U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN GUNDERSON and U.S. POSTAL SERVICE,
POSTAL OFFICE, Tampa, FL

Docket No. 98-1381; Submitted on the Record;
Issued January 20, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

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

On January 12, 1995 appellant, then a 32-year-old postal distribution clerk, filed a notice of occupational disease and claim for compensation alleging that she sustained a shoulder condition as a result of casing mail in the performance of duty. She indicated on her CA-2 form that she first became aware of her shoulder condition in February 1994. At the time her claim was filed, appellant was working in a light-duty position as a result of a prior work injury.[1] Her work hours were from 6:00 p.m. to 2:50 a.m. The Office accepted the claim for left impingement syndrome of the shoulder on January 27, 1995. Appellant stopped worked on December 8, 1994 and received compensation on the periodic rolls for total wage loss.

In support of her claim, appellant submitted treatment notes from her attending physician, Dr. Alfred V. Hess, a Board-certified orthopedic surgeon, indicating that she was treated intermittently during 1994 for complaints of left shoulder pain related to her work duties for which she was prescribed physical therapy. Dr. Robert J. Belsole, a Board-certified orthopedic surgeon, also treated her during that time for carpal tunnel syndrome.

In an October 19, 1994 report, Dr. Hess advised that appellant was at maximum medical improvement for her left shoulder impingement syndrome. He noted that appellant was not a good candidate for surgery based on her history of diabetes. Dr. Hess released appellant to work in a light-duty position with the permanent lifting restrictions of no more than 20 pounds and no continuous overhead activity.

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[1] Appellant filed an occupational claim for carpal tunnel syndrome, which was accepted by the Office. She was also involved in a nonwork-related car accident on July 8, 1994.

In a report dated November 11, 1994, Dr. Brendan C. O'Malley, a Board-certified endocrinologist, noted that appellant was an insulin-dependent diabetic and recommended that she only work between the hours of 8:00 a.m. and 6:00 p.m.

In a November 16, 1994 report, Dr. Conrad P. Weller, a Board-certified psychiatrist, diagnosed that appellant suffered from depression and anxiety. He also recommended that appellant only work a daytime shift between the hours of 8:00 a.m. and 6:00 p.m.

By letter dated January 17, 1995, the employing establishment noted that it had refused to accommodate appellant's request for a shift change because her medical problems were nonwork related.

The Office referred appellant, along with a copy of the record and a statement of accepted facts, to Dr. Gilberto E. Vega, a Board-certified orthopedic surgeon, for a second opinion evaluation on March 2, 1995. In a report dated March 13, 1995, Dr. Vega noted appellant's work and medical histories, and he discussed appellant's physical findings. He diagnosed that appellant had a mild impingement syndrome of the left shoulder. Dr. Vega opined that appellant could work within the medical limitations of no continuous overhead reaching and no overhead lifting of over 20 pounds as prescribed by Dr. Hess.

In a letter dated July 28, 1995, the Office requested that Dr. Hess provide an updated opinion as to appellant's ability to perform the functions of her job based solely on her left impingement syndrome.

The employing establishment offered appellant a position of modified manual distribution clerk, which was to be available August 24, 1995. The job was noted to be in conformance with the restrictions provided by Dr. Hess on October 19, 1994. The work hours were listed as between 2:00 p.m. and 9:00 p.m.

Dr. Hess signed the last page of the job offer on September 1, 1995 indicating his approval of the position.

By letter dated September 5, 1995, the Office determined that the modified position offered to appellant was suitable work. Appellant was then advised of the provision of 5 U.S.C. § 8106(c) and given 30 days from the date of the Office's letter to either accept the position or provide a written explanation of her reasons for refusing the job offer.

On September 13, 1995 appellant rejected the job offer. At that time she also resubmitted copies of the reports from Drs. O'Malley and Weller recommending that appellant only work between the hours of 8:00 a.m. and 6:00 p.m.

In a September 29, 1995 letter, the Office advised appellant that her reasons for refusing the offered position were unacceptable. She was informed that she had 15 days from the date of the Office's letter to accept the job offer and return to work or else her compensation benefits would be terminated.

In a report of a telephone call dated October 16, 1995, an Office claims examiner noted the following message: "diabetic -- can only work daylight [hours], 2:30 a.m. to 9:00 p.m. is only LD [available] but [employing establishment] has told her that they [will not] let her clock in due to diabetic [condition]." Appellant was advised to provide an explanation in writing.

By decision dated October 17, 1995, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.[2]

On October 8, 1995 appellant requested a hearing. In conjunction with her hearing request, she submitted an October 13, 1995 report from Dr. Hess, which reiterated his previous medical restrictions.

Appellant also submitted several progress notes from Dr. Edward N. Feldman, a Board-certified orthopedist, which diagnosed chronic impingement syndrome of the left shoulder, subdeltoid bursitis, and chronic inflammation of the rotator cuff. In a January 24, 1996 report, Dr. Feldman advised that appellant could work in a light-duty capacity without involving any movements over her head or repetitive use of her arms.[3]

In an October 16, 1996 report, Dr. Feldman noted that appellant continued to have severe symptoms of left shoulder pain, neck pain, as well as pain and numbness radiating down her left arm. He diagnosed chronic impingement syndrome of the left shoulder, cervical radiculopathy, and "R/O herniated disc." Dr. Feldman indicated that a herniated disc could mimic shoulder pain with arm pain. He opined that appellant was totally disabled and felt appellant was a candidate of arthroscopic evaluation and acromioplasty to the left shoulder.

A hearing was held on October 22, 1996. Appellant testified that the job offered to her by the employing establishment was the same job she was performing when she left work in December 1994, but with later hours. She stated that if the same job had been offered on the day shift she would have tried it. Appellant alleged that she called George Stratis, an employing establishment superintendent, on an unspecified date, and was told that she would not be allowed to clock in and work the hours of 2:30 p.m. to 9:30 p.m. given her medical conditions. According to appellant, she made several calls to the employing establishment "around the same time frame that her claim was being terminated" because she wanted to verify that she would be allowed to clock into work before showing up for work at that time of night and interrupting her daughter's sleeping schedule. The Office hearing representative left the record open for 30 days in order to obtain a response from the employing establishment as to appellant's allegations.

By letter dated October 31, 1996, the Office hearing representative inquired of the employing establishment whether appellant was advised that she could not report for work. The employing establishment responded by submitting a routing slip from "[Mr.] Strattis" which stated "I [deny] that I have ever told [appellant] that she could not work the shift which was specified in the [Office's] job offer she rejected on September 13, 1995."

[2] In a memorandum accompanying the Office's decision dated October 17, 1995, it was noted that appellant retained her right to medical care for her accepted condition.

[3] In an April 24, 1996 report, Dr. Feldman discussed only appellant's carpal tunnel syndrome.

In a decision dated January 23, 1997, the Office hearing representative determined that the employing establishment made appellant a job offer in good faith, and that if appellant had reported to work within the 15-day period provided by the Office's September 29, 1995 letter, she would have been permitted to work.[4] The Office hearing representative, therefore, affirmed the Office's October 17, 1995 decision terminating appellant's wage-loss benefits.

By letter dated November 20, 1997, appellant requested reconsideration. She submitted a June 11, 1997 magnetic resonance imaging (MRI) report of the cervical spine which provided an impression of bulging disc at C5-6; a June 3, 1997 report and nerve conduction studies prepared by Dr. Feldman, wherein he diagnosed bilateral ulnar entrapment of the deep motor branch, mild entrapment of the left median nerve at the wrist with mild left carpal tunnel syndrome; a July 30, 1997 MRI report of the left shoulder interpreted as normal; and reports dated November 11, 1996, March 24 and May 27, 1997, from Dr. Feldman which diagnosed that appellant was disabled from gainful employment by chronic impingement of the left shoulder, cervical radiculopathy and possible herniated disc.

In a decision dated January 15, 1998, the Office denied modification following a merit review of the record.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof in terminating appellant's wage-loss compensation benefits.

It is well established that once the Office accepts a claim and pays compensation for disability, it has the burden of justifying termination or modification of benefits. Under such circumstances, the Office must establish either that its original determination was erroneous or that the employment-related disability has ceased.[5]

Section 8106(c)(2) of the Federal Employees' Compensation Act[6] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[7] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[8]

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

[4] The Office hearing representative was not persuaded that the employing establishment actually made a job offer which it had no intention of honoring. She noted that, during the October 1995 telephone call and the October 1996 hearing, appellant made references to "her assessment that she could not work nights" and although appellant alleged that she would have worked the night shift anyway, appellant did not actually report for work.

[5] *Lawrence D. Price*, 47 ECAB 120 (1995).

[6] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

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

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

opportunity to make such a showing before entitlement to compensation is terminated.[9] 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.[10]

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.[11] 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 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.[12]

In the instant case, appellant refused to return to work in the position of a modified distribution clerk on the advise of her endocrinologist, Dr. O'Malley, who opined that her diabetic condition, unrelated to the work injury, would prevent her from working from 2:30 p.m. to 9:00 p.m., the stated work hours of the job offer. Dr. Weller, appellant's treating psychiatrist, likewise opined that appellant suffered from depression and anxiety, which would be complicated if appellant returned to the late shift at work. He specifically opined that appellant's work hours should be limited from 8:00 a.m. to 6:00 p.m.

The Office rejected appellant's reasons for refusing the job offer, finding that her evidence was not relevant to her accepted work injury. However, under the Office's procedures pertaining to suitable work, if the file documents a medical condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable, even if the subsequently acquired condition is not work related.[13] Once the issue of appellant's disability due to her diabetes and depression was raised by Drs. O'Malley and Weller, the Office erred by not obtaining a medical opinion that appellant could perform her duties within the hours prescribed by the job despite her diabetic and emotional conditions. As it is the Office's burden of proof to establish that appellant refused a suitable position without reasonable justification, the Office did not meet its burden of proof in this case.[14]

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

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

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

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

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) provides that "If medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related."

[14] *See Barbara R. Bryant*, 47 ECAB 715 (1996) (the Board reversed a suitable work determination for failure to

The decision of the Office of Workers' Compensation Programs dated January 15, 1998 is hereby reversed.

Dated, Washington, D.C.
January 20, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

address the shift hours recommended by appellant's physician).