U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH E. SCOTT and U.S. POSTAL SERVICE,
POST OFFICE, Tulsa, Okla.

Docket No. 97-2236; Submitted on the Record;
Issued May 12, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits for refusal of suitable work.

In the present case, the Office accepted that appellant, a postal supervisor, sustained aggravation/acceleration of anxiety and depression as a result of factors of her federal employment, on or about January 13, 1994. On March 24, 1997 the employing establishment offered appellant a position as a supervisor in the Sapulpa, Oklahoma Post Office. The employing establishment advised appellant that her physician had reported on January 28, 1997 that she had recovered sufficiently to be able to return to her regular position as a supervisor of customer services, as long as she was not under the direct supervisor of the Tulsa system. On April 10, 1997 the Office advised appellant that it had found the position offered to be suitable to her work capabilities. The Office further advised that the position was currently available, and that appellant would have 30 days to either accept the position or provide an explanation of the reasons for refusing it. At the expiration of 30 days, a final decision would be made, and if appellant did not accept the position, any explanation or evidence which appellant provided would be considered, prior to a determination whether or not her reasons for refusing the job were justified. Appellant was further advised that pursuant to 5 U.S.C. § 8106(c)(2), any claimant who refused an offer of suitable employment was not entitled to any further compensation for wage loss or schedule award.

On April 24, 1997 appellant advised the Office of the reasons why she would not accept a position at the Sapulpa Post Office. Appellant also forwarded a work restriction evaluation, dated April 29, 1997, from her treating physician. On May 14, 1997 the Office advised appellant that it had considered the reasons she had given for refusing the position and had found them to be unacceptable. The Office advised appellant that she would have 15 days to accept or reject the offer, at which time a final decision would be made in this matter. On June 6, 1997 the Office terminated appellant's compensation benefits on the grounds that appellant had refused a suitable job offer as a supervisor, customer services, without justified reasons.

The Board finds that the Office did not meet its burden of proof in this case.

Under section 8106(c)(2) of the Federal Employees' Compensation Act[1] 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.[2] Section 10.124(c) of the Code of Federal Regulations[3] 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 showing before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable[5] and must inform appellant of the consequences of refusal to accept such employment.[6]

On November 7, 1996 appellant's treating psychiatrist, Dr. F. David Kondos, reported that appellant continued with diagnoses of situational anxiety and depression. Regarding appellant's ability to return to work, Dr. Kondos opined that "[appellant] will definitely never return to her previous job situation. At this point in time, I sincerely doubt that she will be able to return to the [employing establishment]. Whereupon her original anxiety disorder was based on her situation in her department at work, I believe now that it is generalized to the entire [employing establishment]." On January 2, 1997 he completed a work restriction evaluation wherein he indicated that appellant could not return to work for eight hours a day. Dr. Kondos also recommended vocational rehabilitation as he noted that appellant would not be able to return to her previous job situation.

The Office thereafter referred appellant to Dr. Mark A. Kelley, a Board-certified psychiatrist, for a second opinion examination. In a report dated January 28, 1997, Dr. Kelley explained that appellant could return to work and perform work duties, however, that it would have to be outside of the Tulsa Postal System. He explained that appellant most likely would be able to successfully work in another agency with the government. However, Dr. Kelley stated that appellant could not function if returned to work within the postal system, as appellant anticipated that a return to work within the system would result in a "set up." He noted that appellant developed physical symptoms of insomnia, headaches, digestive tract problems, scalp itch and rash, when she considered returning to work in the same environment she had previously worked. On February 20, 1997 the Office requested that Dr. Kelley clarify his opinion as to whether appellant's related aggravation of anxiety and depression had ceased. The claims examiner advised him that claimants were entitled to compensation benefits only as long as they were disabled as a result of the accepted aggravation and not the underlying condition, and that fear of a recurrence of injury was not a basis upon which compensation could be paid.

On February 21, 1997 Dr. Kelley responded as follows:

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[1] 5 U.S.C. § 8106(c)(2).

[2] *Michael I. Schaffer,* 46 ECAB 845 (1995).

[3] 20 C.F.R. § 10.124(c).

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

[5] *See* 20 C.F.R. § 10.124(e).

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

"In your fax to me of February 20, 1997 you presented, 'In question number four, you stated that the claimant's symptoms had subsided and that they would recur if she were placed back in the same environment. Does this mean that at the time of your examination, the work[-]related aggravation of anxiety depression has ceased and that the claimant has returned to the baseline of her condition? Please explain.' The answer to the question is no. She still remains with the diagnosis that was generated from her experience in the [employing establishment]. She is different or altered, from the experience that she has had. The fact that she might not be experiencing symptoms at a particular time and that those symptoms are not evident or are not likely to be evident unless certain conditions are met does not mean that she is not still damaged. It can be compared to a person with coronary artery disease, in which the arteries are virtually occluded, and at times the person has symptoms of pain due to that but many times can be free of pain, even though the coronary arteries are still occluded. Her work[-]related condition has not ceased even if she has no symptoms at a particular time, similar to a person that has occluded arteries, even though he may have times in which he has no symptoms. It is my opinion that the damage that was done to her in her work in the postal service and subsequent effects is still present with her and that treatment she has had has been insufficient to bring resolution to that damage. In that the diagnosis of post-traumatic stress disorder that in my opinion is present was not diagnosed, it could be addressed adequately to bring relief of that circumstance. Her fear of what will happen if and when she did return to her former position is one but not the only symptom of the post-traumatic stress disorder."

On April 29, 1997 Dr. Kondos completed a work restriction evaluation form wherein he indicated that appellant would return to work, eight hours a day, but not in the offered position. He noted that the offered position would also be a stressful position for appellant. On May 22, 1997 Dr. Kondos completed a second work restriction evaluation wherein he indicated that appellant could return to work, but with the previously stated restrictions.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[7] At the time the Office found that appellant had refused an offer of suitable work, the Office did not have any medical opinion of record that appellant could perform this position. Both Drs. Kondos and Kelley had opined that appellant could not return to work for the postal system. The suitable work position, which was a postal position, therefore was not within the medical restrictions stated by the physicians of record.

The Office requested that Dr. Kelley clarify whether in fact appellant remained disabled, or whether her return to work was not recommended as a prophylactic measure. The Board has held that where employment factors cause an aggravation of an underlying condition, the employee, upon establishing such an aggravation, is entitled to compensation for periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. The Board has also held that fear of a new injury or a recurrence of disability is not a basis for the payment of compensation, and that as such, an employee who is found medically disqualified

[7] *Lawrence D. Price*, 47 ECAB 120 (1995).

to continue in employment because of the effect employment factors may have on an underlying condition, does not qualify as a basis for compensation.[8]

In response to the Office's request for clarification of this issue, Dr. Kelley, the Office's second opinion physician, reported that the accepted aggravation of appellant's condition had not ceased and that appellant still had residuals of the accepted condition. He explained that the manifestation of the accepted condition prevented appellant from returning to work within the postal system.

In finding that the position was suitable, the Office substituted its own medical judgment for that of the physicians of record. As the Office did not meet its burden of proof to establish that the position was suitable to appellant's medical restrictions, the Office did not meet its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated June 6, 1997 is hereby reversed.

Dated, Washington, D.C.
May 12, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[8] *See Gaetan F. Valenza*, 39 ECAB 1349 (1988).