U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HALANNA MARIE MOLINA and U.S. POSTAL SERVICE, MAIN POST OFFICE, Santa Rosa, Calif.

Docket No. 97-1146; Submitted on the Record;
Issued February 24, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

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

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation[5] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6] To

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[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[5] 20 C.F.R. § 10.124(c).

[6] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[9]

In this case, appellant's notice of occupational disease, filed on February 25, 1991, was accepted by the Office for the conditions of right wrist tendinitis and right lateral epicondylitis, based on the reports of Dr. Charles W. Moulton, a Board-certified orthopedic surgeon. On March 27, 1992 the Office referred appellant to Dr. John S. Hege, Board-certified in internal medicine, and Dr. Richard S. Gilbert, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On March 17, 1993 the employing establishment offered appellant a limited-duty position which she rejected on the advice of her physician, Dr. Mark E. Schakel, a Board-certified orthopedic surgeon, who opined that the "job appears to involve too much repetitive use of [appellant's] hands."

To resolve a conflict in the medical opinion evidence[10] between Dr. Schakel and Drs. Hege and Gilbert,[11] the Office referred appellant to a panel of physicians, who concluded that appellant was capable of performing the position's requirements within the restriction of avoidance of repetitive use of her hands.

Responding to the Office's March 4, 1994 determination that the offered position was suitable, appellant again rejected the job offer on the advice of Dr. Schakel, who, in a report dated March 14, 1994, stated his concerns about the amount of writing required in answering telephone inquiries and updating route maps and forms as well as the possibility of having to case mail, all of which would involve "fairly significant" repetitive use of appellant's hands.

On April 19, 1994 the Office informed appellant that her refusal of the offered position was found to be unjustified, based on the opinions of the panel of physicians, and provided 15 days for her to accept the job. On October 4, 1994 the Office denied disability compensation on

[7] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[8] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[9] *Arthur C. Reck*, 47 ECAB 339 (1996).

[10] *See Dallas E. Mopps*, 44 ECAB 454, 456 (1993) (finding that the Office properly referred the claim to an impartial medical examiner because of a conflict in the opinions of a psychiatrist and a psychologist).

[11] The Office found a conflict between the opinions of Dr. Gilbert and Dr. Hege, but both are Office referral physicians. The real conflict is between Dr. Schakel, who disapproved of the March 13, 1993 job offer and the opinions of Drs. Gilbert and Hege that appellant could perform the requirements of the offered position.

the grounds that appellant had refused an offer of suitable work, which the medical evidence established she was capable of doing.

Appellant requested a hearing, which was held on May 1, 1996. On June 7, 1996 the hearing representative found that the Office was justified in terminating appellant's compensation because she refused an offer of suitable work. Appellant requested reconsideration, which was denied on October 10, 1996 on the grounds that the evidence submitted in support was insufficient to warrant modification of the hearing representative's decision.

The Board finds that the medical evidence is sufficient to establish that appellant was capable of performing the listed requirements of the offered position. The job duties included answering telephone inquiries, updating various forms and route maps, reviewing other forms, installing case labels, checking the lobby to help with customers, stocking the carrier supply cases, and filing on occasion. Medical restrictions included intermittent sitting, walking, standing, and bending, no twisting, squatting, kneeling, climbing, or pushing/pulling and lifting limited to 10 pounds.

Appellant's initial treating physician, Dr. Moulton, released her to return to work in late 1991 without any physical restrictions after referring her to two specialists and noting that her physical examination was "entirely normal." The second opinion physician, Dr. Hege, stated on June 14, 1992 that appellant was capable of sedentary work not requiring repetitive hand movements and added that her work restriction was not due to the work-related tendinitis and epicondylitis, which should have improved since she last worked in March 1991. Dr. Gilbert released appellant to work full time, but advised her to avoid fine manipulation and repeated, continuous grasping.

Dr. Stephen H. Nimelstein, Board-certified in internal medicine, to whom appellant's second treating physician had referred her, stated in a November 4, 1992 report that all appellant's tests produced normal results and that unless her tendinitis symptoms improved with medication, her ability to do work that required repetitive motion with her hands and wrists would remain limited.

The panel of physicians to whom the Office referred appellant also agreed that she was capable of work within the repetitive restriction. Dr. Jack E. Kundin, a Board-certified neurologist, stated on September 9, 1993 that appellant was restricted from heavy lifting and repetitive gripping/grasping as well as pushing/pulling. He reviewed the March 17, 1993 job description and concluded that appellant was capable of doing her usual and customary job within those restrictions. Similarly, Dr. Brenda B. Spriggs, Board-certified in internal medicine, stated on September 14, 1993 that appellant could return to her usual and customary work if her duties could be modified to exclude repetitively lifting more than 15 pounds and repetitive gripping with the hands.

Finally, Dr. James E. Damon, a Board-certified orthopedic surgeon, stated on September 13, 1993 that appellant was physically limited from constant repetitive grasping activities and heavy lifting and could not sort mail, but could perform all her other duties as a carrier. On December 1, 1993 Dr. Damon reported that he had reviewed the March 13, 1993

offer of a modified letter carrier and concluded that appellant could perform the job, noting that no precluded activities were identified in the description.

Even Dr. Schakel stated on March 9, 1993 that appellant would be capable of sitting for eight hours and standing and walking for a significant portion of the day. He added that appellant should avoid repetitive use of her hands and overhead activities, and should lift or carry no more than 5 to 10 pounds intermittently. However, upon reviewing the March 13, 1993 job offer and talking with appellant, Dr. Schakel stated that the position appeared to involve too much repetitive use of appellant's hands.

On March 14, 1994 Dr. Schakel noted that he was concerned about the amount of writing required in answering telephone inquiries and updating documents. He added that casing of mail apparently would also be required and that would mean fairly significant repetitive use of appellant's hands. He concluded that, absent further information to the contrary, appellant would not be capable of doing the job without risk of a flare-up of her symptoms and further disability.

While Dr. Schakel disagreed with Dr. Damon on whether appellant could perform the duties of the offered position, his contrary conclusion does not constitute a conflict in the medical opinion evidence because Dr. Schakel based his statement on an erroneous premise -- the position offered does not require any casing of the mail -- and on the supposition that appellant would be required to use her hands in a repetitive fashion in answering the telephone and updating forms and maps. There is no evidence that the modified position required sustained repetitive movements in performing the listed duties.

Further, Dr. Schakel's opinion referred to prophylactic restrictions rather than appellant's actual medical inability to perform the duties of the position. While appellant contended that anything she did with her hands irritated her tendons and muscles Dr. Schakel did not restrict all hand and finger movements, but only repeated and sustained action.[12] Thus, the Board finds that Dr. Schakel's opinion is insufficiently probative to create a second conflict in the medical opinion evidence on the issue of whether appellant is physically capable of performing the duties of the offered position.[13]

Inasmuch as the medical opinion of an impartial medical examiner, when sufficiently well rationalized and based upon a proper factual background, must be accorded special weight,[14] the Board finds that, based on the opinions of Drs. Damon, Kundin, and Spriggs, the modified

[12] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).

[13] *See Wanda E. Maisonet*, 48 ECAB ___ (Docket No. 94-2466, issued November 29, 1996) (finding no conflict in the medical opinion evidence because appellant's doctor failed to explain the basis for his conclusion that appellant was still disabled by his back strain).

[14] *Roger Dingess*, 47 ECAB 123 (1995).

position offered to appellant was suitable and within her physical restrictions.[15] Therefore, the Office properly applied the penalty provisions of section 8106(c)(2).

The October 10 and May 1, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 24, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *Cf. H. Adrian Osborne*, 48 ECAB ___ (Docket No. 95-251, issued January 21, 1997) (finding that the Office failed to meet its burden of proof in terminating appellant's compensation because she refused an offer of suitable work; the impartial medical examiner's opinion was based on an incorrect job description and was therefore not entitled to probative weight).