U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HEDY C. MARIAS and OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF RETIREMENT PROGRAMS, Washington, DC

Docket No. 97-1964; Submitted on the Record;
Issued April 6, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment.

On December 7, 1990 appellant, then a 39-year-old program analyst, filed a notice of occupational disease and claim for compensation alleging that on November 8, 1990 she first realized her cervical radiculitis was due to her federal employment.[1] On June 11, 1991 the Office accepted the claim for cervical strain and cervical radiculopathy. The Office later expanded this to include aggravation of a preexisting depression. Appellant stopped work and received appropriate benefits.

On January 11, 1991 appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on August 16, 1990 she picked up several drafting boards and felt pain and tingling radiating from her neck to her arms, hands and fingers.[2] The Office accepted the claim for cervical stain on June 3, 1991.[3]

On January 28, 1992 appellant filed a claim for a recurrence of disability from her accepted August 16 and November 8, 1990 employment injuries, which the Office accepted.[4]

[1] This was assigned claim number A25-378478.

[2] Appellant had previously filed a claim alleging that on December 2, 1975 she injured her neck, lower back, legs and shoulder blades when she fell to the floor out of the chair she was sitting in.

[3] This was assigned claim number A25-379624.

[4] Appellant alleged a recurrence of disability on January 14, 1992 due to her August 16, 1990 employment injury and January 21, 1992 due to her November 8, 1990 employment injury.

In a report dated August 31, 1995, Dr. Brian M. Schulman, a second opinion Board-certified psychiatrist, opined that appellant could return to work in late September on a 20 hour per week basis. Dr. Schulman stated that the Office should consult with her attending physician as to any physical restrictions. It was his opinion that appellant was capable of handling light typing, clerical/administrative work and using the computer occasionally.

In a report dated September 7, 1995, Dr. Roger V. Gisolfi, a second opinion physician Board-certified in physical medicine and rehabilitation, based upon a physical examination, employment history and a review of the medical records, diagnosed chronic cervical myofascial pain syndrome and depression. Dr. Gisolfi opined that appellant's "current symptoms are due to the postural demands of a lifetime. They are not exclusively referable to working at her desk" at the employing establishment and that appellant was capable of performing her duties as a program analyst. Lastly, he recommended that appellant's future treatment "should emphasize an active exercise reconditioning program."

In a September 21, 1995 letter, Dr. Samuel J. Potolicchio, Jr., an attending Board-certified neurologist, indicated that appellant was totally disabled due to her cervical radiculopathy and her severe chronic pain.

By letter dated October 13, 1995, the employing establishment offered appellant a light-duty position working 20 hours per week performing the functions, normal duties and responsibilities of a GS-12 management analyst "consistent with those restrictions imposed by Dr. Brian Schulman as communicated to us by [the] Office." The employing establishment noted that appellant's working space had been "reconfigured to accommodate her physical limitations."

In a letter dated October 18, 1995 the Office, in response to a telephone conversation with appellant on October 18, 1995, advised appellant that based on the medical evidence she was capable of performing light duty. The Office informed appellant of the penalty provisions under 5 U.S.C. § 8106, which states that a disabled employee who refuses a suitable job offer is not entitled to compensation. Lastly, the Office advised appellant that it had not accepted that appellant had any disability due to conflicts with her supervisor.

By letter dated October 20, 1995, appellant through her counsel indicated that she could not accept nor reject the position as the job offer failed to comport with the applicable regulations.

By letter dated October 30, 1995, the Office requested a second opinion from Dr. Gisolfi as to whether appellant was capable of performing the light-duty position offered by the employing establishment.

By letter dated October 30, 1995, appellant's counsel submitted a September 21, 1995 report from Dr. Potolicchio. In this letter, he opined that appellant was totally disabled due to her cervical radiculopathy. The physician noted that the "severe chronic pain that she experiences radiates from her neck down into her arms, hands and fingers making it impossible for her to work."

On October 31, 1995 the Office issued a proposed notice of termination of benefits based upon the reports of Drs. Gisolfi and Schulman.

By letter dated November 28, 1995, appellant's attorney submitted a November 21, 1995 report by Dr. Lewis Winkler, an attending Board-certified psychiatrist and neurologist, in response to the October 31, 1995 proposed notice of termination. Dr. Winkler, in his November 21, 1995 report, diagnosed major depression and chronic pain syndrome with chronic cervical radiculopathy. The physician agreed "that she could psychiatrically attempt (I do not know whether medically she could handle this) to return to work on a four[-]hour day, five[-]day week sub. with 'medically determined' (per Dr. Potolicchio's advise and consent.) [l]ight duty." Regarding the job offer, Dr. Winkler opined that it failed to meet Dr. Schulman's recommendation of a position in either another department or under a different supervisor.

Appellant submitted a November 29, 1995 report by Dr. Potolicchio. In a November 29, 1995 report, Dr. Potolicchio indicated that the position offered by the employing establishment was unsuitable as the duties of standing in a stationary position for prolonged periods, sitting for prolonged periods, using the keyboard, grasping objects and handwriting aggravate or irritate the spinal nerve and trigger the onset of pain episodes. He also opined that appellant had not recovered from her 1990 employment injury and that at the time of her second opinion appointments she had been out of work for approximately eight months. Dr. Potolicchio noted that appellant's job duties "bring on episodes of severe pain even though she has received ergonomic equipment. The pain situation continues to aggravate her depressive reaction."

By letter dated December 1, 1995, the Office advised appellant that the medical opinions of Drs. Potolicchio and Winkler were insufficient to support a refusal of the light duty offered by the employing establishment. The Office informed appellant that she had an additional 15 days to provide medical evidence to support her refusal. The Office also informed appellant that absent any supporting medical evidence that her compensation would be terminated effective December 16, 1995.

By decision dated December 18, 1995, the Office terminated appellant's compensation benefits effective that day on the basis that she refused an offer of suitable employment.

Appellant requested a hearing, which was held on August 26, 1996. At the hearing appellant was represented by counsel and allowed to testify.

In a May 7, 1996 report, Dr. Potolicchio diagnosed recurrent cervical C6 radiculopathy and chronic pain. He also noted that appellant's condition worsened in 1991 such that she was totally disabled for the period January 1992 to May 1992 when she returned to work and that she stopped work in January 1995. Lastly, Dr. Potolicchio noted that appellant's syndrome began in 1990 and that "there has been progression most probably aggravated by her work-related injury in August 1990. The two electromyograms done shortly after that injury evidence a severe trauma that was unverified until the 1996 magnetic resonance imaging [scan]. Her chronic condition is a permanent disability."

In an August 22, 1996 report, Dr. Winkler diagnosed major severe depression, herniated disc at C5-6 and severe stressors. He noted that he had treated appellant since June 15, 1991 for

treatment-resistant depression due to her chronic pain syndrome, which was due to her cervical disc herniation and both personal and work-related stress. As to returning to work, Dr. Winkler opined that "both medically and psychiatrically, it would be catastrophic for her to return to work *at all*." (Emphasis in the original.) He further noted that if appellant was "forced to return to work, she could become suicidal, regress and need day- or full-time psychiatric hospitalization. In any event, she is too phobic, panic-stricken and regressed to consider any return. It would cause *undue* personal and psychic harm." (Emphasis in the original.) Lastly, he stated that appellant was unable to "function *whatsoever* in the work-environment at all." (Emphasis in the original.)

By decision dated February 6, 1997, the Office hearing representative affirmed the termination of benefits.

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[5] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation 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 a showing before entitlement to compensation is terminated.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9]

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 medical evidence.[10] In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the

[5] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[6] *See Leonard W. Larson*, 48 ECAB 507 (1997).

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

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

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

[10] *Marilyn D. Polk*, 44 ECAB 673 (1993).

accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

In this case, the light-duty position offered by the employing establishment was found to be within the physical restrictions specified by the second opinion physician, Dr. Schulman, who examined appellant on August 31, 1995 and indicated that appellant was capable of performing light typing, clerical/administrative work and using the computer occasionally. Dr. Gisolfi, a second opinion physician, in a report dated September 7, 1995, indicated that appellant was capable of performing her duties as a program analyst. However, Dr. Potolicchio, appellant's treating physician, specifically opined in his September 21, 1995 report that appellant remained totally disabled due to her cervical radiculopathy and her severe chronic pain. Furthermore, Dr. Winkler, in an August 22, 1996 report, opined that appellant was totally disabled from both a psychiatric and medical aspect due to her employment injury. Thus, the opinions of Drs. Potolicchio and Winkler are in conflict with the opinions of Drs. Schulman and Gisolfi, as to whether appellant is totally disabled and capable of returning to light-duty work.

When there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[12] Based on the above conflict in medical oipinion the Board finds that the Office improperly invoked the penalty provision of section 8106(c) in this case. The record contains insufficient evidence to meet the Office's burden to show that the modified position appellant was offered was suitable.[13] The Office, therefore, improperly terminated appellant's benefits effective December 16, 1995.

[11] *Connie Johns*, 44 ECAB 560 (1993).

[12] 5 U.S.C. § 8123(a); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

[13] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

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

Dated, Washington, D.C.
April 6, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member