U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORRAINE C. HALL and U.S. POSTAL SERVICE, POST OFFICE, Millington, NJ

Docket No. 98-280; Submitted on the Record;
Issued April 14, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138.

The Board has duly reviewed the case record in the present appeal and finds that the Office improperly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] 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.[3] To justify termination of compensation, the Office must show that the work offered was suitable[4] and must inform appellant of the consequences of refusal to accept such employment.[5] Office

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

[2] 5 U.S.C. §§ 8101-8193.

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

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

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

procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[6] The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[7]

In the instant case, appellant sustained an employment-related injury on March 18, 1993, which the Office accepted for a fractured right ankle. Additionally, the Office authorized two surgical procedures. On September 17, 1994 appellant returned to work in a limited-duty, part-time capacity. Dr. Robert M. Lombardi, a Board-certified orthopedic surgeon and an Office referral physician, examined appellant on May 31, 1995 and he concluded that appellant was capable of working an eight-hour day. He indicated that appellant was capable of standing and walking up to four hours per day and that she could perform a sedentary position the balance of the day. Appellant's treating physician, Dr. Dean L. Carlson, also Board-certified in orthopedic surgery, reviewed Dr. Lombardi's report and concurred with his assessment regarding appellant's ability to work an eight-hour day. The employing establishment subsequently prepared a full-time, limited-duty job offer as a modified window clerk, which was approved by both Drs. Lombardi and Carlson. On October 26, 1995 the employing establishment offered appellant the limited-duty position; however, she declined the offer on November 14, 1995. The same day she declined the offer, appellant filed a notice of recurrence of disability (Form CA-2a). She alleged that upon returning to work in a limited-duty capacity her pain persisted because she was required to stand for longer periods than the position description indicated. Appellant ceased working on November 13, 1995.

By letter dated November 21, 1995, the Office informed appellant that it found the offered position to be suitable for her work capabilities and allowed appellant 30 days to either accept the position or provide an explanation for her refusal. In response, appellant submitted a brief note, dated November 10, 1995, from Dr. Albert A. Milanesi, an orthopedic surgeon.[8] He indicated that appellant's ankle condition prevented her from working for a period of eight weeks. Dr. Milanesi also advised that appellant required surgery to remove the hardware that had originally been placed in her right ankle on March 18, 1993. The surgery was scheduled for January 30, 1996.

On December 27, 1995 the Office advised appellant that her reason for declining the offered position was unacceptable and that she had 15 days to accept the position. She did not accept the position and she subsequently underwent surgery as scheduled on January 30, 1996.

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[6] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

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

[8] On August 26, 1995 appellant advised the Office that she wished to change physicians because she was not satisfied with the care she had received from Dr. Carlson. She later advised the Office that she had made arrangements to see Dr. Milanesi. On November 20, 1995 the Office denied appellant's request to change physicians and advised her that she would be responsible for all bills incurred from Dr. Milanesi's treatment.

In a decision dated March 8, 1996, the Office terminated appellant's compensation based upon her failure to accept suitable work. She subsequently filed a request for reconsideration, which the Office denied in a merit decision dated April 17, 1997. Appellant filed a second request for reconsideration on May 15, 1997, which the Office similarly denied on August 5, 1997 without reaching the merits of appellant's claim. She filed an appeal with the Board on October 21, 1997.

At the time the Office terminated benefits, appellant was recuperating from ankle surgery performed on January 30, 1996. Thus, while the limited-duty position that was initially offered on October 26, 1995 was still available, there is no indication that appellant was capable of performing the described duties at the time the Office terminated compensation on March 8, 1996. In its most recent merit decision, the Office characterized the evidence provided by Dr. Milanesi as being of limited probative value. Quite to the contrary, the fact that appellant underwent additional surgery to remove hardware inserted in her ankle during a previously authorized surgical procedure should have been an indication to the Office that appellant's pain prevented her from standing as the position description required and at a minimum further development of the medical evidence was required. While the Office might not have been satisfied with the initial evidence provided by Dr. Milanesi, his recommendation of surgery to remove previously approved inserted hardware at least warranted further investigation on the part of the Office. Neither Drs. Lombardi nor Carlson were requested to address whether the surgery was unnecessary or inadvisable. Consequently, the Board finds that appellant presented reasons and medical evidence requiring further development of the case record. Furthermore, the Board notes that the Office did not specifically address appellant's November 14, 1995 claim for recurrence of disability. Under the circumstances, the Office has failed to meet its burden of proof and, accordingly, the decision to terminate compensation is reversed.

The decisions of the Office of Workers' Compensation Programs dated August 5 and April 14, 1997 are, hereby, reversed.[9]

Dated, Washington, D.C.
April 14, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[9] Given the Board's disposition of the merit issue in the present case, it is not necessary for the Board to specifically address the nonmerit issue of whether the Office, by decision dated August 5, 1997, properly denied appellant's May 15, 1997 request for reconsideration.