U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THELMA P. SMITH and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Sepulveda, CA

Docket No. 99-181; Submitted on the Record;
Issued July 20, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 14, 1997, on the grounds that she refused an offer of suitable work.

On March 2, 1993 appellant, then a 61-year-old psychiatric nurse, injured her left knee while getting up from a chair. She filed a claim for benefits on March 30, 1993, which the Office denied by decision dated June 1, 1993. Appellant's representative requested reconsideration on July 1, 1993. The Office subsequently accepted appellant's claim for left knee meniscus tear and surgical repair.[1] She was paid appropriate compensation for temporary total disability and placed on the periodic rolls. Appellant attempted to return to work in a four hour per day, light-duty capacity in February 1994, but stopped work by April 1994 as she was unable to walk up and down stairs. She has not returned to work since that time.

In a report dated December 29, 1994, Dr. James A. Shankwiler, a specialist in orthopedic surgery and appellant's treating physician, stated that she would significantly benefit from a pain control program and recommended that she remain off work. In a report dated May 25, 1995, Dr. Shankwiler stated that appellant had clinical findings consistent with possible reflex sympathetic dystrophy (RSD) of her left knee and that she continued to have persistent pain in her left knee. He reiterated that he was attempting to have appellant placed in a pain control program.

In order to clarify appellant's current condition, the Office scheduled a second opinion examination with Dr. Ronald D. Levin, Board-certified in physical medicine and rehabilitation, for July 6, 1995. In a report of that date, Dr. Levin concurred with Dr. Shankwiler's opinion that appellant had RSD, noted that she appeared quite motivated to return to work, but stated that she complained of pain in the left knee although the results of a magnetic resonance imaging (MRI)

[1] Appellant underwent arthroscopic surgery on her left knee on June 21, 1993.

scan were not very conclusive with regard to her current condition. He stated that appellant had physical limitations against prolonged standing and walking, walking on uneven ground, stair climbing and prolonged sitting. Dr. Levin further stated that if appellant was sitting she should be allowed to place her knee on an elevated leg rest with her knee in a bent position. He concluded that appellant could return to work in a limited-duty position if she adhered to the restrictions outlined above. Dr. Levin completed a work restriction evaluation form on July 6, 1995, in which he reiterated the restrictions noted in his report and advised that appellant was capable of working an eight-hour day.

On August 8, 1995 the Office referred appellant to a vocational rehabilitation counselor.

In a report dated September 4, 1996, Dr. Shankwiler stated:

> "[Appellant] continues to have significant pain limitation. [She] is unable to ambulate effectively even 30 to 50 feet at this time without severe exacerbation of the discomfort. [Appellant] remains somewhat improved in regards to the reflex sympathetic dystrophy that she has had in the left lower extremity, however, continues to have unacceptable limitation at this time, we feel, that would allow her to return back to any gainful employment with [her] being considered permanently disabled at this time."

On September 9, 1996 the Office determined that a conflict existed in the medical evidence between the opinion of Dr. Shankwiler, appellant's treating physician, and the opinion of Dr. Levin, as to whether appellant could perform the medical technician position offered by the employing establishment and referred appellant for an impartial medical examination with Dr. Richard Lis, a Board-certified orthopedic surgeon, pursuant to section 8123(a).[2]

In a report dated September 27, 1996, Dr. Lis, after reviewing the statement of accepted facts and appellant's medical records, stated his findings on examination and concluded:

> "In my opinion, [appellant] would be able to perform a job which would require no kneeling, bending at the waist or twisting at the waist.... She should be capable of ambulating with her cane for short distances. Due to [appellant's] use of the cane and her radiographic patellofemoral disease, she would be precluded from stair climbing. During her periods of ambulation, she would be limited in carrying that which she could do with one hand and such that it would probably not be more than three to five pounds, as to not unbalance her gait with her cane. I do believe that [appellant's] sitting is not impaired except for more than 30 to 45 minutes, after which she may experience an increase in her knee stiffness and should be allowed time to change positions to prevent and relieve this situation. I do not find any medical evidence as to a work-related condition of her upper extremities and believe her to have full and unrestricted use to perform repetitive motions of her wrist and elbow. As [appellant] has been temporarily disabled for this length of time, I would be cautious with a return to employment (albeit with

[2] 5 U.S.C. § 8123(a).

the above restrictions) on a full-time basis. I would agree with Dr. Shankwiler's method of a gradual return to work, probably on a four hour per day basis at first, but increasing as [appellant] was able to tolerate it."

By letter dated January 30, 1997, the employing establishment offered appellant a four-hour, limited-duty position as a registered nurse based on the restrictions outlined by Dr. Lis. The letter stated that the position had been modified to meet Dr. Lis' limitation for performing her duties initially at four hours per day, five days per week and progressing to full-time duty as tolerated.

By letter dated February 4, 1997, the Office informed appellant that the employing establishment had made an offer of work as a registered nurse consistent with the physical limitations and work restrictions outlined by Dr. Lis, the impartial examiner. The Office stated that it had reviewed the offer of employment and had compared it with the medical evidence concerning her ability to work and had found the offer to be suitable. The Office warned appellant that if she refused the employment or failed to report for work when scheduled without reasonable cause then her compensation benefits would be terminated. The Office stated that the case would be kept open for 30 days. It instructed appellant to either indicate that she had accepted the job, submit any evidence or reasons for refusing the job offer or elect retirement benefits. The Office indicated that appellant should notify the employing establishment of her intentions in writing. The Office informed appellant that if she failed to accept the offered position and did not report to work, any reasons in justification of the failure would be considered by the Office before termination of benefits.

By telephone call dated March 3, 1997, appellant informed the employing establishment that she was refusing the offer.

By decision dated March 13, 1997, the Office found that appellant was not entitled to compensation benefits, effective March 14, 1997, on the grounds that she had refused to accept a suitable job offer.

By letter dated March 20, 1997, appellant's representative requested a hearing, which was held on January 5, 1998. She did not submit any additional medical evidence with this request.

By decision dated March 19, 1998, the Office affirmed the March 13, 1997 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[3] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4]

[3] 5 U.S.C. §§ 8101-8193.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 compensation.[5] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position offered to appellant was suitable. 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 the medical evidence.[7] A review of the medical evidence in the present case indicates that there is not sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. Dr. Shankweiler, appellant's attending physician, indicated in his September 4, 1996 report that she was limited in the amount of walking she could do, specifying that she could ambulate no more than 30 to 50 feet at a time. Dr. Lis, the impartial medical examiner, found that appellant could work at a job requiring no stair climbing, kneeling, bending at the waist or twisting at the waist and was capable of ambulating with her cane for "short distances." The Office found that the limited-duty, four hour per day position of registered nurse offered by the employing establishment was within these physical restrictions. However, the description of the limited-duty registered nurse position did not include Dr. Lis' restrictions on walking/ambulation tolerance. The position description merely notes that appellant is expected to perform the clinical duties and other duties assigned by a supervisor within the medical limitations provided. It also notes walking as necessary to complete the assigned duties. The employing establishment's job offer of the limited-duty registered nurse position is vague as to the amount of walking required. The Office, however, did not seek clarification from Dr. Lis regarding appellant's capacity to walk "short distances," or otherwise clarify the amount of walking expected in the offered position. For this reason, the Board finds that the position of registered nurse has not been established as suitable. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[8]

The decision of the Office of Workers' Compensation Programs dated March 19, 1998 is hereby reversed.

Dated, Washington, D.C.

[5] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[7] *Robert Dickinson*, 46 ECAB 1002 (1995).

[8] *Barbara R. Bryant*, 47 ECAB 715 (1996).

July 20, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member