U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWANDA A. HALL and U.S. POSTAL SERVICE,
POST OFFICE, Miami, Fla.

Docket No. 97-2379; Submitted on the Record;
Issued June 7, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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.

On December 3, 1992 appellant, then a 34-year-old letter carrier, filed a notice of traumatic injury and claim for compensation, alleging that while she was delivering mail a dog came after her and she slipped on a tile floor. The Office accepted the claim for left knee sprain. Appellant stopped work on January 9, 1993 and has not worked since that date.

Appellant underwent arthroscopic surgery to the left knee on September 3, 1993 performed by Dr. Melvyn H. Rech, a Board-certified orthopedic surgeon. Appellant has continued under Dr. Rech's care for treatment of an internal derangement of the left knee.

In a report dated March 14, 1994, Dr. Rech responded to an Office inquiry regarding appellant's prognosis for a return to work. He noted that he had attempted on several occasions to return appellant to gainful employment. Dr. Rech recommended a work-hardening program to increase appellant's capabilities and decrease her pain.

In a June 22, 1994 report, Dr. Rech stated that "[appellant] has been refactory to attempts to [return] her to a work program." He recommended that appellant undergo a work-hardening program as soon as possible. Dr. Rech opined that work should be delayed until the program was completed. He noted that he had attempted to return appellant to work in October and December 1993 but stated that "this has been a difficult task."

The Office referred appellant to Dr. Orestats G. Rosabal, a Board-certified orthopedist, for an examination on September 1, 1994. He noted appellant's complaints of left knee pain with intermittent swelling and episodes when her knee would lock and give away. Dr. Rosabal further noted that appellant felt intermittent clicks and had difficulty going up and down stairs. He recorded physical findings including a normal gait and one quarter inch of atrophy about

three inches above the patella. Dr. Rosabal requested a magnetic resonance imagimg scan which was performed on October 4, 1994 and was noted to be essentially unremarkable.

In a work evaluation form dated November 16, 1994, Dr. Rosabal indicated that appellant had reached maximum medical improvement. He opined that appellant could perform sedentary work with restrictions.

On December 6, 1994 the employing establishment offered appellant the position of a modified letter carrier. The Office found the job to be suitable work and provided appellant with 30 days to accept the job or provide an explanation for her refusal.

On January 11, 1995 appellant refused the job offer on the grounds that she still had ongoing pain and swelling in her left knee.

The Office subsequently terminated appellant's benefits on February 8, 1995.

By letter dated March 28, 1995, appellant requested reconsideration.

In conjunction with her reconsideration request, appellant submitted a March 7, 1995 report from Dr. Rech. He advised that appellant was unable to return to work because she had undergone surgery for a partial lateral meniscectomy with limited synovectomy to her left during February 1995.

In a decision dated May 5, 1995, the Office vacated the February 8, 1995 decision following a merit review and reinstated appellant's compensation.

On August 23, 1995 the Office requested that Dr. Rech provid an updated report on appellant's condition, specifically addressing whether appellant was capable of returning to sedentary work.

By letter dated October 20, 1995, the Office referred appellant along copies of the medical record and a statement of accepted facts to Dr. Ubaldo S. Rodriguez, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated November 8, 1995, Dr. Rodriguez noted that appellant had a history of arthrosocpic surgery first performed on August 20, 1990 following a car accident. He noted appellant's December 1992 work injury, subsequent left knee surgeries in 1993 and 1995 and her complaints of pain in the knee joint on palpation and movement. On physical examination, Dr. Rodriguez found that appellant walked without a limp, that her knee had good alignment and that there was no effusion or swelling. He concluded that appellant had reached maximum medical improvement. Dr. Rodriguez further advised that appellant was able to work eight hours a day with restrictions including that she avoid squatting and kneeling, continuous walking for more than one half hour and standing for more than one hour. He completed a work evaluation form reflecting this restrictions.

In a report dated November 10, 1995, Dr. Rech noted that appellant continued to complain of cramping in the foot and persistent knee pain. On physical examination, he noted

slight swelling and crepitus on motion. Dr. Rech noted that appellant walked with a limp and used a cane. He advised that he had attempted on several occasion to return appellant to gainful employment but she complained of extensive pain.

In a work restriction evaluation form dated November 16, 1995, Dr. Rech indicated that appellant should begin working only four hours a day. He further noted that appellant could perform no lifting, bending, or squatting and that she was limited to one hour of walking and standing and four hours of sitting.

By letter dated December 6, 1995, the Office forwarded a copy of Dr. Rodriguez's report to Dr. Rech and asked him to discuss whether he agreed with the assessment of appellant's work restrictions.

In an attending physician's report (Form CA-20) dated February 6, 1996, Dr. Rech check marked a box indicating that appellant was totally disabled. He diagnosed internal derangement of left knee and noted that appellant could perform no work.

By letter dated April 23, 1996, the employing establishment offered appellant a position as a modified part-time flexible clerk beginning May 13, 1996. The position was described as requiring appellant to sit intermittently for 8 hours a day, walk for 30 minutes, stand for 1 hour and perform intermittent lifting of objects no greater than 10 pounds for an hour a day.

On April 2, 1996 a description of the job was forwarded to Dr. Rodriguez for his review. He returned it with his signature of approval.

Appellant returned a form indicating that she refused the offered position.

In a letter dated May 10, 1996, the Office determined that the position of a modified part-time flexible clerk was suitable work. The Office advised appellant that if she failed to either accept the job or provide an explanation for refusing the offer of suitable work within 30 days, her compensation would be terminated.

In a June 26, 1996 decision, the Office terminated appellant's compensation effective July 21, 1996 on the grounds that appellant had refused an offer of suitable work.

By letter dated July 3, 1996, appellant requested reconsideration.

Attached to the reconsideration request was a May 20, 1996 report by Dr. Rech. He advised that appellant was last examined on April 29, 1996 for complaints of continuing pain in the left knee along with spasms and cramping of both lower extremities. Dr. Rech noted appellant had slight swelling of the left knee. He reported that she walked with a limp and used a cane. According to Dr. Rech, obesity was an etiologically factor for a portion of appellant's pain. He noted that appellant had not been performing her occupational duties.

In a decision dated July 30, 1996, the Office denied modification following a merit review.

By letter dated September 12, 1996, appellant filed another request for reconsideration and submitted an August 19, 1996 report from Dr. Rech. In this report, he noted that he had been treating appellant for a left knee condition since May 1990. Dr. Rech discussed the December 1993 work injury and further noted that appellant's history included a car accident involving neck and low back injuries. He noted that appellant was last seen on August 6, 1996 for low back, right wrist and left knee pain. Dr. Rech prescribed a steroid injection and recommended that appellant undergo a weight reduction program for obesity. He did not discuss whether appellant had continuing disability related to her December 1993 injury or whether she was capable of performing the position of a modified clerk.[1]

In a decision dated November 22, 1996, the Office denied modification of its June 26, 1996 decision following a merit review.

The Board finds that the Office improperly terminated appellant's compensation on the grounds that she refused an offer of suitable work.[2]

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.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act[4] provides that the Office may terminate 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.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation 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.[7] To 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.[8]

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[1] In treatment notes dating from March through October 1996, Dr. Rech noted that appellant presented with complaints of severe knee pain and swelling in the left leg.

[2] Appellant submitted additional evidence after the issuance of the Office's final decision, but the Board has no jurisdiction to review that evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[3] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Betty F. Wade*, 37 ECAB 556 (1986).

[4] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

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

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

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

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

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[9] In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

In this case, the light-duty position offered by the employing establishment was found to be within the physical restrictions specified by the second opinion physician, Dr. Rodriguez, who examined appellant and prepared a work restriction evaluation form on November 8, 1995 indicating that appellant could return to work for an eight-hour shift if she avoided squatting and kneeling, continuous walking for more than one-half hour and standing for more than one hour. However, Dr. Rech, appellant's treating physician, specifically opined in his November 10, 1995 report that appellant could not work an eight-hour shift and that appellant was limited to four hours of sitting. After the Office provided Dr. Rech with a copy of Dr. Rodriquez's report, Dr. Rech also submitted an attending physician's report dated February 2, 1996 which found that appellant was unable to work. Although Dr. Rech's two reports are somewhat contradictory, his opinion is in conflict with Dr. Rodriguez's opinion that appellant is capable of returning to sedentary work for eight hours a day.

When there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[11] Based on the above evidence, the Board finds that the Office improperly invoked the penalty provision of section 8106(c) in this case. The record contains insufficient evidence to meet the Office's burden to show that the modified position appellant was offered was suitable. The Office should have referred appellant's case for an independent medical evaluation when it became evident that Drs. Rech and Rodriguez disagreed as to how many hours appellant could work, thereby creating a conflict in the medical evidence.[12] The Office, therefore, improperly terminated appellant's benefits effective July 21, 1996.

[9] *Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *Connie Johns*, 44 ECAB 560 (1993).

[11] 5 U.S.C. § 8123(a); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

[12] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

The decisions of the Office of Workers' Compensation Programs dated November 22, July 30 and June 26, 1996 are reversed.

Dated, Washington, D.C.
June 7, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member