U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH D. DUMAIS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Bangor, ME

Docket No. 98-1203; Submitted on the Record;
Issued October 25, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary benefits on the grounds that she refused an offer of suitable work.

On September 29, 1994 appellant, a service representative, sustained an injury while in the performance of her duties when the automobile in which she was riding was struck broadside at an intersection. The Office accepted her claim for the conditions of concussion, fracture of the ninth rib and multiple contusions.[1] Appellant received compensation for temporary total disability on the periodic compensation rolls.

On January 10, 1995 Dr. Steven J. Badeen, an internist specializing in family and adult medicine and appellant's attending physician, reported that appellant's September 29, 1994 motor vehicle accident caused several fractured ribs and severe contusions to her hips, shoulders and neck. Dr. Badeen stated that appellant had extreme pain in these areas since the accident but that this was slowly resolving. Any type of work activity would probably aggravate her situation, he reported, but appellant should be able to resume light or limited duty in three to six months. Dr. Badeen referred appellant to Dr. Rejean Lebel, for orthopedic consultation, and to Dr. David Goodenough, for neurological consultation. Dr. Badeen reported that appellant remained disabled until cleared by the orthopedist.

On February 14, 1995 Dr. Lebel reported that appellant was not available for work for one month.

On March 15, 1995 the Office referred appellant, together with copies of medical reports and a statement of accepted facts, to Dr. Stephen R. Kline, a neurological surgeon. In a report dated April 12, 1995, Dr. Kline found that there were no objective neurological findings based

[1] The Office noted that concurrent conditions not due to the injury included a history of migraine headaches, right carpal tunnel release in 1983 and smoking.

on his examination of appellant and that current test results ordered by physicians who had seen appellant were within normal limits. He stated that residuals existing from appellant's injury were exclusively subjective in nature and appeared to be well out of proportion to the nature of the injury, the treatment to date and the results of the diagnostic work-up coupled with the current unremarkable neurological examination. Dr. Kline reported that appellant was immediately able to assume light- or limited-duty work. He recommended an antidepressant for what he suspected or feared was a very definite magnified pain syndrome or perhaps chronic pain syndrome. Dr. Kline noted that both Drs. Lebel and Goodenough were of the opinion that appellant was capable of returning to work on April 17, 1995. It was his understanding that appellant was to return to work at two hours a day and after one week increase her hours one hour per day per week. "I think this is fully reasonable and appropriate," Dr. Kline reported, "given the sum total of her work-up, injuries, neurological evaluation and the lack of objective neurological findings noted at this time."

Appellant began seeing Dr. Richard Smith after referral by Dr. Goodenough. On April 14, 1995 Dr. Smith reported that appellant had suboccipital muscle tenderness, splenius capitis and splenius cervicis tenderness with trigger points in these areas. He stated:

> "I believe that these appear to be primarily myofascially mediated by the intense myofascial component of pain in the low back. The quadratus lumborium muscle, as well as, the long thoracic muscle are extraordinarily tender throughout their entire course. The right quadratus muscle is tight, as would require [sic] to feel as if there is no difference between that and the spinatus process.
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> "The patient's gluteal muscle groups including the gluteus medius, minimus and maximum, all contain trigger points and spasms.
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> "ASSESSMENT: It is unclear to me whether my intervention at this point should includ[e] looking in detail at the low back issues, but the myofascial syndrome is so pronounced that it is unavoidable. I do believe that her shoulder and head symptoms are very secondary to the underlying low back problem. I believe that at this point with the amount of tension that is present there, that botulinus toxin injections in the quadratus muscle, as well as, the gluteal muscle groups as described by lieu would be useful in terms of allowing this patient to proceed through [p]hysical [t]herapy."

Dr. Smith noted that appellant was scheduled to return to work on April 17, 1995 and that he advised appellant that the underlying foundation of any return to a normal lifestyle would include a return to all parts of that lifestyle including work. "I have tried to emphasize the difference between hurt and harm," he reported, "and although this patient may not be able to tolerate the amount of pain that she will have from the amount of muscle tightness she is experiencing, a return to work trial is not an outrageous concept. I do believe that a return to work in the face of decreased muscle spasm would be useful. It is possible there will be some relaxation of the upper shoulders and the muscle contraction headache when the low back problem begins to resolve." Dr. Smith later diagnosed myofascial pain secondary to back injury, which in turn was secondary to a motor vehicle accident.

On August 28, 1995 Dr. Badeen reported that appellant's chronic pain syndrome was due to the September 29, 1994 accident and that appellant was disabled for usual work. He indicated that appellant had chronic disability with an inability to stand. Dr. Badeen noted that she needed a cane to walk. He described her prognosis as poor. On September 12, 1995 Dr. Badeen reported that appellant was unable to drive until further notice due to her chronic pain syndrome and the medications she was taking.[2]

The Office referred appellant, together with copies of medical reports, a statement of accepted facts and a functional job description of appellant's regular job, to Dr. Vincent P. Herzog, a Board-certified specialist in physical medicine and rehabilitation, for a second opinion. In a report dated October 2, 1995, Dr. Herzog related appellant's chief complaint, history and medications. He provided a brief review of supplied medical records. After relating his findings on physical examination and the results of a brief lifting evaluation, Dr. Herzog diagnosed chronic pain syndrome, diffuse myofascial pain and deconditioning syndrome, among other conditions. He described the job description submitted for his review and stated as follows:

> "Based on my evaluation, there is no apparent cognitive deficit, so I feel that the mental requirements for the job could easily be fulfilled. With regards to her functional capacity, she was able to demonstrate that she could lift and carry 30 pounds. Her job only requires that she carry up to 20 pounds. Subjectively, [appellant] did tell me today that she has the least amount of discomfort when she [i]s sitting down and her job duty is described as 67 [to] 100 percent continuous sitting, so this appears to be reasonable. The description also indicates that she has the opportunity to get up and stretch as needed which I also recommend.
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> "With regards to standing, walking, bending maneuvers, these are only listed as occasional 1 [to] 33 percent of her job. This also appears to be reasonable.
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> "A factor in [appellant's] return to work situation is that she appears to be quite deconditioned. Because of this, I am recommending that she return to work at her full[-]duty expectations as above, but start her days at one-half time, four hours a day and increase her one hour a week until she reaches eight hours a day as her endurance increases.
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> "With regard to the possibility of her pain medications interfering with her driving skills, I feel that this potential problems could be eliminated if she does not use her pain medications prior to driving her car. Fioricet (Butalbital, Acetaminophen, Caffeine tablets) is recommended up to every four hours, she takes it every six hours, but I do not recommend any dosage in the evening or morning prior to her driving to work. [She] could take one dose and should be fine for her drive home if she does not take it other than when she arrives at work in the morning. The Tylenol #3 (Acetaminophen with 30 mg of Codeine) can be

[2] The record indicates that appellant worked partial hours between June 26 and September 12, 1995 and was off work complete since then.

given up to every four hours, she takes this every six hours. She also can take this first thing in the morning when she gets to work and it should be safe for her to drive if she does not dose during work prior to her driving. She rarely takes the Stadol and I do n[o]t recommend that she use this. In general, narcotics should not be used prior to driving, although she is taking relatively very low doses. I think it would be reasonable that she not take pain medicine in the morning, go to work, take her medications, work without taking further medications, drive home and then she can take some more. I think that what [sic] would be the most ideal is that she utilize nonnarcotic pain relievers such as aspirin, nonsteroidal anti-inflammatories or regular Tylenol for her pain. Then this issue would be eliminated. [Appellant] did tell me today during the evaluation that her primary care doctor is concerned about her use of pain medications, and if this is the case, this needs to be addressed."

On November 3, 1995 the Office advised appellant that the attached position of service representative was suitable and currently available, and that she had 30 days either to accept the position or to provide an explanation of the reasons for refusing it. The Office notified appellant of the penalty provision of 5 U.S.C. § 8106(c)(2) and advised: "At the expiration of 30 days, a final decision on this issue will be made."

In a letter dated November 7, 1995, appellant's attorney advised that appellant had no work capacity and that he was requesting a report from Dr. Badeen on the matter.

On December 4, 1995 at the expiration of the 30-day period, the Office issued a decision terminating appellant's monetary compensation effective December 9, 1995 on the grounds that she refused an offer of suitable work.

On December 12, 1995 the Office received a letter dated December 1, 1995 from appellant's attorney formally refusing the offered employment out of medical necessity. To support this refusal, the attorney attached a December 1, 1995 report from Dr. Badeen, who updated appellant's return-to-work status as follows:

"[Appellant] does have a severe chronic pain syndrome, as a result of a motor vehicle accident which she was involved in recently. She has had multiple evaluations by orthopedic specialists, and physical therapy was also unsuccessful in resolving her pain. Other various pain modalities have been used, including Elavil and Tegretol, which have been unsuccessful. As a result, the only medications she is able to take are a muscle relaxer in the form of a Benzodiazepine and narcotic analgesic.

"In terms of her returning to work, I think it is unlikely that she can do anything for prolonged periods of time. If at all, she may be able to sit or stand for 20 minutes at a time with frequent breaks throughout the day. However, as a result of the medication she needs to take in order to control her pain, I think her ability to perform her present duties at the [employing establishment] would be very unsuccessful. I think her ability to perform her job would be quite impaired due to her medication regimen, and I feel that these medications are medically

necessary. At this time, I feel compelled not to recommend that she return to work because of the reasons listed above."

Following an oral hearing before an Office hearing representative on June 23, 1997, appellant submitted a July 1, 1997 report from Dr. Badeen. Addressing whether appellant's chronic pain syndrome was causally related to her accident on September 29, 1994, Dr. Badeen reported as follows:

"First of all, I would like to state that [appellant] was functioning normal without any type of chronic pain problems except for an occasional migraine headache before this accident. She has been severely debilitated since the accident and I do feel that her chronic pain syndrome is related to the accident and is causally related.

"The accident initially occurred in September of 1994. It was a high impact injury and I see this chronic pain syndrome quite frequently in patients that were fine without complaints prior to high impact injuries, and afterwards they have chronic pain at multiple sites. During this [motor vehicle administration] MVA, she developed right rib fractures, multiple contusions involving her upper body and lower body. She also had a possible T5 compression fracture of her back in again an area where she has chronic pain at the present time. She also experienced a postconcussion syndrome which can last six to eight weeks after an injury but can plague a patient with headaches and dizziness for many years post injury. The etiologic nature of this is unclear per neurologic studies. Even though some of her diagnostic studies in the past have been normal, they did document fractured ribs on the right side.

"I feel this has to be reevaluated because we are dealing with a young woman who was completely pain free prior to September 29, 1994, except for an occasional migraine headache, and after this she [has] had chronic pain syndrome and postconcussion symptoms since that time which are clearly related to the accident. No other injury or work-related injury occurred prior to this and the accident did occur during her normal working activities."

In a decision dated August 21, 1997, the Office hearing representative affirmed the termination of appellant's monetary compensation on the grounds that she failed to provide sufficient medical documentation to support her refusal of the suitable job offer.

The Board finds that the Office properly terminated appellant's monetary benefits on the grounds that she refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[3] The Office

[3] 5 U.S.C. § 8106(c)(2).

has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[5]

The Office met its burden in this case. It received ample evidence in 1995, from referral and attending physicians alike, that appellant was no longer totally disabled for work and should attempt to return to light or limited duty. Reports from appellant's primary care physician, Dr. Badeen, and a consulting orthopedist, Dr. Lebel, supported that appellant might be able to resume light or limited duty as early as March 1995. In April 1995 Dr. Kline, the Office referral physician, reported from a neurological standpoint that appellant was immediately able to assume light- or limited-duty work, though he recommended an antidepressant for what he suspected or feared was a very definite magnified pain syndrome or perhaps chronic pain syndrome. He reported that it was fully reasonable and appropriate for appellant to return to work at two hours a day and after one week increase her hours one hour per day per week. Dr. Smith, another consulting physician, reported that a return to work trial was not an outrageous concept and that a return to work in the face of decreased muscle spasm would be useful. Appellant's actual return to part-time work in June 1995 demonstrated that she was no longer totally disabled for work. It was not until September 1995 that Dr. Badeen reported that appellant was unable to drive until further notice due to her chronic pain syndrome and to the medications she was taking.

After securing a functional job description of appellant's regular job, the Office referred appellant to Dr. Herzog for an opinion on whether she could perform the duties of that position. Dr. Herzog's diagnoses included chronic pain syndrome, diffuse myofascial pain and deconditioning syndrome. It was his opinion that appellant could perform the full duties of the position of service representative, but because of her deconditioning he recommended that she start her days at one-half time, four hours a day and increase her one hour a week until she reached eight hours a day as her endurance increased. Dr. Herzog addressed the issue of appellant's medication and ability to drive by noting this potential problem could be eliminated by simply not using pain medications prior to driving. Ideally, he reported, appellant should use nonnarcotic pain relievers: "Then this issue would be eliminated."

The evidence of record thus showed that the position of service representative was suitable and currently available. The Office properly so advised appellant, notified her of the penalty provision of 5 U.S.C. § 8106(c)(2) and allowed her 30 days either to accept the offer or to explain her reasons for refusing. The only response the Office received within this time was

[4] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[5] *Glen L. Sinclair*, 36 ECAB 664 (1985).

the November 7, 1995 letter from appellant's attorney, who stated simply that appellant had no work capacity and that he was requesting a report from Dr. Badeen on the matter.

By December 4, 1995 the Office had received no further evidence. The record demonstrated that appellant could work. The medical evidence set forth specific restrictions on her ability to work and established that the specific job requirements of the offered position were within her work restrictions. The Office therefore met its burden of showing that the work offered to and not accepted by appellant was suitable and properly invoked the penalty provision of 5 U.S.C. § 8106(c)(2).

The Board also finds, however, that medical evidence subsequently received by the Office has created a conflict on the issue of suitability.

On December 12, 1995 the Office received a report from Dr. Badeen stating that appellant had a severe chronic pain syndrome as a result of her motor vehicle accident and that multiple orthopedic evaluations and physical therapy and various pain modalities were unsuccessful in resolving her pain. As a result, he explained, the only medications she was able to take were a muscle relaxer in the form of a Benzodiazepine and narcotic analgesic. Dr. Badeen reported that it was unlikely that appellant could do anything at work for prolonged periods of time. More significantly, he reported that appellant's ability to perform her duties would be very unsuccessful as a result of the medication she needed to take in order to control her pain. Because her ability to perform her job would be quite impaired due to her medication regimen, which he felt was medically necessary, Dr. Badeen was compelled not to recommend that she return to work. In a July 1, 1997 report, Dr. Badeen offered his medical reasons for relating appellant's chronic pain syndrome to her accident on September 29, 1994.

Section 8123(a) of the Act provides in part: "If there is 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."[6]

After the termination of appellant's monetary compensation, the receipt of Dr. Badeen's report on December 12, 1995 created a conflict with opinion obtained from the Office referral physician, Dr. Herzog. The physicians disagreed on the nature of appellant's necessary medication regimen and on her ability to perform the duties of her position under medication. To resolve this conflict between appellant's physician and the Office referral physician, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial specialist for an opinion on the suitability of the offered position, particularly as it relates to appellant's medication regimen. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on the suitability of the offered position and on appellant's entitlement to monetary compensation.

The August 21, 1997 decision of the Office of Workers' Compensation Programs is affirmed on the issue of whether the Office properly terminated appellant's monetary

[6] 5 U.S.C. § 8123(a).

compensation on December 4, 1995. The August 21, 1997 decision is otherwise set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
October 25, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member