U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA L. BAKER and DEPARTMENT OF DEFENSE,
DEFENSE MAPPING AGENCY, St. Louis, MO

Docket No. 97-2427; Submitted on the Record;
Issued July 24, 2000

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned suitable work that was offered to her; and (2) whether appellant's disability after June 9, 1992 was causally related to her carpal tunnel syndrome.

The case has been on appeal previously.[1] In a July 7, 1994 decision, the Board noted that appellant had filed a claim for left carpal tunnel syndrome which the Office had accepted and for which the Office had authorized surgery. Appellant had stopped working on November 26, 1990, returned to part-time, light-duty work in July 1991 and subsequently missed intermittent periods of work. She stated, in an undated statement received by the Office on February 14, 1992, that after she began part-time work she was assigned two full-time jobs to complete, which hindered her recovery. Appellant complained of arm and wrist pain, swelling and numbness and noted that she was beginning to have symptoms in her right hand. She stopped working on June 9, 1992 and filed a claim for recurrence of disability. The Board indicated that the issue was whether appellant had a recurrence of disability after June 9, 1992 arising from her accepted carpal tunnel syndrome and found there existed a conflict in the medical evidence on this point. Dr. S. Vic Glogovac, a Board-certified orthopedic surgeon and Dr. Bernard C. Randolph, a Board-certified physiatrist, had concluded that appellant was disabled due to cumulative trauma syndrome, which encompassed appellant's left carpal tunnel syndrome. The Office medical adviser, concluded, on the other hand, that appellant was not disabled due to the factors of her employment, suggesting that appellant's symptoms, other than her carpal tunnel syndrome, were not related to her employment but to a connective disease. The Board directed the Office to refer appellant to an appropriate impartial medical specialist for an examination and opinion on whether appellant's disability after June 9, 1992 was causally related to her accepted left carpal tunnel syndrome.

[1] Docket No. 93-1192 (issued July 7, 1994).

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Gerlyn Friesenhahn, a Board-certified neurologist, for an examination. In a December 20, 1994 report, he noted that motor examination showed giveaway weakness in the left deltoid and biceps but full strength in the other muscles in the arm. Dr. Friesenhahn indicated appellant had diminished sensation in the first, second and third fingers distally and a small portion of the distal palm in the median distribution. He reported that he performed nerve conduction studies of both arms and an electromyogram (EMG) of the left arm showed borderline electrodiagnostic evidence of left carpal tunnel syndrome and a left ulnar neuropathy at the wrist. Dr. Friesenhahn concluded that appellant had mild left carpal tunnel syndrome treated by surgery with mild residual subjective sensory symptoms. He related appellant's condition to her employment. Dr. Friesenhahn stated that he did not feel appellant's shoulder pain was a residual effect of her carpal tunnel syndrome. He commented that appellant's reports of pain and functional disability were out of proportion to his objective findings. Dr. Friesenhahn concluded that appellant was not totally disabled by her left carpal tunnel syndrome indicating that she would be capable of performing the duties of her position as a geodesist as of August 10, 1992, based on the medical reports of record because the position was sedentary with no heavy physical requirements with extensive keyboarding. He commented that she could have returned to this position with appropriate work station adjustments to provide suitable posture and hand positioning.

In a January 12, 1995 decision, the Office denied appellant's claim for compensation beginning June 9, 1992 because the medical evidence of record failed to demonstrate objective findings to support disability after that time. The Office further found that appellant had partial disability after that time but had abandoned suitable light-duty work and therefore was not entitled to further compensation under section 8106(c)(2).[2]

In a February 8, 1995 letter, appellant requested a hearing before an Office hearing representative which was conducted on September 14, 1995. In a January 22, 1996 decision, the Office hearing representative found that Dr. Friesenhahn's report constituted the weight of the medical evidence and concluded that appellant did not have justifiable grounds for refusing suitable work. He further found that appellant had not established a change in the nature and extent of her employment-related disability or in the nature of the light-duty job requirements. The Office hearing representative therefore affirmed the Office's January 12, 1995 decision.

In an April 18, 1996 letter, appellant requested reconsideration. In a July 11, 1996 merit decision, the Office denied modification of its prior decisions. In a September 11, 1996 letter, appellant again requested reconsideration. In an October 16, 1996 merit decision, the Office again denied modification of its prior decisions. In a January 13, 1997 letter, appellant made a third request for reconsideration. In an April 15, 1997 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and cumulative and therefore insufficient to warrant further review.

The Board finds that the Office improperly determined that appellant abandoned suitable work.

[2] 5 U.S.C. § 8106(c)(2).

Appellant indicated that she worked at her position as a geodesist for 40 hours a week from August 8, 1989 to July 1991. She was reduced to 24 hours a week after surgery on her left arm. Appellant noted that she would spend 30 hours a week out of a 40-hour week inputting data into the computer database, which required repetitive hand motions. She noted that in August 1991 she was appointed the manager of a large database which required 23 to 24 hours of computer work a week. Appellant indicated that, despite medical restrictions, she was not removed from computer work until December 1991. The employing establishment indicated that on May 17, 1992 appellant was reassigned to another position in an effort to alleviate the problems with her physical limitations. She was given assignments to identify ship survey tracks with pencil and paper, perform regular map analysis and processing and train geodetic technicians by allowing them to perform the necessary keyboard work. The employing establishment indicated that it could not continue to maintain appellant's accommodations indefinitely and still accomplish the employing establishment's mission and function. It noted that it would make every effort to accommodate appellant's physical limitations.

Section 8106(c) of the Federal Employees' Compensation Act provides:

"A partially disabled employee who --

> (1) refuses to seek suitable work; or
>
> (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him;
>
> is not entitled to compensation."

In this case, the Office initially found that appellant had not established that her disability beginning June 9, 1992 was due to factors of her employment. After the Board set aside the Office's decision and remanded the case, the Office found not only that appellant had not established total disability beginning June 9, 1992 but further found she had abandoned suitable work. The application of section 8106(c) was improper in this context. The termination of benefits under section 8106(c) raises due process and fairness considerations.[3] These considerations arise because compensation benefits constitute a property interest that is protected by the due process clause.[4] The Supreme Court has held that the essential requirements of due process are "notice and an opportunity to respond."[5] These essential due process principles require that an employee have "at least notice and an opportunity to respond in some manner" prior to the termination of compensation benefits.[6] Accordingly, appellant's compensation or

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

[4] *Raditch v. United States*, 929 F.2d 478, 480 (9th Cir., 1991); *Kendall v. Brock*, 689 F.Supp. 354, 361 (D. Vt., 1987).

[5] *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

[6] *Raditch v. United States, supra.*, note 4.

right to compensation may not be terminated under section 8106(c)(2) for neglecting or abandoning suitable work without prior notification and an opportunity to respond.[7]

In this case, the Office did not invoke section 8106(c)(2) until almost three years after appellant stopped working and after an initial decision, which did not refer to section 8106(c)(2), was set aside by the Board. The Office did not make any findings, at the time appellant stopped working, that the job was suitable for her, did not notify her of any such findings, failed to inform her of the provisions of section 8106(c)(2), and the consequences of failure to comply with these provisions and failed to provide an opportunity to respond. The Office's application of section 8106(c)(2) retroactively was in error. The Office therefore improperly invoked section 8106(c)(2) in this case.

The Board finds, however, that the evidence of record does not establish that appellant was disabled after June 9, 1992 due to her accepted carpal tunnel syndrome.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[8]

Appellant indicated that when she went from full-time to part-time work in July 1991, she was still given duties that required considerable time on the computer involving repetitive motion. She stated that she was not removed from computer work in December 1991. The employing establishment noted that it was making efforts to find a position for appellant which required minimal keyboard usage. It reported that she was offered assistance to perform her duties but she did not respond to the offers. Appellant was moved to a different position in May 1992. However, she claimed that her assignments still required heavy computer use which impeded her recovery from carpal tunnel surgery. At the hearing appellant indicated that she was managing two databases for the employing establishment and was being required to perform full-time work on a part-time basis. She was transferred in May 1992 because she needed to return to full-time work for financial regions. Appellant stated that the duties in the new position still required considerable computer work. She submitted at the hearing a description of the standard operating procedure of her new assignment which discussed in detail the necessary computer usage to perform the duties of the position. Appellant therefore stopped working and subsequently resigned her position. Her claim centered on the contention that she was required to exceed her work restrictions on the use of her left arm which led to her disability beginning June 9, 1992.

[7] *Mary A. Howard*, 45 ECAB 646 (1994).

[8] *George DePasquale,* 39 ECAB 295 (1987); *Terry R. Hedman,* 38 ECAB 222 (1986).

In an August 12, 1991 note, Dr. Glogovac stated that appellant should not use her left hand in computer work. In a December 3, 1991 note, he restricted appellant to no computer work with either hand. In an accompanying report, Dr. Glogovac noted appellant's history of increased work at the computer. He commented that appellant's condition had initially improved after the surgery for carpal tunnel syndrome in May 1991 but her condition had deteriorated since August 1991. Dr. Glogovac recommended that appellant's time at the computer terminal be decreased and suggested that she be retrained and not use the computer terminal at all.

In a June 12, 1992 report, Dr. Randolph diagnosed cumulative trauma involving the left arm and concluded that appellant should be off work and avoid any repetitive or strenuous arm activities. In an August 21, 1992 report, he stated that appellant's symptoms for the prior two months were related to the conglomeration of symptoms she first reported in November 1990. Dr. Randolph related that he had diagnosed a regional myofascial pain syndrome and commented that these syndromes were frequently associated with repetitive motion type jobs such as appellant's work at the employing establishment. He indicated that appellant had made significant improvement after the two months of treatment. Dr. Randolph stated that appellant was recently allowed to restricted duty with a plan to return her to unrestricted return to duty in one to two weeks.

Dr. Friesenhahn, after finding that appellant's symptoms were not supported by objective findings, concluded that she was able to return to light duty, eight hours a day, as of the date of Dr. Randolph's August 10, 1992 examination. He concluded that appellant could return to her most recent position, eight hours a day, with some adjustments to her work station even though the position did require extensive use of a computer keyboard.

In a September 26, 1995 report, Dr. Randolph again stated that appellant's condition was consistent with a regional myofascial pain syndrome that was related to appellant's work which involved frequent and perhaps repetitive arm activities. He commented that these activities might have been associated with the onset of appellant's symptoms. Dr. Randolph concluded that appellant was capable of continuing to work. He indicated that he would not put restrictions on appellant's activities. Dr. Randolph noted that if appellant returned to sedentary work, attention to posture and proper workstation set up would be important.

On the other hand, Dr. Glogovac noted that appellant reported that she had to stop working because of the discomfort caused by the use of a computer keyboard. He stated that since then, appellant had some resolution without significant use of the arm with a keyboard. Dr. Glogovac indicated, however, that appellant had recurrence of pain, numbness and paresthesias when she attempted to use her arm in more vigorous activity. He stated that an EMG in 1994 again showed findings consistent with an abnormal median nerve at the left wrist. Dr. Glogovac concluded that appellant had developed a carpal tunnel syndrome which led to a chronic median neuritis which had not resolved in 1995. He stated that appellant's condition's would continue in the foreseeable future and would not change significantly to permit appellant to return to her former occupation.

In an August 12, 1996 report, Dr. Edwin Dunteman, an anesthesiologist, stated that much of appellant's pain arose from the cervical spine, produced by spondylosis and other musculoskeletal changes. He commented that in a patient with carpal tunnel syndrome, with a

considerable amount of time in front of a computer keyboard, postural and workstation factors must be considered as contributing to her pain. Dr. Dunteman indicated that with the displacement of the shoulder off the ribcage area, forcing much of the weight of the arms onto the cervical and occipital regions, abnormal traction in the cervical spine could produce increased pain by aggravating myofascial trigger points or exaggerating the spondylosis. He stated that the exact degree of injury produced by the workstation would be difficult to determine though it seemed likely that appellant's job contributed to her symptoms. In a December 30, 1996 addendum, Dr. Dunteman indicated that either appellant's current work or work in her previous positions could potentially worsen neck pain syndromes.

The medical record of evidence establishes, that appellant's condition after her carpal tunnel surgery in July 1991 grew worse until she stopped working on June 8, 1992. Both Drs. Glogovac and Randolph attributed the worsening of appellant's condition to repetitive motion of the left arm as required by use of the computer keyboard in her work. Dr. Randolph, however, indicated in his August 11, 1992 report that appellant could return to light-duty work, a conclusion that was consistent with his September 26, 19995 report that appellant could continue to work. Dr. Friesenhahn cited to Dr. Randolph's finding as a basis for his conclusion that appellant was capable of returning to work in August 1992. Dr. Glogovac's report had aided in creating the conflict in the medical evidence that was resolved by Dr. Friesenhahn's report. He stated in his September 27, 1995 report that appellant continued to be disabled due to his left arm condition caused by her employment activities and cited a 1994 EMG in support of his opinion that appellant continued to have a neuritis that had not resolved. Dr. Glogovac's report, however, did not offer new evidence of sufficient probative value to overcome the weight attributed to Dr. Friesenhahn's report as an impartial medical examiner. Dr. Dunteman's report was equivocal and speculative on the relation of appellant's current conditions to her employment. His report therefore has little probative value and is insufficient to establish that appellant continued to be disabled due to her left arm condition. The reports of Dr. Randolph and Dr. Friesenhahn establish that appellant was able to return to light-duty work by August 11, 1992. Appellant is entitled to compensation only until that time.

The decision of the Office of Workers' Compensation Programs dated April 15, 1997 is set aside; the decisions dated October 16 and July 11, 1996 are hereby reversed in part. The decisions of the Office are affirmed to find that appellant had no disability subsequent to August 11, 1992.

Dated, Washington, D.C.
July 24, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member