U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORA T. MANNING and U.S. POSTAL SERVICE,
POST OFFICE, Gulfport, MS

Docket No. 99-1793; Submitted on the Record;
Issued June 22, 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 on the grounds that she refused an offer of suitable work.

On November 8, 1996 appellant, then a 46-year-old clerk, filed a notice of traumatic injury and claim for compensation alleging that she injured her back and shoulder while lifting and throwing mail sacks on November 6, 1996. The Office accepted the claim for cervical strain and radiculopathy. Appellant received continuation of pay and was placed on the periodic rolls for wage-loss compensation. She has not worked since November 20, 1996.

Appellant was initially treated by Dr. Faison, an orthopedic surgeon, who diagnosed cervical radiculopathy related to her November 6, 1996 work injury. Dr. Faison prescribed a course of physical therapy, medication and rest at home. He ordered a magnetic resonance imaging (MRI) scan of the cervical spine, which was performed on December 1, 1996 and revealed a right C5 root impingement, degenerative disc disease and foraminal stenosis. Dr. Faison also referred appellant for an evaluation with Dr. Harry A. Danielson, a Board-certified neurologist.

In a report dated January 7, 1997, Dr. Danielson described appellant's work duties and her history of injury on November 6, 1996. He noted that appellant presented with complaints of back, neck, shoulder arm and left hip pain. Based on the December 1, 1996 MRI scan results, Dr. Danielson opined that appellant had an anterior herniation at C5-6 with beginning spur formation and possible stenosis. He recommended a cervical myelogram, which was performed on March 11, 1997.

In a follow-up report dated March 13, 1997, Dr. Danielson diagnosed that appellant had mild stenosis at C2-3 through C7-T1, moderate stenosis at C3-4 through C6-7 and a disc herniation along with spondylosis. He recommended that appellant undergo a cervical discectomy which was also performed on April 16, 1997.

In a June 12, 1997 report, Dr. Danielson attributed appellant's continuing back symptoms to her November 6, 1996 work injury. He prescribed physical therapy, hot packs, medication and exercise. Dr. Danielson also stated that appellant remained temporarily totally disabled.

The Office referred appellant to a nurse intervention program to facilitate a return to work.

On July 24, 1997 the Office referred appellant for a second opinion evaluation with Dr. James C. Butler, a Board-certified orthopedic surgeon. In a report dated August 20, 1997, Dr. Butler noted appellant's symptoms, physical findings, work and medical histories. He reviewed cervical spine x-rays taken at his office along with appellant's December 1, 1996 MRI scan. Dr. Butler stated that, from an objective standpoint, appellant had no impairment of the lumbar spine; however, he opined that appellant had not fully recovered from her cervical work injury. He advised that appellant's bone graft might never fully heal but estimated that she would reach maximum medical improvement in six months. Dr. Butler concluded that appellant could perform sedentary work. He further stated the following:

> "It is my understanding that her employer is willing to offer her work on a modified duty basis. I have reviewed her job description as a flat sorting machine operator. In view of [appellant] still presently wearing a soft cervical collar, I am not sure that she will be able to do this job, since this job 'requires a high degree of manual and visual coordination and close visual attention for sustained periods.' I see no contraindications to her doing other job tasks, such as what is termed a "sweeper tier."

Dr. Butler indicated that appellant was under a 15-pound weight lifting restriction and that she could not reach above the shoulder. He noted, however, that appellant could push and pull, walk and stand, intermittently.

On October 30, 1997 the employing establishment offered appellant a job as a "modified FSM [flat sorting machine]" operator. The physical requirements of the job were listed as follows: intermittent lifting of up to 15 pounds; intermittent sitting; intermittent standing; intermittent walking; intermittent pulling/pushing; and intermittent simple grasping. The Office referred a copy of the job offer to Dr. Danielson for his approval.

In a report dated November 4, 1997, Dr. Danielson advised that appellant had reached maximum medical improvement. He opined that appellant was capable of sedentary work but stated that she needed to avoid rapid head and neck movements, overhead movement, prolonged extension of the head and neck, and prolonged ladder climbing. Dr. Danielson also recommended that appellant be permitted to change positions from sitting, standing and ambulating as her tolerance demands. He noted that appellant was under a 10- to 15-pound weight restriction and that she could only push and pull sedentary type loads on occasion. Dr. Danielson concluded his report by stating that he would no longer sign off on job descriptions, as he could not go to the work site to see what an individual job entailed.

On November 11, 1997 appellant declined the job offer, stating that she was waiting on an evaluation by her physician.

On November 26, 1997 Dr. Butler signed the job form indicating his approval of the modified position.

In a November 20, 1997 letter, the employing establishment requested that the Office make a suitability rating.

By letter dated April 24, 1998, the Office advised appellant that the offered position was deemed suitable to her work capabilities, and informed her appellant that she had 30 days from the date of the letter to accept the position or to provide an explanation of her reasons for refusing it.

On May 11, 1998 appellant rejected the position and submitted an April 24, 1998 report from Dr. Faison, stating that she was unable to perform the duties associated with the modified position. He expressed concern that the job would exacerbate appellant's symptoms related to the cervical injury.

By letter dated May 27, 1998, the Office informed appellant that her reasons for refusing the job offer were unacceptable. The Office further advised appellant that she had 15 days to accept the position before compensation would be terminated pursuant to 5 U.S.C. § 8106(c).

In a letter dated June 3, 1998, appellant stated that the Office had given her "no alternative but to accept the job offer" against the advice of her treating physician.

In a decision dated August 11, 1998, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.[1]

By letters dated September 21 and October 15, 1998, appellant indicated that she had reported to the Office of Personnel Management on August 19, 1998, showed them her termination letter and applied for "reemployment priority consideration." She stated that she discussed her "status" with them, but was told that she "was never unemployed." Appellant also stated that she went to the employing establishment and turned in a CA-17 form.

In conjunction with her letters, appellant also submitted new medical evidence. In an August 24, 1998 report, Dr. Rand M. Voorhies, a neurosurgeon, noted appellant's history of injury and symptoms of back and neck pain. He reviewed an MRI scan dated August 19, 1998 which showed some degenerative changes at L2-3 in the lumbar region and minimal right forminal stenosis at C3-4. Dr. Voorhies opined that appellant suffered from fibromyalgia for which he recommended a nonsurgical approach under the direction of a rheumatologist.

On October 26, 1998 appellant filed a request for reconsideration.

In support of her reconsideration request she submitted an August 31, 1998 report from Dr. Jihan Saban, an internist specializing in rheumatology. Dr. Saban diagnosed that appellant suffered from mild cervical spondylosis, fibromyalgia and depression. He indicated that mild

[1] The Office noted that appellant was still entitled to medical benefits for any residuals of the accepted work injury.

cervical spondylosis at level C3-4 could be causing appellant's continued neck pain. Dr. Saban prescribed a neck pillow, an exercise program and medication.[2]

In a report dated September 11, 1998, Dr. Faison indicated that appellant was unable to work due to her general medical condition. He noted that a diagnosis of fibromyalgia was confirmed by Dr. Voorhies. Dr. Faison also opined that appellant was suffering from depression causally related to her work injury. He concluded that, since appellant was under medication for control of pain associated with fibromyalgia and her postoperative cervical condition, which often caused drowsiness and altered her ability to concentrate, she was not able to work.

In a decision dated February 4, 1999, the Office denied modification following a merit review.[3]

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation.[4]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5] This includes situations where the Office terminates compensation under 5. U.S.C. § 8106(c) for refusal to accept suitable work.[6]

In the instant case, the Board finds that a conflict exists in the record between the opinion of appellant's treating physician, Dr. Faison, and the opinion of the Office referral physician, Dr. Butler, as to whether appellant could perform the duties of the modified position offered to her. Dr. Faison stated in a September 11, 1998 report that appellant could not return to work since she was under medication for control of her pain related to her fibromyalgia and postoperative cervical condition that caused drowsiness and would effect her ability to concentrate on her job duties. Dr. Faison also reviewed the job requirements of the modified position and, in an April 24, 1998 report, stated that appellant could not perform the duties given her continuing cervical condition. In contrast, Dr. Butler opined in his August 20, 1997 report that appellant could perform sedentary work. His medical restrictions specifically served as the template for creating the modified job for appellant.

Section 8123(a) of the Federal Employees' Compensation Act provides that, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an

[2] An MRI scan of the cervical spine dated August 19, 1998 demonstrated degenerative changes with no disc herniation.

[3] The Office apparently considered either the September 21 or October 26, 1998 letter as a request for reconsideration.

[4] Appellant submitted evidence on appeal. The Board, however, is unable to review any evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[5] *Harold S. McGough*, 36 ECAB 332 (1984).

[6] *Arthur C. Reck*, 47 ECAB 339 (1996); *Barbara R. Bryant*, 47 ECAB 715 (1996).

examination."[7] Where there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act to resolve the conflict in the medical evidence.[8]

Inasmuch as a conflict was created under section 8123(a) between the reports of Drs. Faison and Butler, the Office was required to obtain an independent medical evaluation prior to reaching its determination on the suitability of the modified FSM operator position. Because the record is in conflict as to whether appellant is capable of performing the offered job, the Board finds that the Office necessarily failed to meet its burden of proof in terminating appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated February 9, 1999 and August 11, 1998 are hereby reversed.

Dated, Washington, D.C.
June 22, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] 5 U.S.C. § 8123(a).

[8] *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).