U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY J. DECKER and DEPARTMENT OF THE ARMY,
DCS, G4, SUPPLY DIVISION, Fort Dix, NJ

Docket No. 98-276; Submitted on the Record;
Issued January 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On December 3, 1990 appellant, then a 54-year-old motor vehicle operator, filed a notice of traumatic injury and claim for compensation alleging that on November 29, 1990 she injured her right arm, shoulder and neck when she lifted a 14 gauge steel trap door to expose a fill pipe. The Office accepted the claim for a sprain of the right shoulder and arm. Appellant stopped work on December 3, 1990, received continuation of pay and wage-loss compensation. She returned to light duty from February to April 16, 1991. Appellant then left work in order to undergo an arthroscopic acromioplasty of her right shoulder on April 26, 1991 and an open exploration and repair of the rotator cuff on February 17, 1992. The Office authorized both procedures and physical therapy. Appellant has not worked since April 16, 1991.

In a (Form OWCP-5) work capacity evaluation report dated June 1, 1994, Dr. W. Francis Kennard, appellant's treating physician and a Board-certified orthopedic surgeon reported permanent work restrictions of no lifting, pushing or pulling. He noted that appellant was disabled from her prior job and opined that she could perform only sedentary work for eight hours a day.

On July 7, 1994 the employing establishment offered appellant a job as a modified accounting technician. The physical demands were identified as sedentary with eight hours of sitting, up to one hour of standing and walking, lifting and carrying up to two pounds, twisting from the waist occasionally, frequent reaching in a forward direction and intermittent grasping.

A copy of the job offer with the physical demands were provided to Dr. Kennard, who approved the position.

On July 22, 1994 appellant signed the job offer indicating that she declined the position. She submitted a statement dated July 22, 1997, noting that she did not have any accounting experience. Appellant expressed her concern that long periods of writing in the job would cause her right hand to go numb. She noted that she was fearful of having to drive to work in ice and snow as her shoulder condition would not allow her to control her car in the event of a skid. Appellant further noted that she was undergoing a severe case of depression.

By letter dated July 25, 1994, the Office notified appellant that the job offer had been found to be suitable with her work restrictions. She was given 30 days to accept the job offer or provide an explanation for her refusal of the position.

In a facsimile transmission dated July 27, 1994, Robert Sans, a vocational rehabilitation counselor, informed the Office that he had discussed the job offer with appellant and was verbally told by appellant that she would not accept the job offer as she planned to move to Florida and pursue disability retirement. Mr. Sans indicated that appellant suffered from depression and forwarded the Office a copy of a prescription form signed by Dr. Bartiss, a psychologist, which stated that appellant was restricted from work until an evaluation on July 29, 1994. According to Mr. Sans, during the time he worked with appellant, she presented every conceivable excuse as to why she could not return to work. He noted that the offered position had been further modified to allow appellant to use a voice activated computer program to alleviate her fear of overuse of her hand and arms. Mr. Sans also noted that while appellant did not have accounting experience, she had been informed that she would receive on-the-job training and a mentor to assist her in learning her new job.[1]

In a report dated September 6, 1994, Dr. Kennard advised that he had examined appellant for a sedentary job which she felt unable to perform due to the lifting requirements. He noted appellant's complaints of continued arm and shoulder weakness and recommended that an electromyogram be obtained. Dr. Kennard reiterated that appellant was only able to perform a strictly sedentary job that required "minimal writing, no lifting at all with the arm that is affected." He stated that for practical purposes, appellant was totally disabled unless she could be retrained to use her nondominant arm and was placed in a job that required minimal use of the upper extremities for any type of lifting. Dr. Kennard further noted that appellant was unable to undergo prolonged driving due to arm and shoulder pain.

By letter dated November 29, 1994, appellant, by counsel, notified the Office that she had relocated to Florida and provided her new address.

In a decision dated January 31, 1995, the Office terminated appellant's compensation effective February 12, 1995 on the grounds that she refused an offer of suitable work.[2]

[1] Attached to the facsimile transmission was a copy of the July 22, 1994 job offer signed by appellant rejecting the position and appellant's July 22, 1994 statement.

[2] A memorandum dated January 27, 1995 from the employing establishment to the Office confirmed that the modified position was still available.

On February 7, 1995 appellant requested a hearing, which was held on November 1, 1995.

In a decision dated January 19, 1996, an Office hearing representative affirmed the Office's January 31, 1995 decision.

By letter dated November 6, 1996, appellant requested reconsideration and submitted an October 13, 1996 report by Dr. Robert J. Caikin, a Board-certified psychologist. He noted appellant's medical history and opined that she suffered from depression related to her disability status. After discussing appellant's educational background and work experience, Dr. Caikin concluded that appellant did "not possess any skills transferable that could be seen as viable for the position of an accounting technician." With respect to the physical demands of the job offer, he noted that appellant would be required to use her right hand on a repetitive basis by writing and reaching which was not within her physical capabilities described by her treating physician. Dr. Caikin noted that appellant was right-hand dominant and would have to be retrained to use her nondominant left hand and arm for any specific job functions. Thus, he concluded that the job offered to appellant was not suitable work.

In a decision dated April 7, 1997, the Office denied modification following a merit review.

Appellant next requested reconsideration on April 24, 1997. In conjunction with her reconsideration request, she submitted a work evaluation report dated September 13, 1996 from Dr. Kennard. He indicated that appellant should limit reaching, lifting, pushing and pulling for no more than two hours per day. Dr. Kennard also noted that appellant was unable to lift her arm at all for any activity and that she was precluded from performing anything but sedentary work for six hours a day. The date of maximum medical improvement was listed as June 16, 1993.

In a decision dated July 21, 1997, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits on the grounds that she refused on offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects work after suitable work is offered to, procured by or secured for the employee.[3] Section 10.124(c) of the Code of Federal Regulations[4] 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 a determination is made with respect to termination of entitlement to

[3] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation." *See also Camilla R. DeArcangelis*, 42 ECAB 941 (1991).

[4] 20 C.F.R. § 10.124(c).

compensation.[5] To justify termination of compensation, the Office must establish that the work was suitable and must inform appellant of the consequences of refusal to accept such employment.[6]

The position of modified accounting technician was designed within the work restrictions provided by Dr. Kennard in the OWCP-5 work capacity evaluation report dated June 1, 1994. He was provided a copy of a detailed analysis of the job description and signed off his approval of the position. By letter dated July 25, 1994, the Office informed appellant that it had found the offered position to be suitable work and gave appellant 30 days to accept the position or provide an explanation for her refusal of the job. Although appellant did not personally respond to the suitability letter she informed the rehabilitation counselor, Mr. Sans, that she was rejecting the offer and submitted a doctor's slip indicating that she was unable to work until she was evaluated on July 29, 1994. Mr. Sans forwarded that information to the Office. Thus, within the 30-day period, the Office had in its possession a job rejection statement from appellant and a doctor's report relevant to appellant's refusal of the offered job. Contrary to Office procedures, however, the Office did not address whether appellant's reasons for refusing the job offer were acceptable and thereby provide appellant with an additional 15 days to accept the position of a modified accounting technician prior to terminating her compensation benefits

The Office's procedures provide that, after the Office determines that a position is suitable, it must advise the claimant that he or she has 30 days in which to either accept a job offer or provide an explanation for refusing it. The Board has held that, if a claimant responds within 30 days and gives reasons for not accepting the job offer, the Office must consider those reasons before it can make a final determination on the issue of suitability.[7] The Office must advise the claimant in writing that her reasons for rejecting the offer are not acceptable or reasonable and thereafter the claimant must be provided an additional 15 days to either accept or reject the offer of suitable work.[8]

In this case, because the Office did not properly consider appellant's reasons for refusing the position of modified accounting technician, the Office's suitability determination is in error. Because the Office did not follow the appropriate procedures for reaching its suitability determination, the Board concludes that the Office erred in terminating appellant's compensation benefits on the grounds that she refused an offer of suitable work.

[5] *Camilla R. DeArcangelis, supra* note 3.

[6] *David P. Camacho*, 40 ECAB 267 (1988); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] *Patsy R. Tatum*, 44 ECAB 490 (1993); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *Id.*

The decision of the Office of Workers' Compensation Programs dated April 7, 1997 is hereby reversed.

Dated, Washington, D.C.
January 4, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member