U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA M. STROUD and DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICES, CLAREMORE INDIAN HOSPITAL, Claremore, OK

Docket No. 98-476; Submitted on the Record;
Issued January 5, 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 for refusal to accept suitable employment.

On October 27, 1994 appellant, then a 41-year-old registered nurse, was helping to pull up an obese, quadriplegic patient when she developed pain in the right shoulder and neck. The Office accepted appellant's claim for a right shoulder sprain and a rotator cuff tear. Appellant stopped working on October 31, 1994. The Office began payment of temporary total disability. She underwent surgery on February 6, 1995 for a right rotator cuff repair and right shoulder acromioplasty with excision of the distal clavicle and coracocromial. Appellant returned to light-duty work on June 6, 1995 but stopped again on June 13, 1995 and filed a claim for recurrence of disability. The Office again began payment of temporary total disability compensation. On October 23, 1995 appellant underwent additional surgery for decompression with a second acromioclavicular arthroplasty of the right shoulder.

In a May 3, 1996 letter, the employing establishment offered appellant a position as a medical assistant. In a letter of the same date, the Office indicated that it found the job offered to appellant was suitable and gave appellant 30 days to accept the position or explain why she could not accept it. The Office warned appellant that if she failed to accept the position and failed to demonstrate that the failure was justified her compensation would be terminated. In a May 13, 1996 response, appellant declined the position. In a June 5, 1996 letter, the Office informed appellant that it found the job offered to appellant was suitable and stated that the reasons appellant gave for not accepting the position were found to be unacceptable. The Office indicated that appellant had 15 days to accept the position or the Office would issue a final decision. In a June 11, 1996 letter, the Office repeated its finding that the job was suitable for appellant and that her reasons for not accepting the position were unacceptable. She again was given 15 days to accept the position. In a June 26, 1996 decision, the Office terminated appellant's compensation on the grounds that appellant had refused suitable work. In a letter

postmarked July 26, 1996, appellant requested a hearing before an Office hearing representative. In an August 25, 1997 decision, the Office hearing representative affirmed the Office's June 26, 1996 decision.

The Board finds that the Office improperly terminated appellant's compensation based on her refusal to accept suitable employment.

Section 8106(c) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered … is not entitled to compensation."[1] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[2]

The Office based its decision on the reports of Dr. Thomas A. Marberry, a Board-certified orthopedic surgeon. In a February 7, 1996 office note, he stated that appellant had excellent motion of the right shoulder with no restriction. Dr. Marberry noted that appellant complained of considerable pain with elevation and extreme pain with palpation of the skin but commented that the subjective responses did not coincide objectively. In a February 8, 1996 work restriction evaluation, he indicated that appellant could sit, stand, walk, bend, squat, kneel or twist eight hours a day, climb intermittently two hours a day and lift intermittently one hour a day. Dr. Marberry noted that appellant could lift up to 10 pounds. He reported, however, that appellant could not work eight hours a day. In a February 20, 1996 letter, the Office requested clarification of Dr. Marberry's evaluation. In an undated response, he indicated that appellant could work eight hours a day if the restrictions could be affirmed. Dr. Marberry concluded that appellant could work eight hours a day.

Based on Dr. Marberry's report, the employing establishment offered appellant a position as a medical assistant in which she would, among other duties, coordinate case management for referrals and call-ins; assist in developing updated policies, procedures and standards for case management; obtain hospital diagnoses and request medical records; help review and update contracts, provider agreements and blanket purchase agreements; and implement new medicaid program requirements. The employing establishment indicated that the work was sedentary with no special requirements.

In a May 9, 1996 report, Dr. Marberry indicated that appellant appeared to be relatively comfortable when her arms were at waist level. He noted, however, that driving tended to bother appellant if she held her arms outstretched too much. Dr. Marberry related that appellant did not foresee any problems performing the duties of the position offered but was concerned about the driving involved in getting to the employing establishment. He stated that he did not know what could be done about driving but the actual job description, from a musculoskeletal situation, indicated that the job would be safe for appellant and would tend to protect her shoulder. Dr. Marberry commented that he did not want appellant engaged in heavy lifting activities or

[1] 5 U.S.C. § 8106(c).

[2] 20 C.F.R. § 10.124.

repetitive usage in an outstretched or overhead position. He estimated that appellant had a 35 percent permanent impairment of the right arm due to her shoulder condition.

In a June 5, 1996 letter, appellant indicated that her shoulder and cervical region would not be able to cope with a 156-mile round trip to and from work each day. She also noted that while she excelled in the high technology intensive care unit, but she had no training on computers and was not familiar with home health guidelines. In a June 10, 1996 letter, appellant indicated that her husband worked five days a week so he would not be able to drive her to and from work. Appellant noted that there was no bus service that would be able to get her from home to work. She stated that she would get pain, swelling and aggravation of her right shoulder driving to a town nine miles away.

In a September 9, 1996 report, Dr. Kenyon R. Kugler, a Board-certified neurosurgeon, stated that seven weeks previously appellant began to feel increasing shock-like pain in the right arm combined with a feeling of weakness and numbness in the right thumb. He noted that appellant continued to complain of severe pain in the right shoulder if she was trying to raise the arm above a horizontal position. Dr. Kugler reported appellant had a weakened grip in the right hand due to pain in the shoulder when attempting to squeeze. He noted decreased sensation of the thumb, index and middle fingers of the right hand. Dr. Kugler reported limited range of motion of the neck due to pain in the right shoulder. He commented appellant had diffuse tenderness over the right shoulder with some mild swelling over the clavicle and acromioclavicular joint. Dr. Kugler concluded appellant had symptoms of right C6 radiculopathy. In an October 21, 1996 report, he stated that a recent magnetic resonance imaging (MRI) scan showed a minimal suggestion of disc protrusion at the C5-6 and C6-7 levels with no significant evidence of impingement on the spinal cord and no evidence of impingement on the right neural foramina. Dr. Kugler indicated that appellant's interscapular pain suggested some persistent disc disturbance in her neck. He stated that it was impossible for appellant to return to work which entailed driving to work each day. A December 13, 1996 electromyogram (EMG) report showed mild carpal tunnel syndrome in the right wrist but was otherwise normal. In a December 18, 1996 report, Dr. Kugler stated that appellant had diffuse tenderness to palpation over the right shoulder. He commented that testing showed a weakened grip on the right side. Dr. Kugler noted that sensation was diffusely decreased in the right hand but did not conform to any dermatonal pattern. He indicated that x-rays and an MRI scan of the neck showed degeneration of the discs at several levels of the neck that did not appear to be severe or lateralized to the right side. Dr. Kugler stated that appellant continued to be unable to return to work which required regular use of the arm and shoulder because this would aggravate her symptoms. In a March 31, 1997 report, Dr. Kugler stated that appellant had limitation secondary to shoulder joint disease without evidence of radiculopathy. He indicated that because of appellant's recurring symptoms with driving, he did not feel appellant was capable of driving long distances such as the 150 miles round trip to work because of the aggravation of her symptoms.

Dr. Marberry indicated that appellant was able to return to work with only restrictions against heavy lifting and repetitive outstretched use of her arm. The position offered to appellant was a sedentary position which Dr. Marberry indicated was within appellant's work limitations. There is no medical evidence of record that showed appellant was unable to perform the duties

of the position of a medical assistant itself. The question presented however is whether appellant was able to travel to the location of the offered position. Appellant contended that she was unable to drive to the location of the offered position because her right shoulder condition would become aggravated from driving 150 miles a day. Under the Office's procedures, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work if supported by medical evidence.[3] Dr. Marberry indicated that appellant would encounter difficulty in repetitive motion in the arms in an outstretched position. Although Dr. Marberry made no direct prohibition on appellant's ability to drive over 150 miles a day, his restriction on repetitive motion of her arms in an outstretched position acknowledged that appellant had and would have difficulty in driving to and from work. Dr. Kugler stated directly, in several reports, that appellant would be unable to drive long distances because it would aggravate the pain in her right shoulder. The medical evidence of record therefore supports appellant's contention that she would be unable to drive the 156 miles to and from work because of her shoulder condition. This evidence in this case establishes that appellant presented a proper reason for refusing the offer of the position of medical assistant because she would encounter difficulty in traveling to work due to residuals of the employment injury. The Office did not further develop this aspect of the case by requesting further clarification from Dr. Marberry or Dr. Kugler. The Office, therefore, did not have an appropriate basis on which to terminate appellant's compensation for refusal to accept suitable work.

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996).

The decision of the Office of Workers' Compensation Programs, dated August 25, 1997, is hereby reversed.

Dated, Washington, D.C.
January 5, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member