U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE COOTER-WEIMER and U.S. POSTAL SERVICE, POST OFFICE, Dayton, OH

Docket No. 98-1956; Submitted on the Record;
Issued June 1, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 29, 1997 on the grounds that she refused suitable employment.

On December 15, 1994 appellant, then a 32-year-old letter carrier, filed a claim alleging that she sustained a traumatic injury on September 16, 1994 in the performance of duty. The Office accepted appellant's claim for lumbar strain and a herniated nucleus pulposus at L5-S1.[1] The Office authorized a microlumbar discectomy at L5-S1 which was performed on October 16, 1995.

The Office determined that a conflict in medical opinion existed between appellant's attending physician, Drs. Hugh Moncrief, a Board-certified neurosurgeon, and Ronald J. Moser, a Board-certified orthopedic surgeon and Office referral physician, regarding whether appellant was partially or totally disabled from employment. The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Richard Sheridan, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated January 20, 1997, Dr. Sheridan found that appellant could not perform her date-of-injury position due to residuals of her employment injury. In a work capacity evaluation (OWCP-5c) dated January 23, 1997, he opined that appellant could work for four hours per day with infrequent bending, stooping, rotation at the waist and reaching from the floor

[1] By decision dated March 31, 1995, the Office denied appellant's claim for a recurrence of disability beginning January 7, 1995; however, in a decision dated August 10, 1995, a hearing representative vacated the March 31, 1995 decision and remanded the case for referral to a second opinion specialist. On November 16, 1995 the Office accepted his claim for a recurrence of disability on January 7, 1995 causally related to her September 16, 1994 employment injury.

to the waist. Dr. Sheridan stated that appellant could "lift under 10 [pounds] frequently and 10 [pounds] to 15 [pounds] infrequently. She can only do frequent lifting six times an hour." He found that the listed restrictions would continue "indefinitely."

By letter dated November 10, 1997, the employing establishment offered appellant the position of modified letter carrier for four hours per day within the restrictions found by Dr. Sheridan. The employing establishment indicated that the effective date of the position was November 23, 1997.

In a letter dated November 14, 1997, the Office informed appellant that it had determined the part-time position of modified letter carrier was suitable and provided her 30 days within which to accept the position or provide reasons for her refusal.

In an electronic correspondence dated November 25, 1997, an Office claim's examiner indicated that he had spoken with appellant on that date and that she had informed him that she had not received either the job offer from the employing establishment or the suitability determination from the Office. The claim's examiner determined that the letters had been sent to an incorrect address and stated that on November 25, 1997 he had remailed copies of both letters to the correct address.

By decision dated December 29, 1997, the Office terminated appellant's compensation effective that date based upon her refusal to accept suitable employment.

In a letter dated January 5, 1998, appellant acknowledged that she had received a letter from the Office with an enclosed job offer from the employing establishment. She stated that she had 30 days, or until December 25, 1997 to accept the position. Appellant maintained that on December 23, 1997 she had express mailed to the Office an acceptance of the position and enclosed an illegible copy of an express mail envelope.

By letter dated January 13, 1998, the Office informed appellant that the express mail envelope did not indicate what was sent or to whom and queried why she did not report to work if she had accepted the position.

On February 24, 1998 appellant, through her representative, requested reconsideration of her claim. In support of her request, she submitted a copy of an express mail envelope which indicated that she mailed something to the Office on December 24, 1997. Appellant further submitted a letter from a union representative dated February 12, 1998, who stated that on January 5, 1998 "[I]t was brought to my attention that [appellant] had accepted a job offer that was made to her by the Office." Appellant also enclosed a disability certificate dated February 9, 1998, in which a physician recommended that she begin maternity leave on that date.

By decision dated April 27, 1998, the Office denied modification of its prior decision.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act[2] 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 partially disabled employee who refuses or neglects 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 requirements of the position.[4] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[5]

With respect to an offer of a light-duty job by the employing establishment, the Office's procedure manual states in pertinent part:

"*Any such offer must be in writing* and must include the following information:

> (a) A description of the duties to be performed.
>
> (b) The specific physical requirements of the position and any special demands of the workload or unusual working conditions.
>
> (c) The organizational and geographical location of the job.
>
> (d) The date on which the job will first be available.
>
> (e) The date by which a response to the job offer is required."[6] (Emphasis in the original).

In this case, the employing establishment sent appellant a job offer on November 10, 1997 which described the requirements of the position, the duties to be performed and the location of the job. The employing establishment indicated that the job commenced November 23, 1997 and informed appellant that "[f]ailure to respond to this job offer by November 21, 1997 constitutes a declination of the position." In a letter dated November 14, 1997, the Office notified appellant that it had determined that the job offered by the employing establishment was suitable and that she had 30 days within which to accept the position or provide reasons for her refusal. In an electronic mail message dated November 25, 1997, an

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

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

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

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (June 1996).

Office claim's examiner determined that both the November 10, 1997 job offer from the employing establishment and the November 14, 1997 30-day letter from the Office had been sent to an incorrect address. The claim's examiner indicated that he had remailed copies of the letters to appellant. The record, however, contains no evidence regarding the remailing of the letters to appellant at the appropriate address. While it appears from subsequent correspondence that appellant did receive both letters, the Board is unable to determine the date upon which the Office resent the letters or the period within which appellant had to respond to the job offer. Further, the Board cannot determine whether the job offer included the date on which the job would be available to appellant. The November 10, 1997 job offer from the employing establishment had a start date of November 23, 1997, which was prior to the date the Office discovered the offer had been sent to an incorrect address. Additionally, there is no evidence in the record regarding whether the Office obtained confirmation from the employing establishment that the part-time limited-duty position remained available for appellant subsequent to November 23, 1997.[7]

The Board accordingly finds that the Office failed to follow its established procedures and failed to meet its burden of proof in terminating appellant's compensation under 5 U.S.C. § 8106(c).

The decisions of the Office of Workers' Compensation Programs dated April 27, 1998 and December 29, 1997 are hereby reversed.

Dated, Washington, D.C.
June 1, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (December 1993); *Robert Dickerson*, 46 ECAB 1002 (1995).