

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARJORIE R. GRANT and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Albuquerque, NM

*Docket No. 99-833; Submitted on the Record;
Issued January 31, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work

The Office accepted that on July 16, 1978 appellant, then a 52-year-old registered nurse, sustained internal derangement of her left knee with effusion and a torn medial meniscus. Appellant stopped work following her 1978 injury, and underwent arthroscopic surgery and an open medial meniscus repair on August 4, 1980. Subsequent to this surgery, appellant has had frequent sharp medial pain, intermittent pain increased with twisting, pain posteriorly with sitting, osteophyte formation and a Baker's cyst and pain with direct pressure on the Baker's cyst.

The records also support that previously in 1972 appellant had undergone surgery for a right trigger thumb release at the employing establishment, allegedly due to pushing syringes and starting intravenouses.

Also on January 19, 1974 appellant had injury to her left knee. She experienced pain for three days and later experienced left knee buckling, but did not stop work.

In 1976 appellant had a rupture of the right gastrocnemius muscle while on duty.

On December 20, 1982 appellant was granted a schedule award for a five percent permanent impairment of her left knee.

On June 11, 1984 and, thereafter, Dr. John C.F. Simpson, a Board-certified orthopedic surgeon, diagnosed appellant as having post-traumatic progressive degenerative joint disease on the left knee, causally related to her July 1978 work injury.

On August 11, 1991 appellant was involved in a motor vehicle accident and injured her cervical spine and right shoulder, for which she underwent a right rotator cuff repair in September 1994.

The record additionally supports that as of September 8, 1994 appellant was diagnosed with glaucoma, for which she was treated with pilocarpine drops.

On September 5, 1990 Dr. Alan L. Altman noted appellant's history and indicated that appellant's left knee revealed a transverse medial scar, medial joint line tenderness near the medial and posteromedial corner, but near full motion. He noted that appellant might have a neuroma in the saphenous nerve distribution as there was a discrete, tender spot which gave a quick electric shock which did not radiate distally. Dr. Altman noted that appellant perhaps had a small Baker's cyst posterolaterally, with slight fullness to the popliteal fossa and an asymmetry when compared to the opposite side. He further noted that appellant's right hand had a scar along the radial aspect of the thumb from the interphalangeal joint to the metacarpophalangeal joint but no definite triggering. Dr. Altman noted that left knee x-rays demonstrated medial osteophytes and an osteochondroma near the pes anserine insertion over the distal tibia and had elevation of the tibial spine and right hand x-rays demonstrated mild degenerative changes. He diagnosed osteoarthritis of the left knee, probable Baker's cyst, osteochondroma probably causing snapping of the medial collateral ligament and pes anserine tendon, status post trigger thumb release of the right hand, and right gastrocnemius pain and opined that appellant was not able to return to work as a nurse, but could possibly seek employment in a sitting position, but that might not be commensurate with her age. Dr. Altman also completed a September 5, 1990 work restriction evaluation indicating that appellant could work eight hours a day but with no lifting, no bending, no squatting, no climbing, no kneeling and no twisting and with four hours a day standing. He also indicated that appellant had hand restrictions on simple grasping, fine manipulation and pushing and pulling restricted on the right. Dr. Altman noted that appellant "may be beyond voc[atational] rehab[ilitation]."

On October 18, 1990 the vocational rehabilitation specialist closed appellant's case noting that the employer was not able to offer her a position as she was 64 years old and had severe limitations and because placement with new employers was not a feasible alternative.

On June 25, 1993 the employing establishment requested that appellant be removed from the compensation rolls as the conditions for which Dr. Altman was treating her were knee osteoarthritis and medial meniscal injury occurring in 1974, when her 1978 injury was the accepted injury. The employing establishment also claimed that appellant's August 11, 1991 automobile accident which caused her cervical disability was not employment related.

Vocational rehabilitation was reinitiated in August 1994 at the Office's request, and the rehabilitation counselor selected the position of medical clerk as being within appellant's functional capacity; however, physical demands were noted to include occasional stooping, and frequent handling and fingering. The rehabilitation specialist concluded that appellant had the vocational qualifications for the position of medical clerk, after having over "15" years of nursing experience.¹ The proposed position was noted to include assembling charts, breaking

¹ Appellant had been a nurse since 1946.

down charts, filing, transcribing physicians' orders legibly, obtaining supplies and stocking main station areas with proper forms, operating a computer terminal to maintain current data on all patients for all activities, inputting data for all patients, retrieving patient information from the computer, performing clerical work of the unit and scheduling appointments for patients in the computer. Other physical requirements were noted to include sitting for long periods of time, mobilization and bending, carrying books, files and office supplies.

A December 8, 1994 physical therapy evaluation noted that appellant had right forearm pain diminished by rest, ice or heat and right shoulder pain which was decreased by not performing overhead reaching activities. The physical therapist recommended a hand specialist evaluation of appellant's thumb.

Dr. Altman ordered a functional capacity evaluation (FCE), which was performed on January 18, 1995. The evaluation revealed that appellant had a positive de Quervain's test at the right thumb with minimal atrophy in the right thenar eminence, and minimally decreased left knee flexion with mild tightness on the left in the iliotibial band and rectus femorus muscles. The evaluation noted that appellant reported pain in the left leg from the knee to the ankle which was constant, and right thumb and forearm pain and snapping in her right fingers occasionally with or after activities and kept her right arm flexed at the elbow with her right thumb adducted in an over protective posture for her right hand complaints. Manipulation testing of right dominant hand revealed a below normal profile, and right shoulder flexion, abduction and adduction were minimally decreased. The evaluation noted reported increased left knee pain on going up and down stairs, getting in and out of chairs, squatting, kneeling, walking a long distance, sitting with her knees flexed or with crossing her left leg over her right. It noted that appellant reported difficulty with her right hand when she eats, writes, stirs, or holds things up, and that she no longer did yard work or played the piano due to her left knee and right hand symptoms. Testing results were noted as demonstrating hesitant stair and curb climbing, slow and awkward repetitive grasping activities due to right thumb complaints, right volar wrist pain with repetitive lifting activities, and reliance on her left hand and right leg during activities. Work activity restrictions were given;² however, the evaluation opinions, work restrictions and the functional capacity evaluation were not signed by a physician, but were signed by someone else signing for a physical therapist.

The rehabilitation specialist met with Dr. Altman on February 6, 1995 to review the job and he opined that it was within appellant's capabilities so long as she worked within the restrictions of the functional capacity evaluation. In a report dated February 6, 1995, Dr. Altman noted that appellant had spinal complaints, and opined that she was cleared to work as a unit clerk but emphasized that she could not bend more than about 45 degrees and could not stoop or squat all the way to the floor based upon her knee difficulties. He noted that appellant must be

² These restrictions noted that appellant could sit for two hours at a time, stand for two hours at a time, walk for one to two hours at a time, occasionally lift and carry up to 20 pounds intermittently, perform right hand simple grasping "intermittently-light resistance" and fine manipulation "not at production speed." Appellant's ability to type or enter data on a keyboard was not addressed. The evaluator indicated that appellant could occasionally bend, occasionally partially squat, and occasionally climb, and could frequently reach with reported decreased shoulder motion abduction and adduction. Appellant's ability to stoop and twist were not addressed.

able to get up and move around from her sitting position frequently. Dr. Altman noted that he had only treated appellant for her right shoulder but not for her left knee, right calf or right hand.

An undated duty status report for the position of unit secretary (medical clerk) completed by the chief nurse indicated that the position required one hour a day of intermittent carrying, six hours a day of intermittent sitting, two hours a day of intermittent standing, two hours a day of intermittent walking, one hour a day of intermittent bending, one hour a day of intermittent stooping, one hour a day of intermittent twisting, one hour a day of intermittent pulling and pushing, eight hours a day of continuous grasping and four hours a day of intermittent fine manipulation.

On July 5, 1995 the vocational rehabilitation counselor noted that appellant disagreed with the medical opinions of record and wanted a second opinion. He opined that there was no reason to continue vocational rehabilitation services and closed appellant's file.

In July 1995 the employing establishment offered appellant the position of medical clerk, which she refused on July 13, 1995, stating that appellant wanted to exercise her right to a second medical opinion on her ability to work.

By letter dated September 15, 1995, the Office advised appellant that she had been offered a position as a medical clerk, which was found to be suitable to her work capabilities and that she had 30 days from the date of the letter within which to accept the position or to provide an explanation for her refusal. The Office also advised of the provisions of 5 U.S.C. § 8106(c).

By response dated October 10, 1995, appellant referred to the Office's September 15, 1995 letter referring to the position's duties, and physical limitations and noted that neither the description of the duties nor the physical requirements were attached. Appellant requested that these be forwarded to her so a knowledgeable response could be made.

By letter dated October 18, 1995, the Office provided a copy of the job offer for appellant's review but noted that it had considered "any reasons given by [her] for refusing this position and found them to be unacceptable." The Office gave appellant 15 days within which to accept the position or her compensation would be terminated and noted that it would not consider any further reasons for refusal.

In a November 1, 1995 letter, appellant responded that she had given no reasons for refusing the offered position and claimed that her disability had not ceased.

In response appellant also submitted a March 1, 1995 report from Dr. Altman which noted her left knee status and her right shoulder which manifested frequent clicking. He noted that appellant wanted referral to a hand specialist for continued hand pain, noted that the FCE therapist told her that she needed to see a hand specialist and opined that appellant was free to contact a hand specialist to get a second opinion.

By decision dated November 6, 1995, the Office terminated appellant's compensation entitlement finding that she failed to accept suitable work. The Office found that appellant had been notified that the position was found to be suitable, yet she did not accept it.

By letter dated December 3, 1995, appellant requested an oral hearing. A hearing was held on March 6, 1997, at which appellant testified that the offered position was not suitable due to the requirement of constantly getting up and down and the right hand use requirement and due to her right shoulder problems which would limit her ability to use a computer. Following the hearing appellant submitted a December 20, 1995 report from Drs. Bret D. Lawlor and Matthew A. Butters, Mayo Clinic Board-certified orthopedic surgeons, who noted that appellant had experienced constant neck pain and right shoulder since her motor vehicle accident, pain radiating down both arms to the elbows and tingling of her hands in the morning. Drs. Lawlor and Butters noted mild weakness in the deltoid and triceps, absent triceps reflexes bilaterally, midline cervical tenderness, limited right shoulder motion, diminished range of neck motion, a positive Hawkins test, co-contraction with abduction of her right arm and asymmetric shoulder height with the right being lower than the left. The doctors noted that electromyographic (EMG) testing revealed mild right carpal tunnel syndrome and that magnetic resonance imaging (MRI) testing demonstrated degenerative disc disease at C5-6 with hypertrophic spurring causing a narrowed disc space and that the thoracic spine showed minimal compression. They diagnosed mild right carpal tunnel syndrome, cervical degenerative disc disease and degenerative joint disease, mild right rotator cuff and biceps tendinitis, altered right shoulder motion with weakness in her rhomboid muscles and cervical myofascial pain. Physical therapy and a wrist splint were recommended.

By decision dated June 6, 1997, the hearing representative affirmed the termination of compensation entitlement, finding that Dr. Altman had approved of the position and that the Office had found it suitable.

Thereafter, appellant again requested reconsideration and in support she submitted a May 28, 1998 supplemental report, from Dr. Butters which noted that their December 1995 examination revealed mild right carpal tunnel syndrome as well as cervical degenerative disc disease and degenerative arthritis. He noted that appellant had bilateral arm pain with neck flexion positioning and opined: “[a]t the time we saw her she would have had a difficult time performing at a desk job for eight hours a day, secondary to the repetitive motions which would have exacerbated her right carpal tunnel syndrome and in a neck flexion position, which is required at a desk job.”

By decision dated August 26, 1998, the Office denied modification of the prior June 6, 1997 decision finding that Dr. Butters’ report was speculative in nature and was, therefore, of no probative value.

The Board finds that the Office failed to meet its burden of proof to terminate appellant’s compensation entitlement.

Section 8106(c)(2) of the Federal Employees’ Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.³ The Office has authority under this section to terminate compensation for any

³ 5 U.S.C. § 8106(c)(2).

partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.⁴ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.⁵ Thereafter, an employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.⁶

In the instant case, the Office did not meet its burden of proof to demonstrate that the offered position was medically suitable to appellant's partially disabled condition.

The medical reports of record support that appellant had multiple medical conditions and injuries occurring both pre- and post-injury, which must be considered when determining the suitability of an offered position.⁷ In addressing suitability of a position, the Office must consider, among other consideration, the degree of appellant's impairment, (including impairments resulting from both injury-related and preexisting conditions) and appellant's age.⁸ Further, the Office, in its preliminary assessment of the position, must ascertain if the medical reports of record document a condition, which has arisen since the compensable injury and determine whether this condition disables an appellant from the offered job, even if the subsequently acquired condition is not work related.⁹ The Office failed to make such determinations in this case. The record supports that appellant was operated on for a right trigger thumb release in 1972 and was left with right hand residuals, that appellant had cervical and right shoulder rotator cuff injury in 1991 with residuals of pain, osteodegeneration, and losses of ranges of motion, that appellant was diagnosed with mild right carpal tunnel syndrome with thenar atrophy and that in 1994 appellant was diagnosed with glaucoma. The Board finds that nowhere in the record were these conditions appropriately evaluated by a physician as to whether they resulted in disability for a typing, data entry, scheduling, and transcribing position which required a good ability to see accurately and the ability to lift and carry supplies. As the Office failed to obtain medical opinions addressing the suitability of the offered position with respect to appellant's other conditions, it did not meet its burden to prove that the offered position was medically suitable.

⁴ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁵ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁶ 20 C.F.R. § 10.124.

⁷ See Federal (FECA) Procedure Manual, Part -- 2, Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993). (If the medical reports of record document a condition which has arisen since the compensable injury, and this condition disables the appellant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired conditions is not work related.)

⁸ *Id.* at 2.14.8(a)(1-6) (December 1993).

⁹ *Id.* at 2.814.4(b)(4) (December 1993).

Consequently, the decision of the Office of Workers' Compensation Programs dated August 26, 1998 is hereby reversed.

Dated, Washington, D.C.
January 31, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member