held that when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.[2] FECA Bulletin No. 92-19, issued July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The Bulletin provides that if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job and advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation payments, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).

[1] 5 U.S.C. § 8106(c)(2).

[2] 42 ECAB 484 (1991), *aff'd on reconsideration*, 43 ECAB 818 (1992).

The Board has recognized that in cases under 5 U.S.C. § 8106(c) due process principles apply to both refusal of an offered position and abandonment of a light- or limited-duty position. As abandonment of a light- or limited-duty position is no less a refusal of suitable work than is refusal of an offered position, the requirements set forth in *Moore* also apply in the present case.[3]

The record shows that appellant accepted an offer of employment and returned to work on April 19, 1996. She worked from 8 a.m. to 12 p.m. and then stopped. After she stopped work, the Office terminated her compensation on May 21, 1997 without first advising her to submit her reasons for stopping work, without advising her whether the position was still available and without providing her a final opportunity to accept or return to the position. The only notice as to termination under section 8106(c) was provided on March 12, 1996, prior to her return to duty on April 19, 1996. No further communication or notice was provided by the Office prior to its May 21, 1997 termination decision.

As the Office failed to follow the procedures necessary to safeguard due process in a termination of compensation under section 8106(c)(2), the Board finds that the Office failed to discharge its burden of proof to justify the termination.[4]

The October 20, 1998 decision of the Office of Workers' Compensation Programs is reversed.[5]

Dated, Washington, D.C.
December 6, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] *Tobey Rael*, 46 ECAB 231 (1994).

[4] *See, e.g., Harold S. McGough*, 36 ECAB 332 (1984) (once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits).

[5] The Board notes that pages 347 and 348 of appellant's case record refer to a different Office case number (A16-530603) and should be associated with the proper case record.