U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRYN KUCERA-BOZARTH and DEPARTMENT OF VETERANS AFFAIRS, HARRY S. TRUMAN MEMORIAL VETERANS HOSPITAL, Columbia, MO

Docket No. 98-1660; Submitted on the Record;
Issued March 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable employment.

On April 27, 1995 appellant, then a 48-year-old clinical nurse specialist, filed a claim for anxiety and related symptoms. She attributed her condition to sexual harassment from a veteran, Chadwick Riddle, who had been assigned to her for therapy. Appellant indicated that he had previously developed sexual fantasies and feelings for a prior female therapist. She related that Mr. Riddle began to send her letters expressing his love for her and calling her four to six times a day. He eventually developed the delusion that he had shot and killed appellant. The employing establishment eventually ordered Mr. Riddle to see a male therapist and developed a policy to have him escorted while he was in the employing establishment. He subsequently was instructed to receive treatment away from the employing establishment site. Appellant described one occasion when she encountered Mr. Riddle in the employing establishment after she had ceased her work with him which caused her considerable stress. She also stated that her superiors at the employing establishment were initially unresponsive and unsympathetic to her problems in treating Mr. Riddle, were slow in taking corrective action and did not fully inform her or consult with her in determining what actions to take with him. The Office found that appellant's interaction with Mr. Riddle was a compensable factor of employment because it involved her assigned duties. The Office, however, found that her reaction that the employing establishment's

administration failed to respond to the situation in a timely fashion was not a compensable factor because it involved administrative actions taken by the employing establishment and those actions were not shown to have been in error or abusive.[1]

The Office referred appellant to Dr. John B. Crane, a Board-certified psychiatrist, for an examination. In a November 8, 1995 report, he diagnosed post-traumatic stress disorder which he related to appellant's work with Mr. Riddle and to her anxiety when he did not respect therapeutic boundaries and appellant's superiors did not respond to her requests for supervision and counseling on her problems with Mr. Riddle. Dr. Crane indicated that appellant had repeated symptoms of anxiety and depression when Mr. Riddle attempted to contact her and would have such symptoms for months and years to come.

The Office accepted appellant's claim for post-traumatic stress disorder. It approved her claim for 32 hours of leave buy back. However, in a June 11, 1996 decision, the Office denied appellant's claim for intermittent periods of disability between July 29, 1994 and December 8, 1995 on the grounds that appellant had not submitted sufficient medical evidence to show that her intermittent disability during that period was causally related to the accepted condition.

In December 1995 appellant was transferred to nursing education. On June 18, 1996 she received another letter from Mr. Riddle. Appellant stopped working immediately. In form reports dated September 4 and September 11, 1996, Dr. Henry Schneider, a psychologist, diagnosed post-traumatic stress disorder. He indicated that appellant had decreased concentration, traumatic, intrusive memories, hypervigilence, feelings of betrayal and distrust, disrupted sleep, exaggerated startle response and was detached from others. In response to a question on permanent effects, Dr. Schneider indicated that appellant was not likely to function as a psychotheratpist or work with psychiatric patients. He commented that appellant may not be able to work in the employing establishment. The Office began payment of temporary total disability compensation effective October 18, 1996 when appellant had exhausted her leave.

In an April 4, 1997 letter, the employing establishment offered appellant a position as nursing instructor, eight hours a day, effective April 28, 1997. The employing establishment indicated that appellant would be escorted by the employing establishment's security service to and from the parking lot at her request. It also indicated that appellant would not be involved in patient care. In an April 21, 1997 letter, appellant declined the job offer. She stated that it was impossible for her to accept any position at the employing establishment because she believed she would be subjected to retaliation and would not be allowed to do her job. Appellant indicated that on April 12, 1997 she had received proficiency rating for the period she worked in nursing education from December 12, 1995 to June 18, 1996. She contended that the rating was erroneous, hostile and discriminatory. Appellant claimed that she had not been treated fairly by the employing establishment since she stopped working. She stated that she feared going back while awaiting a response to her protest against the proficiency rating. Appellant commented

[1] The Board notes that the Director of the employing establishment, in a May 18, 1995 letter, stated to appellant's representative that "our response to her concerns have not been as timely, coordinated and responsive as it should have been." As the issue on this appeal is refusal to accept suitable work and not whether appellant's condition was causally related to compensable factors of employment, the Board will not consider whether this letter constituted a confession of error on the part of the employing establishment.

that she was not protected by existing policy or by the management of the employing establishment as the situation relating to Mr. Riddle escalated. She indicated that she would not feel that the employing establishment was currently a safe or even neutral place to return to after the institutionalized failure to assist her previously.

In a July 21, 1997 letter, the Office found that the position of nursing instructor offered to appellant was suitable for her. The Office gave appellant 30 days to either accept the position or provide an explanation for refusing the position. It indicated that any explanation given would be considered prior to a determination of whether the reasons for refusing the job were justified. The Office warned appellant that if she failed to accept the position and failed to demonstrate that the failure was justified her compensation would be terminated.

In a July 25, 1997 response, appellant stated that she could not return to the employing establishment in the offered position or any position. She stated that the administration of the employing establishment had not fulfilled its responsibility. Appellant commented that she felt isolated as the threatening behaviors escalated and the employing establishment did not take action. She indicated that she regretted leaving her clinical work but believed she was doing well as a nurse instructor until she received her proficiency rating for the period January 1995 through January 1996. Appellant contended that the supervisor who prepared the rating manipulated it with inaccurate and inappropriate statements. She stated that the supervisor was ordered to correct the rating. Appellant claimed that the supervisor was adversarial to her before she was transferred to nursing education and used the proficiency rating to cover up her involvement in the professional abandonment and mismanagement of her case. She extended her complaints to all administrators of the employing establishment who she regarded as participating in Mr. Riddle's attacks on her by standing by and taking ineffectual, if any, action. Appellant stated that the proficiency rating for the period beginning January 1996 contained mistruths and misleading information. She concluded that if she returned to work she would be under the supervision of individuals who failed to perform their management duties on her behalf previously and who had exhibited retaliation against her since she had left the employing establishment in June 1996.

In a September 5, 1997 letter, the Office informed appellant that it had reviewed her reasons for refusing the position and found them unacceptable. The Office gave appellant 15 days to accept the position or it would proceed to a final decision on the issue. The Office stated that it would not consider any further reasons offered by appellant.

In a September 17, 1997 letter, appellant again stated that she could not function as an employee at the employing establishment. She added that her physician had indicated that she could not return to work at the employing establishment.

In a September 23, 1997 decision, the Office terminated appellant's compensation for refusal to accept suitable work.

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[2] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[3]

In this case, the employing establishment offered appellant a position as a nurse instructor. She had previously performed the duties of this position prior to June 18, 1996, when she stopped working due to her emotional condition. The employing establishment indicated that the position remained available to appellant.

In a December 8, 1996 report, Dr. Penny Montgomery, a psychologist, stated that her examination of appellant did not present the clinical picture of post-traumatic stress disorder but rather a thought disorder with paranoia. She commented that while it would be possible for appellant to carry out tasks necessary for her job, it was unlikely that she would say she felt safe enough to work.

In a February 28, 1997 report, Dr. Schneider discussed his treatment of appellant. He stated that she met the criteria for post-traumatic stress disorder at the time he first examined her in May 1995. Dr. Schneider noted that the initial treatment ceased in July 1995 but appellant returned in December 1995 due to a recurrence of symptoms. He commented that appellant increasingly perceived errors of omission and commission by her employer as similar to the former patient who threatened her. Dr. Schneider indicated appellant had lost her sense of safety at work and each new problem with the employing establishment's administration reinforced her feeling of threat. He stated that the current treatment plan was to return appellant to work at the employing establishment. Dr. Schneider indicated that it was not expected that appellant would be able to work in her previous position in the Mental Hygiene Clinic or work in direct patient care. He commented that it was reasonable to expect appellant to work in a position where she could employ skills she had acquired from her years of training and experience. In an April 28, 1997 report, Dr. Schneider indicated that he had reviewed the job offered to appellant and concluded that she was capable of performing the duties of the offered position. He recommended that appellant start at four hours a day and gradually increase to eight hours a day as she adjusted to the stress of employment. Dr. Schneider commented that the provisions to help appellant feel safer appeared to address her needs. He cautioned, however, that appellant felt threatened by the administrators of the employing establishment who she believed did not respond to her safety needs when she was being harassed by her patient. Dr. Schneider stated that administrative errors of omission and commission when she was working and after she left work had reinforced her belief that she was not safe at the employing establishment. She indicated that appellant did not trust that she would be treated fairly and the thought of returning to the employing establishment increased her level of distress.

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124.

The evidence of record therefore shows that the position offered to appellant followed the recommendations and work restrictions of Dr. Schneider and was approved by him. Although he had earlier suggested that appellant might not be able to return to work at the employing establishment, he had subsequently concluded that she could return to work at the employing establishment under certain conditions which the employing establishment incorporated into the job offer. The position was within the physical and vocational capacity of appellant. The offer therefore was suitable for her. Appellant indicated that she refused the job for two reasons, fear for her safety and fear of retaliation from the employing establishment. However, fear of future injury is not sufficient to justify a refusal of employment otherwise found to be suitable.[4] Appellant's claim that the employing establishment would retaliate against her and had shown hostility to her in the proficiency rating related to administrative actions of the employing establishment which cannot be considered in determining appellant's reasons for rejecting the position. She therefore did not present any justifiable reasons for refusing the offered position or any evidence that the effects of her emotional condition would prevent her from ever returning to the location of the employing establishment. The Office properly terminated appellant's compensation for refusal to accept suitable work.

The decision of the Office of Workers' Compensation Programs, dated September 23, 1997, is hereby affirmed.

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

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[4] *Edward P. Carroll*, 44 ECAB 331 (1992).