U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LESLEY JACKSON and DEPARTMENT OF DEFENSE, DEFENSE FINANCE ACCOUNTING SERVICE, Bayonne, NJ

Docket No. 98-894; Submitted on the Record;
Issued October 15, 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 on the grounds that she refused an offer of suitable work.

In the present case, the Office accepted that appellant sustained a cervical radiculopathy in the performance of duty on March 20, 1995, when she slipped and fell at work. Appellant began receiving compensation for temporary total disability.[1] By letter dated May 21, 1996, the Office advised appellant that a job offer by the employing establishment was considered suitable and she must accept the position or provide an explanation for refusing the position. Appellant declined the job offer.

By decision dated July 1, 1996, the Office terminated appellant's compensation effective July 8, 1996 on the grounds that she had refused an offer of suitable work. By decision dated June 25, 1997, an Office hearing representative affirmed the termination. In a decision dated October 20, 1997, the Office determined that the evidence was insufficient to warrant reopening the case for merit review.

The Board has reviewed the record and finds that the Office did not meet its burden to terminate compensation in this case.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, the Office

[1] Appellant briefly returned to work at four hours per day from August 7 to 14, 1995.

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[4]

It is well established under the Office's procedures that unless the medical evidence is "clear and unequivocal," the Office should seek medical advice from an appropriate physician as to the medical suitability of an offered position.[5] In this case, the medical evidence of record was not clear and unequivocal with respect to appellant's work limitations. The Office had declared a conflict in the medical evidence between an attending physician, Dr. Arthur E. Taubman, an orthopedic surgeon, and Dr. Charles E. Granatir, an orthopedic surgeon. Dr. Granatir had opined in an August 28, 1995 report that appellant could return to her normal duties without restrictions. The attending physician, Dr. Taubman, opined in a September 29, 1995 report that appellant remained totally disabled.

In a report dated February 23, 1996, Dr. Paul A. Foddai, a Board-certified orthopedic surgeon serving as an impartial medical specialist, opined that appellant was capable of returning to work, but he indicated that appellant should initially work four hours per day for two weeks, then six hours for two weeks and then resume working eight hours. This report does not, therefore, establish that appellant could immediately work an eight-hour day.

In a work restriction evaluation (OWCP-5c) dated March 26, 1996, Dr. Taubman indicated that appellant was limited to "desk work only" and could work eight hours per day. The job offer made to appellant was a full-time position and the offer letter stated that it was based on Dr. Taubman's restrictions; the medical evidence, however, also includes Dr. Foddai, who indicated that appellant could not immediately resume full-time work. Under these circumstances, the medical evidence is not "clear and unequivocal." Office procedures clearly required that the Office send a copy of the specific job duties and other relevant information to an appropriate physician to secure an opinion that appellant could perform the offered position. There is no indication that the Office followed its procedures in this case to establish that the offered position was medically suitable. It is the Office's burden to terminate compensation, and the Board finds that the Office did not meet its burden here.

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

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

[5] *See Annette Quimby*, 49 ECAB __ (Docket No. 97-317, issued January 30, 1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

The decisions of the Office of Workers' Compensation Programs dated October 20 and June 25, 1997 are reversed.

Dated, Washington, D.C.
October 15, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member