

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALISON V. REYNOLDS and U.S. POSTAL SERVICE,
POST OFFICE, Lilburn, GA

Docket No. 99-1502; Oral Argument Held April 11, 2000
Issued June 27, 2000

Appearances: *Alison V. Reynolds, pro se, Miriam D. Ozur, Esq.*, for the Director,
Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a merit review under 5 U.S.C. § 8128.

On June 6, 1988 appellant, then a 35-year-old distribution clerk, filed a notice of occupational disease and claim for compensation alleging that she sustained a right wrist condition in the performance of duty. The Office accepted the claim for carpal tunnel syndrome of the right wrist. Appellant stopped work in July 1988 and has not returned to work.¹

Appellant has been under the care of several physicians including Dr. Robert D. Rockfeld, a Board-certified orthopedic surgeon and Dr. Grady Clinkscales, a Board-certified hand surgeon. Dr. Rockfeld treated appellant from July to October 1989 during which time appellant had normal electromyogram (EMG) testing. In a report dated December 12, 1989, Dr. Clinkscales diagnosed that appellant had bilateral carpal tunnel syndrome, but opined that she could work with restrictions. Dr. Clinkscales ordered EMG and nerve conduction studies in January 1990 that were also interpreted as normal.

In a treatment note dated January 2, 1990, Dr. Clinkscales opined that appellant's carpal tunnel syndrome had resolved, although he noted that appellant continued to suffer from neck and shoulder pain of an unknown origin. He subsequently noted in a February 6, 1990 treatment note that appellant could perform nonrepetitious activity, but that she did not wish to work.

¹ The record indicates that appellant has worked in some intermittent nonfederal part-time jobs for which she received compensation for partial wage loss.

In a report dated March 28, 1990, Dr. Keith Osborne, a Board-certified orthopedic specialist, was unable to make any clear findings of carpal tunnel syndrome and saw no evidence of neck or shoulder disease. He stated that the etiology of appellant's pain was unclear but thought she might have chronic pain syndrome related to her right arm.

Dr. Osborne referred appellant to a pain management center where she was seen by Dr. Murugiah Mani, a Board-certified anesthesiologist. Dr. Mani noted that appellant was depressed because she could not work but also stated that her pain behavior "appears to be condition and reinforced by learned helplessness and depression, as well as the continuing disability process."

The pain center referred appellant to Dr. Charles Nicol, a Board-certified neurologist. In a report dated July 23, 1991, Dr. Nicol indicated that appellant had a normal examination.

The Office referred appellant to Dr. Ned Armstrong, a Board-certified orthopedist, for an evaluation on August 25, 1993. In his report of the same date, Dr. Armstrong stated that he was unable to determine carpal tunnel syndrome in either extremity and that there was no evidence of tenosynovitis. Dr. Armstrong suggested that appellant suffered from physiological overlay and would benefit from physiological testing. He concluded that appellant was capable of returning to light duty.

Appellant next came under the care of Dr. G.N. Kini, a Board-certified internist. In a work evaluation form dated September 27, 1995, Dr. Kini opined that appellant was capable of performing light duty with limitations on repetitive motions of the right wrist and shoulder. He also noted that appellant suffered from fibromyalgia resulting in stress and anxiety caused by the worker's compensation claim process.

In a work evaluation form dated May 21, 1996, Dr. Kini again stated that appellant could perform light duty up to eight hours per day with a ten-pound lifting restriction. Dr. Kini noted that appellant was severely depressed and that she refused to work for the employing establishment under any circumstances.

On June 13, 1996 the employing establishment offered appellant a limited-duty assignment as a modified clerk. The job included a ten-pound lifting restriction and was described as requiring appellant to answer the telephone and provide tours of the postal facility as needed.²

By letter dated October 1, 1996, the Office informed appellant that the offered position of modified clerk was found to be suitable work. The Office advised appellant that she had 30 days to either accept the position or provide reasons for refusing it and, that if she failed to justify refusal that her compensation would be terminated.

In a letter dated October 18, 1996, appellant stated that she did not agree with the treatment offered by Dr. Kini and requested a referral to an orthopedic specialist. Appellant also

² Dr. Kini signed the job offer indicating that appellant could perform the duties of a modified clerk as outlined in the job offer.

indicated that she would be unable to work in the offered position because the job was not located in her hometown and would require her to commute to work.

The Office subsequently scheduled appellant for an examination with Dr. Alexander Doman, a Board-certified orthopedist, on November 6, 1996. Dr. Doman opined in his November 6, 1996 report that appellant's symptoms were not orthopedic in nature. He stated that appellant displayed markedly inappropriate behavior and considered her complaints and condition to be psychogenic in origin. Dr. Doman opined that appellant had no residual disability related to her work condition and recommended that appellant undergo a psychological evaluation.

On May 12, 1997 the Office advised appellant that her reasons for refusing the job offer of modified clerk were found unacceptable as the medical documentation from her treating physician, Dr. Kini and the Office referral physician, Dr. Doman, established that she was capable of performing the duties of the offered position. Thus, the Office gave appellant 15 days to accept the position of modified clerk without penalty.

Appellant provided an additional letter of protest on May 16, 1997 describing her medical problems, but she did not accept the job offer.

In a decision dated June 23, 1997, the Office terminated appellant's monetary compensation on the grounds that she refused an offer of suitable work.

By letter dated June 18, 1997, appellant requested a hearing, which was held on March 24, 1998.³

In conjunction with the hearing, appellant submitted an August 20, 1997 report by Dr. Joseph N. Saba, a Board-certified neurologist. He noted that appellant suffered from carpal tunnel syndrome caused by excessive hand use and that she could not work in a job with excessive hand use.

In an October 15, 1997 report, Dr. Robert Gilbert, a Board-certified neurologist, indicated that he had examined appellant and found no objective features of either cervical root or peripheral nerve abnormality. He further noted that appellant did not have enough ulnar delay or decreased conduction across the elbow to explain her subjective symptoms. Dr. Gilbert suggested that appellant undergo a magnetic resonance imaging (MRI) and stated that there was probably a strong psychological basis for her chronic pain.

A cervical MRI performed on October 29, 1997 showed a bulging disc at C6-7 with no evidence of cord compression or compromise of the cervical canal.

Appellant next submitted a November 6, 1997 report from Dr. Eric Awad, a neurologist, which noted that, appellant underwent recent nerve conduction studies that were suggestive of

³ In a decision dated August 17, 1997, the Office terminated appellant's medical benefits on the grounds that the work-related injury of July 5, 1998 had resolved. Appellant did not appeal that decision.

cubital tunnel syndrome and not carpal tunnel syndrome.⁴ Dr. Awad did not offer an opinion as to whether appellant could return to work.⁵

Appellant further submitted a March 20, 1998 report by Dr. Robert T. Shepherd, a clinical psychologist. Dr. Shepherd indicated that, appellant had undergone a battery of psychological tests. He diagnosed that, appellant suffered from dysthymia, major depressive disorder, somatoform disorder with features of anxiety and paranoia, as well as mixed personality disorder.

In a decision dated May 4, 1998, an Office hearing representative affirmed the Office's August 17, 1997 decision.

On February 25, 1999 appellant requested reconsideration and submitted a January 20, 1999 report by Dr. Earl H. Thurmond, an internist. He noted that appellant was under his care for cubital tunnel syndrome that caused severe pain, numbness and weakness in the upper extremities. Dr. Thurmond advised that appellant was under medication for her condition and that since the medication impacted her mental alertness and cognition, he recommended that she seek medical disability.

In a decision dated March 19, 1999, the Office denied appellant's request for a merit review.

The Board finds that the Office properly terminated appellant's compensation based on her refusal to accept an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects work after suitable work is offered to, procured by or secured for the employee.⁶ Section 10.124(c) of the Code of Federal Regulations⁷ 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 opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁸ To justify termination of compensation, the Office must establish that the work

⁴ Nerve conduction studies were performed on September 11, 1997 and were reported as suggestive of cubital tunnel syndrome bilaterally.

⁵ In a December 10, 1997 report, Dr. Awad diagnosed stable ulnar neuropathy of the elbow and a psychological overlay.

⁶ 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation." *See also Camilla R. DeArcangelis*, 42 ECAB 941 (1991).

⁷ 20 C.F.R. § 10.124(c).

⁸ *Camilla R. DeArcangelis*, *supra* note 6.

was suitable and must inform appellant of the consequences of refusal to accept such employment.⁹

In the instant case, appellant's treating physician, Dr. Kini, has opined that appellant's symptoms and complaints of pain stem from psychological overlay and not the carpal tunnel syndrome. Dr. Kini prepared work evaluation forms indicating that appellant could perform light duty with restrictions of no lifting over 10 pounds and limitations in repetitive motion. In accordance with Dr. Kini's medical restrictions, the employing establishment offered appellant a job as a modified clerk, an essentially sedentary position. The Office properly determined that the job of modified clerk constituted suitable work and thereby gave appellant 30 days to accept the offer or provide a legitimate reason for refusing the offer. Appellant subsequently requested an evaluation by an orthopedic specialist and the Office referred her to Dr. Doman. Based on his examination and review of the records, Dr. Doman agreed that appellant could perform light duty and that her problems were predominately psychological in nature. The Office, thereafter, complied with the procedural requirements by advising appellant that her reasons for refusing the job offer were unacceptable and gave her an additional 15 days to accept the position. Following the requisite 15-day period, the Office properly issued a decision terminating appellant's compensation for her failure to accept an offer of suitable work.

Although appellant requested a hearing and submitted additional medical evidence to justify her refusal of the modified clerk position, the Office hearing representative properly determined that appellant's evidence was insufficient to establish that she was not capable of performing the duties of the job, particularly when those duties were approved by her treating physician. The Board notes that appellant has been diagnosed with cubital tunnel syndrome and psychological overlay, but neither of these conditions are found to prevent appellant from performing the duties of a modified clerk. Because there is no medical opinion evidence indicating that appellant was not capable of performing the job at the time it was offered to her, nor is there any corroborating evidence from which to conclude that appellant's psychological condition prevented her from accepting the job at the time it was offered to her, the Board finds that appellant refused an offer of suitable work without justification.¹⁰

The Board also finds that the Office properly denied appellant's request for a merit review.

Section 8128(a) of the Act, vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹¹ The regulations provide that a claimant may obtain review of the merits of the claim by: (i) showing that the Office

⁹ *David P. Camacho*, 40 ECAB 267 (1988); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ The Board notes that it was appellant's contention in this appeal, that she was unable to commute to the offered job given her carpal tunnel syndrome, however, appellant did not submit a medical report at the time of the job offer or within 30 days of the suitability determination to show that she was precluded from driving to work by her accepted condition.

¹¹ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

erroneously applied or interpreted a point of law; or (ii) advancing relevant legal argument not previously considered by the Office; or (iii) submitting relevant and pertinent evidence not previously considered by the Office.¹² When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁵ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁶

The Board notes that in this case appellant submitted a January 20, 1999 report, from Dr. Thurmond in support of her reconsideration request. The report indicates that appellant is currently suffering from cubital tunnel syndrome. Dr. Thurmond also did not specifically address whether or not appellant was capable of performing the duties of a modified clerk at the time the job was offered to her. As such appellant's evidence on reconsideration is not relevant to warrant reopening of the case for a merit review. The Board, therefore, finds that the Office properly denied appellant's reconsideration request on the grounds that appellant failed to comply with the requirements of section 8128.

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

¹⁴ *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁵ *Dominic E. Coppo*, 44 ECAB 484 (1993).

¹⁶ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Worker's Compensation Programs dated March 19, 1999 and May 4, 1998 are hereby affirmed.

Dated, Washington, D.C.
June 27, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member