U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGDALIA BOCANEGRA and U.S. POSTAL SERVICE, POST OFFICE, Bronx, NY

Docket No. 98-76; Submitted on the Record;
Issued September 10, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she failed to accept an offer of suitable work.

On November 13, 1996 appellant, then a 29-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on November 12, 1996 she sustained an injury to her lower back. She explained that she felt a pinch in her back while picking up two relay bags; one of which weighed in excess of 70 pounds. Appellant ceased work on November 13, 1996. A physician retained by the employing establishment examined appellant on November 13, 1996 and found that she was not fit for duty due to her employment-related "low back strain." Dr. Walter J. Cersarski, III, a chiropractor, subsequently examined appellant on November 20, 1996 and diagnosed lumbar sprain and strain.[1] He noted that appellant was unable to perform her regular work duties. Appellant's chiropractor subsequently referred her to Dr. Richard O. Kling, a Board-certified orthopedic surgeon, who examined her on December 12, 1996 and diagnosed lumbosacral radiculopathy. Dr. Kling concluded that appellant was unable to resume her regular work duties and recommended that she continue treatment with her chiropractor. In a report dated January 6, 1997, appellant's chiropractor indicated that she would be able to resume light-duty work as of January 13, 1997.[2]

The employing establishment offered appellant a limited-duty position effective January 13, 1997, which she accepted on January 9, 1997. However, shortly after returning to work, appellant sustained a recurrence of disability on January 24, 1997 and she ceased working

[1] A November 21, 1996 x-ray of appellant's lumbar spine was interpreted as revealing disc space narrowing at L5-S1 and lumbar vertebrae subluxation at L5.

[2] Dr. Cesarski explained that appellant must refrain from any lifting or carrying or extended periods of bending or squatting for at least 30 to 45 days. He also indicated that appellant should be permitted to sit and rest at half-hour intervals.

on January 27, 1997. In a January 24, 1997 report, Dr. Cesarski described appellant's condition as "exacerbation of low back pain as [a] result of [a] prior work related accident." He found appellant to be totally disabled, but indicated that she should be able to resume work on or about February 7, 1997. In a follow-up report dated February 7, 1997, Dr. Cesarski indicated that appellant "should refrain from work duties till [sic] further notice." Appellant subsequently filed a notice of recurrence of disability (Form CA-2a) on February 13, 1997, in which she explained that her condition would become more painful after 90 minutes of work and as she continued to work thereafter, the pain would worsen. Appellant further explained that the "pain escalated due to Mr. Spargenburg slapping the injured area."

The Office accepted appellant's claim for subluxation of the lumbar region and lumbosacral radiculopathy and awarded her appropriate compensation for lost wages for the periods December 28, 1996 through January 12, 1997 and January 27 through March 1, 1997.[3] On March 5, 1997 the Office advised appellant that she would be placed on the periodic roll payment system through March 1, 1998 or until she returned to work, whichever occurred first.

In a March 5, 1997 work capacity evaluation report (Form OWCP-5c), appellant's chiropractor, Dr. Cesarski, indicated that she was capable of performing part-time, light-duty work.[4] However, on March 18, 1997, he indicated that appellant should refrain from work duties until further notice. Shortly thereafter, appellant discontinued her treatment with Dr. Cesarski.

On March 28, 1997 appellant began treatment with a new physician, Dr. Joseph M. Waltz, a Board-certified neurosurgeon. In a report dated March 31, 1997, Dr. Waltz provided a diagnosis of lumbosacral radiculopathy. In a subsequent report dated April 7, 1997, he indicated that appellant was unable to work. Dr. Waltz issued similar reports dated April 28 and June 9, 1997. However, on June 15, 1997 Dr. Waltz submitted Form OWCP-5c indicating that appellant was capable of working four hours per day with certain physical limitations.[5]

On July 10, 1997 the employing establishment offered appellant a part-time, limited-duty position ostensibly consistent with the physical limitations imposed by Dr. Waltz.[6] The modified assignment consisted of "casing mail, writing second notices and answering telephones." Appellant accepted this position on July 18, 1997 with the caveat that she would

[3] Additionally, appellant received continuation of pay from November 13 through December 27, 1996.

[4] Dr. Cesarski noted that appellant was capable of working zero to four hours per day with limitations of kneeling, bending, twisting and lifting over ten pounds. He further indicated that these limitations would apply for a period of four to six weeks.

[5] Appellant's limitations included no pushing, pulling, lifting, bending, squatting, climbing, kneeling and twisting. Additionally, appellant was limited to one hour of walking and standing and two hours of sitting. The record also indicates that appellant was advised to undergo physical therapy treatments three times per week for at least four weeks.

[6] The employing establishment had previously extended appellant a limited-duty job offer based on Dr. Cesarski, March 5, 1997 Form OWCP-5c. Appellant declined this offer on April 11, 1997. She explained that she was no longer under Dr. Cesarski's care, and that Dr. Waltz was her current physician. Appellant later submitted evidence from Dr. Waltz indicating that she remained unable to work. Based on this information, the employing establishment effectively rescinded its April 2, 1997 limited-duty job offer.

not be able to case mail because it required bending, twisting and lifting. Dr. Waltz reviewed the job offer and on July 21, 1997. He indicated that the position could be accepted with the modification that appellant not be required to case mail. Consequently, the employing establishment amended its job offer on July 29, 1997. The amended modified assignment consisted of "separating mail into street for carriers (mail will be placed on the table), writing second notices and answering telephones."[7] The Office also informed appellant on July 29, 1997 that it found the limited-duty position to be suitable for her work capabilities and allowed appellant 30 days to either accept the position or provide an explanation for refusing the position.

In a decision dated September 12, 1997, the Office terminated appellant's compensation based upon her failure to accept suitable employment. The Office explained that the July 29, 1997 amended limited-duty job offer had been deemed suitable to appellant's medical limitations and work experience. The Office further explained that no response regarding the job offer had been received within the allotted time and that the position remained available.[8] Inasmuch as appellant did not return to work, the Office terminated her benefits effective September 14, 1997. Appellant subsequently filed an appeal with the Board on October 6, 1997.[9]

The Board finds that the Office properly terminated appellant's disability compensation on the grounds that she failed to accept an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[10] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[11] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[12] To

[7] The amended limited-duty job offer also noted that "All assigned duties will be in strict compliance with your medical restrictions and can be performed to allow intermittent sitting (2 hours), walking (1 hour), standing (1 hour). No lifting, pushing, pulling, bending, squatting, climbing, kneeling [or] twisting. Can reach or work above the shoulder. May work four (4) hours per day."

[8] The Office also noted that "A request for more physical therapy treatment was made." Actually, this June 13, 1997 request for authorization of physical therapy was initially submitted to the Office on June 17, 1997 in conjunction with Dr. Waltz' June 15, 1997 Form OWCP-5c. The Office apparently did not respond to the request and, therefore, it was resubmitted on August 13, 1997 and again on August 14, 1997. The Office subsequently approved the request for physical therapy by letter dated August 15, 1997.

[9] The record on appeal includes evidence that was not submitted to the Office prior to the issuance of its September 12, 1997 decision. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

[10] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[11] 5 U.S.C. §§ 8101-8193.

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

justify termination of compensation, the Office must show that the work offered was suitable,[13] and must inform appellant of the consequences of refusal to accept such employment.[14]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[15] The Board finds that the probative medical evidence indicates that the position offered was within appellant's medical restrictions. Dr. Waltz, appellant's treating physician, objected to the employing establishment's initial limited-duty job offer solely on the basis that appellant could not perform the required duty of casing mail. Although Dr. Waltz did not offer an explanation as to why he believed appellant could not case mail, the employing establishment nonetheless amended its initial offer to exclude this particular job duty.[16] Instead of casing mail, the July 29, 1997 amended limited-duty offer required that appellant "separat[e] mail into street for carriers…." Additionally, the offer provided that the mail would be placed on the table, thus apparently alleviating the need for any undue bending or lifting. Furthermore, the offer clearly indicated that "[a]ll assigned duties [would] be in strict compliance with [appellant's] medical restrictions…." The restrictions outlined in the offer were consistent with those identified by Dr. Waltz in his June 15, 1997 Form OWCP-5c. As such, the medical evidence supports the Office's determination that the July 29, 1997 amended limited-duty offer was suitable to appellant's medical limitations and work experience. Moreover, the record indicates that the position remained available as of September 4, 1997.

With respect to the procedural requirements for termination under section 8106(c), the Office advised appellant, by letter dated July 29, 1997, that the position of limited-duty city carrier offered by the employing establishment was found to be suitable and appellant had 30 days to either accept the offer or provide reasons for refusing the offer. The Office further informed appellant that at the expiration of 30 days, a final decision would be issued and that if she refused to accept the position, any explanation or additional evidence offered would be considered prior to determining whether her reasons for refusing the job were justified. Inasmuch as the Office did not receive a timely response to its July 29, 1997 notice, the Office terminated appellant's compensation benefits for failing to accept suitable work. The Board, therefore, finds that the Office properly followed the procedural requirements for termination under section 8106(c).

As appellant failed to accept an offer of suitable work, the Office properly terminated her compensation benefits pursuant to 5 U.S.C. § 8106.

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[13] *Arthur C. Reck*, 47 ECAB 339 (1996).

[14] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

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

[16] On July 18, 1997 Dr. Waltz indicated that appellant could accept the employing establishment's July 10, 1997 limited-duty offer. However, on July 21, 1997, he indicated that the position could be accepted with the following modification: "[Patient] cannot do casing of mail." While Dr. Waltz did not offer an explanation as to why he believed appellant was unable to case mail, appellant explained that it was impossible for her to perform this particular duty because it required "bending, twisting and lifting."

The decision of the Office of Workers' Compensation Programs dated September 12, 1997 is, hereby, affirmed.

Dated, Washington, D.C.
September 10, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member