U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY J. GRAY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Mountain Home, TN

Docket No. 98-354; Submitted on the Record;
Issued July 21, 1999

DECISION and ORDER

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

The issues are: (1) whether appellant is entitled to a schedule award; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for disability.

The Office accepted that appellant sustained a thoracic strain and a left shoulder strain in a June 20, 1995 injury in which she tripped over an electrical cord during the performance of her duties as a licensed practical nurse. Appellant received continuation of pay from June 21 to August 4, 1995, after which the Office began paying her compensation for temporary total disability. Appellant returned to light-duty work for brief periods in October, November and December 1995 and last worked on December 21, 1995

On April 15, 1996 the employing establishment offered appellant a position as a program support clerk. By letter dated April 26, 1996, appellant declined this offer stating that she was physically unable to perform the required duties.

On June 26, 1996 appellant filed a claim for a schedule award. By decision dated September 30, 1996, the Office found that "the evidence of file fails to demonstrate any permanent impairment of the left shoulder and any continuing residuals of the [June] 20[,] [19]96 injury." Appellant requested a hearing, which was held on May 15, 1997. By decision dated October 14, 1997, an Office hearing representative found that appellant was not entitled to a schedule award, that the Office had improperly concluded that appellant had recovered from all effects of her employment injury and that appellant was not entitled to compensation on the basis that she refused an offer of suitable work.

The Board finds that appellant is not entitled to a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

In a report dated July 19, 1996, appellant's attending physician, Dr. William E. Kennedy, noted that appellant had a full range of left shoulder motion and concluded, "During this evaluation, I found no objective evidence of any permanent physical impairment or permanent loss of function in the left shoulder." In a report dated May 24, 1996, Dr. John Holbrook, a physician to whom the Office referred appellant, also noted a full range of left shoulder motion, the absence of arthritic changes on x-rays, negative thoracic outlet testing and good grip strength. He concluded, "This lady has subjective feelings of pain in her shoulder but I would not afford her permanent impairment related to the shoulder, a zero [percent] would be issued." There is no medical evidence that appellant has a permanent loss of use of her left arm due to her June 20, 1995 employment injury.

In a report dated December 11, 1995, Dr. Kennedy stated, "Using the A.M.A., *Guides* 4th edition, it is my opinion that she has an eight [percent] permanent physical impairment to the body as a whole as a result of her thoracolumbar spine condition. It is further my opinion that her permanent physical impairment is attributable to the work-related injury of June 20, 1995…." However, a schedule award is not payable for the loss, or loss of use, of a part of the body not specifically enumerated in the Act.[4] There is no provision in the Act or its regulation on schedule awards[5] for payment of a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[6] A schedule award is therefore not payable for any permanent impairment to appellant's back.

The Board further finds that the Office improperly terminated appellant's compensation for disability.

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *Quincy E. Malone*, 31 ECAB 846 (1980).

[4] *James E. Jenkins*, 39 ECAB 860 (1988).

[5] 20 C.F.R. § 10.304.

[6] 5 U.S.C. § 8101(19).

There is no indication that, before her compensation was terminated, appellant was apprised by the Office that it had reviewed the evidence and found that the position offered by the employing establishment was suitable. Nor was appellant informed by the Office that her monetary benefits could be terminated if she refused to accept the offered position.[7] Since section 8106(c)(2) of the Act[8] is a forfeiture provision, the Office improperly invoked the statutory penalty without first determining the suitability of the job offered to appellant and informing appellant of the consequences of her refusal to accept such employment.[9] In addition, the medical evidence does not establish that the offered position was suitable. Dr. Kennedy stated in a December 19, 1995 report, that appellant was unable "to tolerate even sedentary work requiring a great deal of sitting." An Office referral physician, Dr. Fred R. Knickerbocker, stated in a February 15, 1996 report that appellant could work four hours per day; however, the offer was for an eight-hour per day position. For these reasons, the Board finds the Office did not properly terminate appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated October 14, 1997 is affirmed with regard to the denial of a schedule award. With regard to the termination of appellant's compensation for disability, the Office's October 14, 1997 decision is reversed.

Dated, Washington, D.C.
July 21, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[7] These requirements are set forth in Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (December 1993). This section then states, "All of the foregoing is the responsibility of [the] O[ffice] and cannot be delegated to the employing agency."

[8] 5 U.S.C. § 8106(c)(2) states that a partially disabled employee who "refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[9] *Kathy M. Webb*, 36 ECAB 242 (1984).