U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS O. LEWIS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Washington, DC

Docket No. 99-1255; Submitted on the Record;
Issued August 25, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) 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; and (2) whether the Office's refusal to reopen appellant's claim for further merit review constituted an abuse of discretion.

On October 10, 1996 appellant, then a 28-year-old legal technician, slipped and fell down some stairs while in the performance of duty and injured her right knee. The Office accepted the claim for the condition of tear of the right medial meniscus and approved a subsequent arthroscopic procedure. Appellant was placed on the periodic rolls. She resigned from the employing establishment effective November 3, 1997.

On April 28, 1997 Dr. Debra K. Spatz, a Board-certified osteopath specializing in orthopedics and appellant's attending physician, opined that appellant was able to work in the office in a wheelchair so long as there was no kneeling, bending, or squatting and no standing more than one hour each day. It was further noted that transportation was needed as appellant was unable to drive a standard transmission.

In a July 18, 1997 report, Dr. Gerald D. Schuster, a Board-certified orthopedic specialist and an Office referral physician, examined appellant and reviewed the medical record. He advised that appellant was able to return to her job with restrictions and, with physical therapy, appellant should be able to operate a stick shift automobile within two to three weeks.

The field nurse associated with the case noted that appellant's treating physician had released appellant to light duty, eight hours per day, with some restrictions, including no bending, or kneeling, which Dr. Spatz deemed as permanent. The field nurse noted that Dr. Spatz initially restricted the amount of walking that appellant could do to one hour daily and restricted her from walking the block and a half into the building from the bus. Dr. Spatz also restricted appellant's driving to a 20-minute drive, from her home to catch the bus, which was a

½ hour drive. The field nurse related that she had located a new bus service within a 10-minute drive from appellant's home. A vanpool driver was also located.

By decision dated November 28, 1997, appellant was awarded a 31 percent permanent impairment to her right lower extremity commencing November 1, 1997 for a period of 89.28 weeks.

The employing establishment made a limited-duty job offer to appellant as a legal technician, which noted that someone else would do the pushing, pulling, kneeling, bending and reaching and advised that a wheelchair could be accommodated. One hour of standing and one hour of walking small distances was noted.

On November 28, 1997 appellant was advised that the position of legal technician was found to be suitable by the Office and was provided 30 days in which to accept or refuse the offered job. Appellant was specifically advised of the provisions of 5 U.S.C. § 8106(c)(2).

In an undated letter received by the Office December 30, 1997, appellant rejected the job offer stating that the bus transportation, which the nurse found for her would not get her home until 7:30 p.m. and that she was unable to find a babysitter for her kids till 7:30 p.m.

By letter of April 10, 1998, the Office advised appellant that neither her transportation concerns nor her child care arrangements had any bearing on her ability to perform the limited-duty position. Accordingly, appellant's reasons for refusing the offered position were deemed unacceptable. She was afforded an additional 15 days within which to accept the offered position. Appellant was specifically advised that, "[i]f you have not accepted this position by April 26, 1998, your schedule award, which you are currently in receipt of and any further entitlement to compensation for wage loss will be terminated." Appellant did not provide any response of acceptance or refusal of the offered position.

By decision dated July 23, 1998, the Office terminated appellant's entitlement to compensation effective August 16, 1998, finding that she refused or failed to accept suitable work within her medical limitations after it was offered to her by her employing establishment.

In a letter dated August 9, 1998, appellant requested reconsideration. Submitted with her request was an extract from a compensation benefits handbook publication entitled "Chapter 7: Compensation Benefits" and an August 3, 1998 report from Dr. Spatz.

By decision dated March 9, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not raise any substantive legal questions or valid arguments and did not include any new or relevant evidence. Accordingly, the Office declined to reopen appellant's case on the merits.

The Board finds that the Office properly terminated appellant's monetary compensation based on her refusal of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by,

or secured for him is not entitled to compensation.[1] Further, the Office has promulgated federal regulations under this section of the Act concerning an employee's obligation to return to work or to seek work when available. Section 10.124(c) provides:

> "Where an employee has been offered suitable employment (or reemployment) by the employing agency *(i.e.*, employment or reemployment, which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions, which preexisted the injury and within the limitations and restrictions, which resulted from the injury), or where an employee has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. 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 showing before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)(2) and paragraph (e) of this section."[2]

The Office's implementing regulations further provide, at sub section(e), as follows:

> "A disabled employee who, without showing sufficient reason or justification, refuses to seek suitable work or refuses or neglects to work after suitable work has been offered to, procured by, or secured for the employee, is not entitled to further compensation for total disability, partial disability, or permanent impairment as provided by sections 8105, 8106 and 8107 of the Act. An employee shall be provided with the opportunity to make such showing of sufficient reason or justification before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)."[3]

In the present case, the Office has properly exercised its authority as granted under the Act and implementing federal regulations.[4] The record on appeal demonstrates that, following the acceptance of appellant's claim for tear of the right medial meniscus causally related to her federal employment, the Office paid appropriate benefits and medical expenses. The employing establishment identified an eight-hour light-duty position within appellant's physical limitations. Appellant was properly notified by the Office that the selected position was found suitable and was advised that if she refused to accept the position her compensation benefits could be terminated. Appellant was provided with the opportunity to accept the position, but she declined the position stating that she had transportation and child care issues.

[1] 5 U.S.C. § 8106(c)(2).

[2] 20 C.F.R. § 10.124(c).

[3] 20 C.F.R. § 10.124(e).

[4] It is well established that once the Office accepts a claim, it has the burden of proof of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation entitlement under section 8106(c) for refusal to accept suitable employment; *see Shirley B. Livingston*, 42 ECAB 855 (1991).

The Board finds that the Office properly determined that appellant rejected an offer of suitable employment and met its burden of proof in terminating appellant's compensation benefits effective August 16, 1998. The evidence of record establishes that appellant was provided with the opportunity to accept or reject the position, following notification of the Office's determination of suitability of the offered position and advising appellant of the penalty for refusing to accept such employment. Appellant has not demonstrated, nor has she submitted any evidence, that the position was outside her physical limitations as recommended by her attending physician, Dr. Spatz. Additionally, the field nurse associated with the case found an acceptable bus service only a 10-minute drive from appellant's home, which is within Dr. Spatz's 20-minute driving restriction. Appellant's dissatisfaction with the transportation arrangements and resulting child care issues have nothing to do with the suitability of the offered position. Moreover, the physical restrictions and accommodations offered by the employing establishment are consistent with Dr. Spatz's permanent restrictions concerning no kneeling, bending, or squatting and no standing more than one hour each day. It is further noted that, although the record is not clear whether Dr. Spatz's restriction of having appellant walk the block and a half into the building from the bus was temporary or permanent, the van pool option solves this problem. Moreover, appellant has not submitted any medical evidence establishing that she was not physically capable of performing the duties of the light-duty position offered in this case. The Office, therefore, met its burden of proof to terminate appellant's monetary benefits effective August 16, 1998.

The Board also finds that the Office did not abuse its discretion by denying merit review of appellant's claim on March 9, 1999.

Under section 8128(a) of the Act,[5] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[6] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that the Office erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[7] If a claimant fails to submit relevant

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.606(b) (1999).

[7] 20 C.F.R. § 10.608(b) (1999).

evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.[8]

In this case, the Office properly declined to review the merits of appellant's claim. In requesting reconsideration, appellant was required to address the relevant issue of whether the Office improperly terminated appellant's compensation benefits after she refused suitable employment, which was offered to her under section 8106(c)(2). In support of her reconsideration request, appellant attempted to submit relevant and pertinent evidence not previously considered by the Office. Appellant's letter dated August 9, 1998 did not offer any relevant information not already before the Office at the time of its July 23, 1998 decision. The extract from a compensation benefits handbook publication entitled "Chapter 7: Compensation Benefits" does not contain a medical opinion concerning any causal relationship between appellant's claimed condition and her refusal of suitable work. Moreover, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[9] Therefore, this evidence does not pertain to the relevant issue of the case, *i.e.*, whether appellant properly refused suitable work. The Board has held that the submission of evidence, which does not address the particular issue involved is of little probative value.[10] Although the August 3, 1998 medical report from Dr. Spatz, which notes appellant's medical progress is new evidence, this evidence is not relevant in determining the suitability of the position offered to appellant.

Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether she properly rejected the offer of suitable employment, the Office acted within its discretion in declining to reopen the claim.

[8] *John E. Watson*, 44 ECAB 612, 614 (1993).

[9] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[10] *Supra* note 8.

The decisions of the Office of Workers' Compensation Programs dated March 9, 1999 and July 23, 1998 are affirmed.

Dated, Washington, D.C.
August 25, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member