U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA M. WALKER and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

Docket No. 97-26; Submitted on the Record;
Issued February 11, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) on the grounds that she refused to perform suitable employment.

The Office accepted that appellant sustained lumbosacral spasm and strain and myofascitis due to an injury in 1980. Appellant returned to employment following her injury but experienced intermittent recurrences of disability until May 10, 1987, when she stopped work and did not return.

By decision dated April 12, 1993, the Office terminated appellant's compensation benefits based on her refusal to accept suitable employment. The Office based its finding that the offered position of modified distribution clerk was suitable on the opinion of Dr. Moses Leeb, a Board-certified orthopedic surgeon, to whom the Office referred appellant for an impartial medical evaluation.

By decision dated April 30, 1993, the Office vacated its April 12, 1993 decision and reinstated appellant's compensation for total disability. The Office found that the opinion of Dr. Clarence Huggins, a Board-certified surgeon and appellant's attending physician, supported a finding that appellant remained totally disabled due to her employment injury. The Office further accepted that appellant sustained an employment-related herniated nucleus pulposus at L4-5.

On August 25, 1993 the Office referred appellant to Dr. Leeb to resolve a conflict in medical opinion.[1] In a work restriction evaluation and accompanying narrative report dated September 9, 1993, Dr. Leeb found that appellant could return to light-duty work for four hours

[1] By decision dated September 29, 1993, the Office denied appellant's request for a whirlpool.

per day with listed restrictions. Dr. Leeb further reviewed the employing establishment's offer of modified mailhandler and found that it was within appellant's physical capabilities.

After informing appellant of the suitability of the position of modified mailhandler and reviewing and rejecting her reasons for refusing the job, the Office, by decision dated April 27, 1995, terminated appellant's compensation based on her refusal of suitable employment.

On May 26, 1995 appellant requested a review of the written record by an Office hearing representative.

By decision dated September 8, 1995, the Office hearing representative set aside the Office's April 27, 1995 decision. The hearing representative found that Dr. Leeb could not be an impartial medical specialist as he had previously examined appellant. The hearing representative determined that the record contained a conflict in medical opinion between Dr. Leeb and Dr. Huggins regarding whether appellant could perform the position of modified mailhandler.

By letter dated September 22, 1995, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Alan Wilde, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 6, 1995, Dr. Wilde discussed appellant's history of injury and medical treatment received, listed findings on physical examination, and diagnosed degenerative disc disease at L4-5 and L5-S1 without radiculopathy. Dr. Wilde found that appellant could return to work as a modified mailhandler with lifting restrictions of 20 pounds or less. He stated, "I believe that she is capable of returning to work as I can not find any evidence of muscle spasm, restriction of motion, or any objective evidence of radiculopathy." In a work restriction evaluation dated October 24, 1995, Dr. Wilde opined that appellant should limit lifting to no more than 20 pounds and work four hours per day for the first month progressing to eight hours per day thereafter.

By letter dated November 6, 1995, the employing establishment offered appellant a position as modified mailhandler for four hours per day beginning November 25, 1995 in accordance with Dr. Wilde's restrictions. The employing establishment indicated that Saturday and Sunday were appellant's nonscheduled nights.

On November 6, 1995 the Office notified appellant that the position of modified mailhandler was suitable and advised her that under section 8106(c) an employee who refused or neglected to work after an offer of suitable work was not entitled to compensation. The Office informed appellant that she had 30 days to either accept the position or provide reasons for her refusal.

On November 9, 1995 appellant refused the employing establishment's job offer. Appellant submitted a report dated November 12, 1995 from Dr. Huggins, who opined that she was not physically capable of performing the offered position.

By letter dated December 7, 1995, the Office advised appellant that the information she submitted had been considered and found insufficient to alter its determination of the suitability

of the position of modified mailhandler. The Office provided appellant 15 days to accept the offered position.

On December 19, 1995 appellant accepted the position of modified mailhandler.

In a December 22, 1995 telephone call, the employing establishment informed the Office that appellant had accepted the limited-duty job offer and was tentatively scheduled to start January 6, 1996.

On January 9, 1996 an official with the employing establishment notified the Office that appellant did not report to work and stated that she had been verbally informed of her start date.

By decision dated January 9, 1996, the Office terminated appellant's compensation based on her refusal to perform suitable work.

By letter dated June 11, 1996, appellant requested reconsideration of her claim. In a statement submitted following the termination of her benefits, appellant informed the Office that the employing establishment failed to notify her either verbally or in writing that she was supposed to begin work on January 6, 1996. She further indicated that she had complied with the employing establishment's requirement that she undergo drug testing and fingerprinting. She also noted that January 6, 1996 was a Saturday and thus not a day that she reported for work.

By decision dated August 20, 1996, the Office denied modification of its prior decision.

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of 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 or her is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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 requirements of the position.[3] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

In the present case, the Office accepted that appellant sustained lumbosacral spasm, lumbosacral strain, myofascitis and a herniated nucleus pulposus at L4-5 as a result of an

[2] 5 U.S.C. § 8106(c)(2).

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

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

employment injury. In reports dated October 6 and 24, 1995, Dr. Wilde, a Board-certified orthopedic surgeon, performed an impartial medical examination on appellant and concluded that she could return to work as a modified mailhandler with lifting restrictions of no more than 20 pounds. He found that she could work four hours per day for the first month and progress to eight hours per day thereafter. As the impartial medical specialist selected to resolve a conflict in medical opinion, Dr. Wilde's reports are entitled to special weight under Board precedent and therefore constitute the weight of the medical opinion evidence.[5]

On November 6, 1995 the employing establishment offered appellant the position of modified mailhandler for four hours per day beginning November 25, 1995 in accordance with Dr. Wilde's restrictions. Appellant initially rejected the position of modified mailhandler on November 9, 1995; however, after being advised by the Office that the reasons she provided for refusing the position had been found unacceptable, on December 19, 1995 she signed the job offer letter accepting the position. On January 9, 1996 an official with the employing establishment related that appellant did not report to work on January 8, 1996 as scheduled. However, the record contains no written evidence regarding the date upon which appellant was to begin employment. According to the Office's own procedures, suitable work offers must be in writing and include, among other things, the date upon which the position will be available.[6] In the instant case, the only evidence regarding appellant's start date was an Office memorandum documenting a telephone call in which an official with the employing establishment stated that appellant was "tentatively" scheduled to start January 6, 1996. Appellant has claimed that she did not know that she was supposed to begin work on January 6, 1996, and the record contains no evidence which would establish knowledge on the part of appellant. Additionally, January 6, 1996 was a Saturday, and thus a day upon which appellant was not scheduled to work in the original job offer. As the employing establishment failed to provide appellant with a written job offer indicating the date upon which she was to begin employment, after she accepted the proffered position, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106 (c).

[5] *James P. Roberts*, 31 ECAB 1010 (1980).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 1996).

The decisions of the Office of Workers' Compensation Programs dated August 20 and January 9, 1996 are hereby reversed.

Dated, Washington, D.C.
February 11, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member