U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KELLI E. KELLOGG and U.S. POSTAL SERVICE,
POST OFFICE, Lincoln, Nebr.

Docket No. 99-388; Submitted on the Record;
Issued June 14, 1999

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 26, 1995 on the grounds that she refused suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act; and (2) whether appellant is entitled to a schedule award for her right upper extremity.

On April 25, 1992 appellant, then a letter carrier, filed a claim for an occupational disease (Form CA-2) alleging that she first became aware of her right shoulder and right arm injuries in February 1992. Appellant further alleged that she first realized that her condition was caused or aggravated by her employment on March 6, 1992. Appellant stopped work on April 22, 1992.[1]

The Office accepted appellant's claim for right anterior shoulder impingement syndrome and right thoracic outlet syndrome. The Office authorized a first rib resection which was performed on January 6, 1993 and arthroscopy and arthroscopic subacrominal decompression which was performed on September 2, 1993.

By letter dated May 16, 1994, the Office advised Dr. John C. Yeakley, a Board-certified orthopedic surgeon and appellant's treating physician, that based on his latest work restriction evaluation form, it was going to offer a job under its rehabilitation program. By letter dated May 31, 1994, the employing establishment offered appellant the position of modified city carrier. Dr. Yeakley reviewed the description of the offered position and approved the position on May 23, 1994.

Appellant accepted the position on June 13, 1994 and returned to work on June 25, 1994. On June 30, 1994 appellant returned to work with a medical note from Dr. Yeakley releasing her to work four to six hours per day.

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[1] Appellant returned to work, but stopped work on April 30, 1992. Appellant filed for disability retirement benefits on May 7, 1996 and she retired from the employing establishment on disability effective August 21, 1996.

On July 25, 1994 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on July 1, 1994. Appellant stopped work on July 1, 1994. By letter dated October 3, 1994, the Office advised appellant to submit additional factual and medical evidence supportive of her recurrence claim.

On September 7, 1994 appellant underwent a functional capacity evaluation. The report revealed that appellant was working two to three hours per day at the employing establishment and recommended that appellant increase her daily work hours by one hour per week progressing up to eight hours of activity. Dr. Yeakley agreed with the findings of the functional capacity evaluation. Appellant stopped work on December 14, 1994 based on the Dr. Yeakley's advice.

By letter dated August 21, 1995, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Michael Morrison, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Morrison of the referral.

In a September 12, 1995 medical report, Dr. Morrison indicated a review of a description of the modified position of city carrier and opined that appellant could perform the duties of this position with restrictions regarding her right upper extremity.

On October 10, 1995 the employing establishment offered appellant the modified position of city carrier. Appellant rejected the job offer on October 24, 1995 indicating that her physician had not released her to return to work. By letter dated November 6, 1995, appellant submitted Dr. Yeakley's opinion of that same date revealing that she could not perform the duties of the offered position.

By letter dated November 16, 1995, the Office requested that Dr. Yeakley provide whether he agreed or disagreed with Dr. Morrison's medical report and opinion that appellant could perform the duties of the modified city carrier position. In a November 22, 1995 response letter, Dr. Yeakley stated that he basically agreed with Dr. Morrison's opinion and recommended that appellant work two to four hours per day with restrictions.

The Office found a conflict in the medical opinion evidence between Dr. Yeakley and Dr. Morrison regarding appellant's ability to return to work. By letter dated January 17, 1996, the Office referred appellant along with a statement of accepted facts, a list of specific questions, a description of the offered position and medical records to Dr. Bernard L. Kratochvil, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict in the medical evidence. By letter of the same date, the Office advised Dr. Kratochvil of the referral.

Dr. Kratochvil submitted a February 13, 1996 medical report indicating that appellant could work at any position that did not require her to perform heavy lifting with her right upper extremity or to reach above shoulder level. Dr. Kratochvil also indicated that appellant could perform the offered modified position of city carrier.

On March 20, 1996 the employing establishment again offered appellant the modified position of city carrier. On that date, appellant rejected the job offer stating that she had already

tried to work in this position and that her physician did not give her approval to work in this position. Appellant further stated that she planned to retire on disability.

In a March 22, 1994 letter, the Office advised appellant that the offered position was suitable for her work capabilities. The Office also advised appellant that she had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Act.

In an undated letter, appellant rejected the job offer stating that she would be ignoring Dr. Yeakley's advice if she accepted the offer. By letter dated April 24, 1996, the Office advised appellant that her reason for refusing the offered modified position of city carrier was not justified. The Office then advised appellant that she had to accept the offered position within 15 days. The Office further advised appellant about the penalties for refusing an offer of suitable work under section 8106 of the Act.

By decision dated May 14, 1996, the Office terminated appellant's compensation effective May 26, 1996 on the grounds that appellant refused suitable work. In so doing, the Office found that appellant had forfeited any continuing wage loss or schedule award benefits.

On May 17, 1996 the Office received appellant's claim for a schedule award (Form CA-7) dated May 8, 1996. In a May 17, 1996 letter, the Office advised appellant that she was not entitled to a schedule award as a result of refusing a suitable job offer.

In an undated letter, appellant requested an oral hearing before an Office representative. In a November 20, 1997 statement, appellant, through her representative, requested approval of her schedule award.

By decision dated January 29, 1998, the hearing representative affirmed the Office's May 14, 1996 decision. Additionally, the hearing representative denied appellant's claim for a schedule award. In a June 11, 1998 letter, appellant, through her representative, requested reconsideration of the hearing representative's decision.

By decision dated September 17, 1998, the Office denied appellant's request for modification based on a merit review of the claim.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation effective May 26, 1996 on the grounds that she refused suitable work pursuant to section 8106(c) of the Act.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] This includes cases in which the Office terminates 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 under section 8106(c)(2).[3]

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*,

The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[4] 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 the medical evidence.[5]

Section 10.124(e)[6] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 showing before a determination is made with respect to termination of entitlement to compensation.[7] To justify termination, the Office must show that the work offered was suitable,[8] and must inform appellant of the consequences of refusal to accept such employment.[9] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[10] In the present case, the Office has properly exercised its authority as granted under the Act and implementing federal regulations.

Section 8123(a) of the Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11] In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12]

In this case, the Office found a conflict in the medical opinion evidence between Dr. Yeakley, appellant's treating physician, and Dr. Morrison, a second opinion physician, concerning appellant's ability to perform the duties of the modified city carrier position that was

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36 ECAB 235 (1984).

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

[5] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[6] 20 C.F.R. § 10.124(e).

[7] *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[9] *See Maggie L. Moore*, *supra* note 7; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[11] 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[12] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

offered to appellant by the employing establishment. The Office properly referred appellant to Dr. Kratochvil, for an impartial medical evaluation pursuant to section 8123(a) of the Act.

In terminating appellant's compensation, the Office relied on Dr. Kratochvil's February 13, 1996 medical report. In this medical report, Dr. Kratochvil indicated a history of appellant's February 1992 employment injury and medical treatment, and a review of medical records. Dr. Kratochvil further indicated his normal findings on physical and objective examination. He diagnosed first rib resection, cervical strain/sprain and a previous operation on appellant's right shoulder for bursitis. Dr. Kratochvil opined that based on the medical records and the history as given by appellant, appellant sustained a strain or a sprain of her neck and shoulder while working in February 1992. He noted that an arthroscopic procedure performed by Dr. Yeakley showed evidence of bursitis and there was no intra-articular pathology. Dr. Kratochvil then opined that appellant had reached maximum medical improvement and that no further medical treatment other than simple conservative measures was necessary for appellant's current symptoms. Dr. Kratochvil concluded that appellant was employable and capable of any type of work that did not require heavy lifting with the right upper extremity or reaching above shoulder level. Dr. Kratochvil recommended that appellant undergo a functional capacity assessment if there was still a question about her ability to work. Dr. Kratochvil estimated that due to her previous surgery, appellant had a 10 percent permanent impairment of the right upper extremity. On March 19, 1996 Dr. Kratochvil indicated that he had reviewed a description of the offered modified position of city carrier and that the duties of this position were within appellant's medical restrictions.

While appellant contends that the modified position of city carrier was not suitable because she had previously attempted to perform the duties of this position, the record does not contain any rationalized medical evidence establishing that appellant was unable to perform the

duties of this position. The record reveals emergency room medical treatment notes of Dr. Mark Steven Howerter, a Board-certified family practitioner, dated February 18, 1996 regarding the treatment of appellant's right shoulder pain. The record further reveals Dr. Yeakley's February 26, 1996 medical note indicating appellant's treatment for shoulder problems. Dr. Howerter's treatment notes and Dr. Yeakley's medical note failed to address whether appellant could perform the modified position of city carrier.

Appellant submitted Dr. Yeakley's April 1, 1996 medical report revealing that during the past several years, she had worked as a clerk, but that she was unable to fulfill her duties due to the physical demands on her symptomatic right shoulder. Dr. Yeakley stated that if appellant continued to work as a clerk for the employing establishment, she would continue to experience the complaints and problems that she had concerning her right shoulder. Dr. Yeakley then stated that until appellant stopped performing repetitive manual labor using the right upper extremity, she would continue to have medical problems. Dr. Yeakley failed to provide any medical rationale explaining how or why appellant would continue to have problems with her right upper extremity if she continued to perform the duties of a clerk.

Appellant also submitted an April 3, 1996 report of Karen A. Knortz, a physical therapist, revealing her complaints of persistent upper back, right shoulder and neck pain. Ms. Knortz's report has no probative value inasmuch as a physical therapist is not a physician under the Act and therefore is not competent to give a medical opinion.[13]

Further, appellant submitted an April 8, 1996 medical note of Dr. Brian J. Bossard, a Board-certified internist, indicating that she had been evaluated for shoulder discomfort, treated for a chronic rotator cuff injury and was status post two separate surgical procedures for this problem. Dr. Bossard opined that based on this medical history, repetitive shoulder activity "would likely result in an exacerbation of shoulder discomfort." The Board has long recognized that the opinion of a physician cannot be speculative or equivocal, but rather must be supported with affirmative evidence, be explained by medical rationale, and be based on a complete and accurate factual and medical background.[14] Dr. Bossard's opinion that repetitive shoulder activity "would likely result in an exacerbation of shoulder discomfort," without medical rationale is speculative in nature. Therefore, his opinion is insufficient to establish that appellant could not perform the duties of the modified city carrier position.

Additionally, appellant submitted an April 13, 1996 statement from her mother, Bette Kellogg, and an undated statement from Stacy Hames, appellant's brother's girlfriend, concerning her pain and physical limitations. Inasmuch as the question of whether appellant was physically capable of performing the modified position of city carrier is a medical question, the statements of Ms. Kellogg and Ms. Hames are of no probative value. In addition, appellant's

[13] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

[14] *Philip J. Deroo*, 39 ECAB 1294 (1988).

contention that she refused the offered position because she was going to retire on disability does not constitute a valid reason for refusing the position.[15]

The Office received Dr. Yeakley's June 4 and October 2, 1996, and January 15 and August 25, 1997 notes indicating the treatment of appellant's shoulder. These notes failed to address whether appellant could perform the duties of the modified city carrier position.

Inasmuch as Dr. Kratochvil provided a rationalized opinion based on a complete medical and factual background, the Board finds that his medical report represents the weight of the evidence in this case and establishes that appellant was able to perform the duties of the modified city carrier position offered to her by the employing establishment. The Office, therefore, met its burden in terminating appellant's compensation effective May 26, 1995 on the grounds that appellant refused suitable work.

The Board further finds that appellant is not entitled to a schedule award for her right upper extremity.

The schedule award provision of the Act[16] and its implementing regulation,[17] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[18] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[19]

In this case, appellant contends that she is entitled to a schedule award because she elected to retire on disability. The Board has held that, based on a refusal of suitable employment, the Act and implementing federal regulations serve as a bar to the receipt of further compensation under section 8107 by appellant arising from the accepted employment injury.[20] Inasmuch as the Office properly determined, in its decisions dated January 29 and September 17, 1998, that appellant refused an offer of suitable work, appellant is not entitled to compensation benefits under section 8107 for any period after May 26, 1996.

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[15] *Stephen R. Lubin,* 43 ECAB 564, 569 (1992).

[16] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[17] 20 C.F.R. § 10.304.

[18] 5 U.S.C. § 8107(c)(19).

[19] *See James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[20] *Arthur E. Anderson*, 43 ECAB 691 (1992); *Stephen R. Lubin, see supra* note 15.

The September 17 and January 29, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
June 14, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member