

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA D. SAMPSON and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

*Docket No. 99-863; Submitted on the Record;
Issued May 26, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

On December 15, 1991 appellant, then a 32-year-old mailhandler, filed a claim alleging that she sustained a traumatic injury on December 12, 1991 in the performance of duty. The Office accepted appellant's claim for subluxation of the right patella, a sprain of the left foot and arthroscopy of the right knee. The Office further accepted that appellant sustained cervical sprain, lumbar sprain and labyrinthus as a result of being in a motor vehicle accident on February 1, 1995 enroute to physical therapy. Appellant stopped work on February 1, 1995 and did not return.

By letter dated May 1, 1996, the Office referred appellant to Dr. Patrick Ronan, a Board-certified physiatrist, for a second opinion evaluation. In a report dated May 7, 1996, Dr. Ronan discussed appellant's history of a motor vehicle accident on February 1, 1995. He noted that subsequent to the accident appellant reported that she had no further pain in her right knee or left foot. Dr. Ronan diagnosed resolved cervical and lumbar strain, deconditioning and labyrinthus. He recommended a conditioning program and stated:

“[I]n the interim, she is capable of gainful employment with limitations as provided on the work capacity evaluation sheet.

“I would defer to Dr. Busis regarding [appellant's] labyrinthus. She is certainly capable of taking public transportation in lieu of driving in unfamiliar areas.”

In the accompanying work capacity evaluation (OWCP-5c), Dr. Ronan opined that appellant could work for eight hours per day. He found that appellant could sit and stand for six hours per day, walk for four hours per day, occasionally kneel, squat, crawl, bend, climb stairs

and reach overhead with her right upper extremity. Dr. Ronan further found that appellant could frequently twist and reach horizontally with her right upper extremity.

In a report dated May 10, 1996, Dr. Sidney N. Busis, a Board-certified otolaryngologist and appellant's attending physician, discussed her continued complaints of dizziness and noted essentially normal findings on examination. He stated:

“As you know, dizziness is a subjective sensation and, therefore, since [appellant] still has this sensation, it is my opinion that she should not drive. However, she should be able to take public transportation. From an otologic perspective, she should be able to perform light duty.”

In a form report dated September 18, 1996, Dr. Busis diagnosed labyrinthus and vertigo and checked “yes” that appellant was disabled from employment.

By letter dated October 23, 1996, the Office requested that Dr. Busis clarify his opinion regarding whether appellant could return to light-duty employment.

In a report dated October 29, 1996, Dr. Busis indicated that appellant should resume employment but noted that she should take public transportation. He further stated that “she should be able to drive if she feels comfortable driving.”

By letter dated March 7, 1997, the employing establishment offered appellant the position of modified mailhandler with her choice of two schedules. The schedule for one of the positions was from 8:00 a.m. to 4:30 p.m. with Saturday and Sunday as nonscheduled days in order to facilitate her use of public transportation.

On September 22, 1997 Dr. Busis reviewed the limited-duty employment offer and checked “yes” that the March 7, 1997 job offer with the schedule that accommodated appellant's need for public transportation was “in compliance with her work restrictions.”

By letter dated October 8, 1997, the Office notified appellant that the position of modified mailhandler was suitable, informed her of the penalty provision of section 8106(c) and provided her 30 days to accept the position or offer reasons for refusal.

On November 6, 1997 appellant declined the offered position because her physician, Dr. Eugene Herron, had not released her for duty and because she was not “physically or mentally prepared to return to work at this current time.”

In a letter dated November 18, 1997, the Office advised appellant that her reason for refusing the position was unacceptable and provided her 15 days within which to accept the position.

Appellant submitted a form report dated November 20, 1997 from Dr. Busis, who diagnosed labyrinthus and vertigo and found that appellant could perform sedentary work lifting no more than five pounds “away from high-speed machinery.”

By decision dated December 19, 1997, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated January 15, 1998, appellant requested a hearing before an Office hearing representative.¹ Appellant submitted a report dated November 25, 1997 from Dr. Moises A. Arriaga, a Board-certified otolaryngologist, who noted her complaints of dizziness and performed objective tests. He stated:

“The results of rotational vestibular testing and computerized electronystagmography were essentially normal. Results of computerized dynamic posturography were inconclusive due to the physiologically inconsistent pattern of abnormality.”

In a report dated January 8, 1998, Dr. Busis related:

“[Appellant] does not feel safe driving on the parkway and, in view of her equilibrium problem, this is understandable. However, she can drive on side roads. In view of this, it is my suggestion that she be reassigned to a local [employing establishment office] that she could reach by side road....

“Also, as we have discussed, [appellant] has found it difficult to ride on the bus because it has promoted a sensation of dizziness.”

In a report dated February 17, 1998, Dr. Busis discussed the history of his treatment of appellant, diagnosed “[p]ersistent vertigo secondary to labyrinthine concussion” and related that she “should not be placed in a position where good balance is required, where she must work at heights or where she is around moving machinery. It is not possible to state with certainty how long these restrictions will be in effect.”

By decision dated October 16, 1998, the hearing representative affirmed the Office's October 16, 1998 decision.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act 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.² 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

¹ Appellant subsequently requested a review of the written record.

² 5 U.S.C. § 8106(c)(2).

work restrictions, setting forth the specific requirements of the position.³ 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.⁴

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.⁵ The Board finds that the probative medical evidence establishes that the position offered was within appellant's medical restrictions.

The Office referred appellant to Dr. Ronan, a Board-certified psychiatrist, who found that she could work eight hours per day with listed limitations. Dr. Ronan deferred to Dr. Busis, appellant's attending physician, for an opinion regarding her ability to work due to labyrinthus. The employing establishment sent a job offer within the restrictions listed by Dr. Ronan, to Dr. Busis for his opinion regarding whether appellant was capable of performing the duties of the position of modified mailhandler, while taking public transportation to get to and from work. Dr. Busis found that the offered position was within appellant's restrictions.

The Office further complied with its procedural requirements by advising appellant, in a letter dated October 8, 1997, that the position of modified mailhandler was suitable and providing her 30 days to accept the position or provide an explanation for refusing it and of the consequences of refusing suitable work. Appellant declined the job offer stating that she was unable to perform the duties of the position and that her physician, Dr. Herron, had not released her from work. The Office notified appellant by letter dated November 18, 1997, that her reasons for refusing the position were not acceptable and provided her 15 additional days within which to accept the position.

The weight of the medical evidence establishes that the position offered appellant was consistent with her physical limitations. Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation.

Subsequent to the Office's termination of compensation, appellant submitted a report from Dr. Arriaga, who found essentially normal findings on vestibular and electronystography testing. This report is not relevant to the issue at hand, which is whether appellant could perform the duties of the modified mailhandler position. In a report dated January 8, 1998, Dr. Busis suggested that appellant be reassigned to a work station where she could get to work by driving on side roads and further noted that she felt dizzy on buses. However, Dr. Busis did not indicate that appellant could not perform the limited-duty employment, which he had previously found

³ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁴ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁵ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

within her limitations or provide any objective findings or rationale in support of his findings. Thus, his opinion is of little probative value.⁶

In a report dated February 17, 1998, Dr. Busis noted that appellant should not work around moving machinery or high above the ground, however, the position of modified mailhandler offered by the employing establishment did not require either working above ground or around moving machinery.

The Office properly met its burden of proof to terminate appellant's compensation benefits for refusing suitable work and appellant has not submitted sufficient medical opinion evidence to establish that her refusal of the offered position was justified.

The decisions of the Office of Workers' Compensation Programs dated October 16, 1998 and December 19, 1997 are hereby affirmed.

Dated, Washington, D.C.
May 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁶ *Jean Culliton*, 47 ECAB 728 (1996) (a medical conclusion without supporting rationale is of little probative value).