U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE FITZPATRICK and U.S. POSTAL SERVICE,
POST OFFICE, Sanford, Maine

Docket No. 97-1819; Submitted on the Record;
Issued July 2, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof in terminating appellant's compensation benefits effective May 8, 1996 on the grounds that appellant refused suitable work; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On August 8, 1988 appellant, then a 29-year-old carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her head when she was struck by the over head door in a postal vehicle.[1] The Office accepted the claim for contusion of the head with no lost time.[2]

On August 28, 1989 appellant filed a claim alleging that her chronic pain was due to her employment accident on October 18, 1988. The Office accepted the claim for cervical strain on February 2, 1990.

On July 23, 1990 appellant filed a traumatic injury claim alleging that the tendinitis in her right arm and hand were due to her employment duties as a modified clerk.[3]

On August 15, 1990 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on July 13, 1990 she first realized that her neck pain

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[1] This claim was assigned as A1-267531.

[2] Appellant filed claims for recurrences of disability commencing July 5, August 24, October 7 and 24, 1989. The Office denied appellant's July 5, 1989 recurrence claim in a decision dated July 10, 1990.

[3] The Office assigned this claim the number A1-280103. Appellant was terminated from the employing establishment on November 3, 1990. The employing establishment noted that appellant had stopped work on July 13, 1990.

and swelling and numbness and tingling in the fingers of her right hand was due to the modified clerk position to which she returned on June 4, 1990.[4]

In a decision dated October 19, 1990, the Office denied appellant's July 13, 1990 injury claim on the basis that the evidence was insufficient to establish fact of injury.

On June 24, 1991 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that the numbness and tingling in the fingers of her right hand was due to her sorting of mail.[5] The Office accepted the claim for tendinitis of the right hand on September 23, 1994. Appellant was placed on the automatic rolls for temporary disability effective July 20, 1995.[6]

On August 1, 1995 the Office referred appellant to Dr. Donald M. Booth, a Board-certified orthopedic surgeon, for a second opinion on appellant's disability status.

In a report dated August 29, 1995, Dr. Booth, based upon a physical examination, statement of accepted facts and review of the medical records, diagnosed chronic pain syndrome involving the cervical and thoracic spine, thoracic outlet syndrome in the right upper extremity, chronic tendinitis of the right wrist and hand, chronic depression and general deconditioning particularly in the cervical spine and upper extremities. He opined that appellant still suffered from residuals of her accepted employment injuries. Dr. Booth opined that appellant was unable to return to her previous job and that she was unable to perform any work involving the upper extremity. He stated that appellant could work three to four hours per day with restrictions on sitting, no twisting or turning of her neck or upper trunk, no repetitive use of her right hand, no lifting above one pound for the right hand and five pounds for the left, no riding or driving a car, no bending and no use of vibrating equipment with the right hand.

By letter dated September 12, 1995, the Office forwarded Dr. Booth's report to Dr. John P. Meserve, appellant's attending Board-certified family practitioner, for his comments and whether he concurred with Dr. Booth. Dr. Meserve did not respond to the Office's request.

In a letter dated March 13, 1996, the employing establishment offered appellant a position as a modified carrier in Wells Maine Post Office for four hours per day answering the telephone, photo-copying readdressed mail and carrier route book maintenance (as needed only). The employing establishment noted that appellant could sit, stand and walk as needed as the job listed could be performed intermittently and that there was no bending, twisting or lifting involved in the position.

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[4] This claim was assigned the number A1-286088.

[5] This claim was assigned the number A1-294775.

[6] In a memorandum to file dated May 17, 1995, the Office indicated that the five actions would be taken which included processing compensation for the period July 13, 1990 to May 31, 1991 and June 2, 1992 to November 1, 1994, processing compensation for partial disability based on appellant's actual earnings as a day care attendant for the period June 1, 1991 to June 6, 1992, advising appellant to submit a Form CA-8 to claim any additional compensation after November 1, 1994 and schedule a second opinion to determine the nature and extent of appellant's disability.

In a letter dated March 20, 1996, the Office informed appellant that the position offered by the employing establishment was found to be suitable and that she had 30 days to either accept the position or provide and explanation for refusing the position. The Office also advised appellant that compensation could be terminated if she refused the position and failed to demonstrate that the refusal was justified.

By letter dated April 22, 1996, appellant through her counsel, stated that she could neither accept nor reject the job offer as Dr. Meserve, her treating physician, was on vacation.

In a letter dated April 23, 1996, the Office informed appellant that she had 15 days from the date of the letter to accept the position and that if she failed to accept the position then termination of her compensation would commence. The Office also informed appellant that no further reasons for failing to accept the position would be considered.

By decision dated May 9, 1996, the Office terminated appellant's compensation effective May 8, 1996 on the grounds that she refused or neglected to work after suitable work was offered. In an accompanying memorandum incorporated by reference, the Office stated that the employing establishment offered a position based upon the restrictions noted by Dr. Booth, the second opinion physician.

Subsequent to the May 9, 1996 decision, appellant submitted treatment notes from Dr. George J. Pasquarello, appellant's attending physician and physical therapy notes for the period July 15 to September 20, 1996. In the various treatment notes dated June 17 to November 4, 1996, Dr Pasquarello diagnosed myofascial pain syndrome and cervical thoracic strain. He presented no opinion as to whether he agreed with the restrictions listed by Dr. Booth or whether appellant could perform the job offered.

On October 18, 1996 appellant, through her attorney, filed a request for reconsideration and submitted physical therapy notes for October 15 to November 15, 1996, a November 12, 1996 treatment note by Dr. Pasquarello and an August 27, 1996 letter from the Board in support of her request.

By decision dated January 17, 1997, the Office denied appellant's request for a merit review. In the attached memorandum, the Office noted that none of the evidence submitted by appellant addressed the issue of whether the offered position was suitable.

The Board finds that the Office has met its burden of proof in terminating appellant's compensation benefits on the grounds that she refused suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[7] Section 10.124(c) of the Code of

[7] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation." *See also Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Federal Regulations[8] 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 a determination is made with respect to termination of entitlement to compensation.[9] To justify termination of compensation, the Office must establish that the work was suitable and must inform appellant of the consequences of refusal to accept such employment.[10]

The initial question is whether the Office properly determined that the offered position was suitable. In a report dated August 29, 1995, Dr. Booth, a Board-certified orthopedic surgeon to whom appellant was referred by the Office, provided a history of appellant's condition and physical findings on examination and opined that appellant was able to perform limited-duty work three to four hours per day with certain restrictions which included no prolonged sitting, no twisting or turning of her upper trunk or neck, lifting up to one pound for the right hand and five pounds for the left hand, no riding or driving a car, no bending, and no use of vibrating equipment with the right hand. On March 13, 1996 the employing establishment offered appellant a limited-duty position within the work restrictions established by Dr. Booth. There is no evidence of record that appellant would not be able to perform the limited-duty position.

In view of the foregoing, the Board finds that the medical evidence establishes that appellant was physically capable of performing the duties of the limited-duty position as offered on March 13, 1996.

By letter dated March 20, 1996, the Office advised appellant that it had found the limited-duty position to be suitable and advised appellant to either accept the position within 30 days or provide an explanation of her reasons for refusing it. She was advised that an employee who failed to accept an offer of suitable work and did not provide acceptable reasons for refusing the job was not entitled to compensation benefits. By letter dated April 23, 1996, appellant, through her attorney, indicated she was unable to either accept or reject the offered position as her treating physician was on vacation.

The Office's procedure manual indicates that, once a claimant has been informed that the Office finds that the job offered is suitable and that compensation will be terminated if the job offer is not accepted, there are some acceptable reasons for refusing to accept an offer of suitable employment.[11] Review of the record shows that none of these reasons is applicable in appellant's case. Her only reason for not accepting or rejecting the position was that she was waiting for her physician's opinion. However, the limited-duty position offered to appellant

[8] 20 C.F.R. § 10.124(c).

[9] *Camillo R. DeArcangelis, supra* note 7.

[10] *David P. Camacho*, 40 ECAB 267 (1988); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997).

complied with the restrictions noted by Dr. Booth as it was four hours per day with appellant able to sit, stand or walk as needed since the duties could be performed intermittently and no bending, twisting or lifting required. In addition, appellant did not submit any evidence from her treating physician that indicating that she was incapable of performing the offered job.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits and this includes cases in which the Office terminates compensation under section 8106(c) of the Act for refusing to accept suitable work or neglecting to perform suitable work.[12]

Section 8106(c)(2) of the Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[13] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal was justified.[14]

Next, the Board finds that the Office properly denied appellant's application for review without considering the merits.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at lease one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[15] Evidence that repeats or duplicates evidence already in the case record has no evidentiary basis and does not constitute a basis for reopening a case.[16] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[17]

With appellant's request for reconsideration dated October 18, 1996, she submitted a letter from the Employees' Compensation Appeals Board as well as physical therapy notes and treatment notes from Dr. Pasquarello. Dr. Pasquarello does not address whether appellant was capable of performing the position offered in any of the treatment notes submitted by appellant. The evidence submitted by appellant is not sufficient to warrant review of her case by the Office since it is irrelevant to the central issue in her case. The medical evidence submitted by appellant failed to address whether the position offered to appellant was suitable and, thus, is

[12] *Shirley B. Livingston*, 42 ECAB 885, 860-61 (1991).

[13] 5 U.S.C. § 8106(c)(2).

[14] 20 C.F.R. § 10.124.

[15] 20 C.F.R. § 10.1138(b)(2).

[16] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[17] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekempter*, 31 ECAB 224 (1979).

irrelevant. Appellant has not submitted new evidence that requires that the case record be reopened.[18]

The decisions of the Office of Workers' Compensation Programs dated January 17, 1997 and May 9, 1996 are hereby affirmed.

Dated, Washington, D.C.
July 2, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[18] Appellant submitted additional evidence following issuance of the Office's January 17, 1997 decision. However, the Board cannot consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).