

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN J. WILLIAMS and DEPARTMENT OF THE ARMY,
U.S. ARMY MILITARY POLICE SCHOOL, Fort McClellan, AL

*Docket No. 98-265; Oral Argument Held October 11, 2000;
Issued November 30, 2000*

Appearances: *Donald R. Rhea, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation effective March 31, 1996 on the grounds that she refused to accept an offer of suitable work.

On July 1, 1993 appellant, then a 49-year-old secretary, filed a traumatic injury claim alleging that she injured her neck and arms on June 30, 1993 when the shelf holding her computer fell and she grabbed the shelf to stop the computer from hitting the floor. The Office accepted the claim for cervical strain and cervical disc herniation. On August 27, 1993 appellant was placed on the automatic rolls for temporary total disability.¹

In a May 17, 1995 report, Dr. R. Rex Harris, a second opinion Board-certified orthopedic surgeon, concluded that appellant's accepted cervical strain had resolved and opined that she was capable of performing sedentary part-time work as set forth in the job description.

On August 29, 1995 the employing establishment advised appellant that her accepted conditions had resolved and offered her a position with limitations on kneeling, bending, stooping and twisting as well as no lifting over 20 pounds for 4 to 6 hours per day. The duties of the offered position included reshelving books, checking books in and out, typing book and patron cards when required, typing replacement labels for books, recovering books as directed, retrieving mail and distributing, answering telephones and providing information to customers.

In a report dated September 6, 1995, Dr. Henry Ruiz, an attending Board-certified neurological surgeon, based upon discussions with appellant and her rehabilitation counselor regarding work conditions, concluded that appellant would be capable of performing the job offered by the employing establishment as it allowed alternating between walking, sitting and

¹ On July 10, 1996 appellant was approved for disability retirement.

standing and repetitive motions were avoided. Dr. Ruiz also noted that the offered position complied with the recommendations noted in a functional capacity evaluation which had been performed and “recommended this type of sedentary type of job avoiding lifting, typing on a computer and sitting for prolonged periods of time.”

Appellant, in a letter dated October 1, 1995, declined the position offered by the employing establishment as she felt that her health would not permit her to perform the activities required of the position.

By letter dated December 4, 1995, the Office advised appellant that it had found the position offered by the employing establishment to be suitable. The Office informed appellant that she had 30 days to either accept the position or provide a reason for declining. Lastly, the Office advised appellant of the penalty provisions of section 8106(c) for refusal of a suitable position.

By letter dated December 29, 1995, appellant declined the position offered by the employing establishment. Appellant stated that when she used her arms repetitively the pain became unbearable and that her muscles had deteriorated since the accident due to myotonia, which caused a nerve impingement. Appellant stated that she had constant pain, her hands swelled up and that if she moved her neck to the back, she blacked out due to the pain.

In a January 16, 1996 letter, the Office informed appellant that the reasons she provided for refusing the position were unacceptable and that she had 15 days to accept the position and that if she did not accept the position that her compensation payments, including any schedule awards, under section 8106(c) would be terminated.

By decision dated March 26, 1996, the Office terminated appellant’s monetary compensation benefits on the basis that she refused an offer of suitable work.

In a letter dated April 5, 1996, appellant’s representative requested a hearing before an Office hearing representative.

A hearing was held on November 21, 1996 at which appellant was represented by counsel, allowed to testify and submitted a November 13, 1996 magnetic resonance imaging (MRI) scan and November 13, 1996 deposition of Dr. Kenneth L. Pilgreen, appellant’s attending Board-certified clinical neurophysiologist and neurologist, and various treatment notes.

In the November 13, 1996 deposition, Dr. Pilgreen stated that he had diagnosed and treated appellant for myotonia since 1992 and that the condition had been aggravated by her working conditions and the desk falling on her. Dr. Pilgreen testified that activities such as lifting, repetitive work, use of her hand, and picking things up over her head “really bothers her a lot because she has to use her neck muscles, shoulder muscles and arm and hand muscles to be able to do that.” The physician opined that the duties of the librarian position such as “reshelving books and moving carts of books around is going to be particularly bothersome to her” and that she would have difficulty performing those duties. Lastly, Dr. Pilgreen reviewed the job description of the offered position and opined that he did not think she would be able to perform the position and he would be concerned that the duties would exacerbate her pain syndrome.

In a November 13, 1996 MRI scan, Dr. Pilgreen diagnosed a large paracentral disc extrusion at the right side of the C7 nerve root which would be consistent with appellant's radicular and myelopathic symptomatology. Dr. Pilgreen noted that the fusion at the C5-6 level was good. The physician noted that there appeared "to be a large central disc extrusion with mild spinal cord compression" at the C6-7 level with right nerve root compression at C7.

In a December 17, 1996 treatment note, Dr. Ruiz reviewed the November 13, 1996 MRI scan which revealed a ruptured disc at C6. Dr. Ruiz opined that "this disc is considered to be related to the same previous disc pathology at C5 since stabilization of the spine at one level creates the potentials for ruptured disc or herniation above and below."

By decision dated February 21, 1997, the hearing representative affirmed the Office's decision to terminate benefits based upon appellant's refusal of an offer of suitable employment. The hearing representative found that the opinion of Dr. Ruiz, appellant's attending physician, opined that appellant was capable of performing the offered position, which was also supported by the opinion of Dr. Harris, a second opinion physician. The hearing representative determined that Dr. Pilgreen, appellant's attending physician, had failed to provide a rationalized medical opinion to support his conclusion that appellant was incapable of performing the offered position.

By letters dated March 17 and April 24, 1997, appellant's counsel requested reconsideration and enclosed an April 17, 1997 letter from appellant stating that Dr. Harris was not her treating physician and a November 30, 1996 deposition of Dr. Ruiz.

Dr. Ruiz, in his November 30, 1996 deposition, opined that appellant was not capable of performing the duties listed in the librarian position offered to appellant based upon the findings in the November 13, 1996 MRI scan performed by Dr. Pilgreen. Dr. Ruiz indicated that he concurred with Dr. Pilgreen's opinion that appellant would have been incapable of performing the duties of the offered position in the fall of 1995 based upon Dr. Pilgreen's concerns regarding appellant's having to lift and reach above her head to reshelve books which "might be counter productive to her myotonia condition." Dr. Ruiz testified individuals with myotonia "are more prone to develop nerve entrapments" and "develop disc herniations in the spine." Next, Dr. Ruiz indicated that surgical procedures and injuries can be an aggravating factor of a patient's myotonia.

On July 8, 1997 the Office denied modification of the prior decision and found that the evidence submitted was insufficient to support that appellant was incapable of performing the position offered to her in August 1995.

On August 26, 1997 appellant's counsel requested reconsideration again and submitted medical notes dated June 10, July 15 and August 17, 1997 from Dr. Ruiz, pathology and radiology reports dated August 5, May 31, May 30 and May 29, 1997 and handwritten notes for the period December 17, 1996 through August 12, 1997.

By decision dated October 9, 1997, the Office denied appellant's request for modification on the basis that the evidence was insufficient to establish that appellant was incapable of performing the offered position at the time it was offered to her.

The Board finds that the Office met its burden to terminate appellant's monetary compensation.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.² Section 8106(c)(2) of the Federal Employees' Compensation Act³ provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁴ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁵

The implementing regulation⁶ 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 entitlement to compensation is terminated.⁷ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁸

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.⁹ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.¹⁰

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹¹

² *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

³ 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

⁴ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

⁵ *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

⁶ 20 C.F.R. § 10.124(c).

⁷ *John E. Lemker*, 45 ECAB 258, 263 (1993).

⁸ *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ *Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

¹⁰ *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

¹¹ *Connie Johns*, 44 ECAB 560, 570 (1993).

In terminating appellant's compensation benefits, the Office properly relied upon the September 6, 1995 report of Dr. Ruiz, appellant's attending Board-certified neurological surgeon, which was supported by the May 17, 1995 report of Dr. Harris, a second opinion Board-certified orthopedic surgeon. In his medical report, Dr. Ruiz noted that he had reviewed the proposed job description offered by the employing establishment and discussed this with both appellant and her rehabilitation counselor. Dr. Ruiz opined that appellant was capable of performing the offered position as it complied with the recommendations made in a functional capacity evaluation and as long as it allowed appellant to alternate between sitting, walking and standing and she was not required to perform any repetitive motions.

Subsequent to the termination of her benefits, appellant submitted a November 13, 1996 MRI scan, November 14, 1996 deposition of Dr. Pilgreen and a December 17, 1996 treatment note by Dr. Ruiz to support her refusal of the offered position. In his deposition, Dr. Pilgreen opined that appellant was totally disabled based upon the November 13, 1996 MRI scan and indicated that in his opinion appellant was not capable of performing the position offered by the employing establishment. Dr. Ruiz concluded in a December 17, 1996 treatment note that appellant would not have been able to perform the offered position based upon the November 13, 1996 MRI scan. While appellant has submitted additional medical evidence in support of her claim that she was physically unable to perform the offered position, the medical evidence lacks a sound medical discussion showing that appellant's diagnosed condition of a herniated disc at C6-7 was present at the time she refused the offer of suitable work in December 1995. In the case of *Linda L. Mendenhall*,¹² the Board observed that a delay in diagnostic testing may be so significant that it calls in to question the validity of an affirmative opinion based at least in part on that testing. The greater the lapse of time between the injury claimed and the diagnostic testing, the greater the likelihood that an event not implicated by the claimant has intervened either to worsen the injury or to cause the condition for which the claimant seeks compensation. Such delayed testing may document the injury claimed, but to discharge the claimant's burden of proof, the physician must provide sufficient medical rationale to support the affirmative opinion offered.

Neither Dr. Ruiz nor Dr. Pilgreen have, pursuant to the standard above, provided sufficient rationale to support appellant's position that she would not have been able to perform the offered position and, therefore, that the position was unsuitable when offered. In a report dated November 13, 1996, Dr. Pilgreen diagnosed a large paracentral disc extrusion at the right side of the C7 nerve root which was consistent with appellant's radicular and myelopathic symptomatology. In a November 13, 1996 deposition, Dr. Pilgreen opined that appellant was incapable of performing the activities noted in the proposed job description. He concluded that the appellant was totally disabled due to myotonia which had been aggravated by her accepted employment injury and that appellant was unable to perform the duties of the position of librarian offered by the employing establishment. Dr. Pilgreen also referred to the November 13, 1996 MRI scan which revealed disc extrusion at the C6-7 level which he opined was consistent with her myelopathic and radicular symptomatology. Dr. Ruiz, in his November 30, 1996 deposition, opined that appellant was not capable of performing the duties listed in the librarian position offered to appellant based upon the findings in the November 13, 1996 MRI scan performed by Dr. Pilgreen. Neither physician provides a sufficiently rationalized opinion detailing that this disc extrusion was present in 1995 when appellant declined the position and

¹² 41 ECAB 532 (1990).

her benefits were terminated. The medical evidence from Dr. Ruiz had determined that appellant was capable of performing the limited-duty position. As neither Dr. Ruiz nor Dr. Pilgreen provided sufficient rationale in support of their conclusions, their opinions are of diminished probative value and, thus, do not show that the offered position was not suitable.

Consequently, the Office properly terminated compensation as it found that appellant had refused an offer of suitable work and her reasons for refusing the position were not justified.

The decisions of the Office of Workers' Compensation Programs dated October 9, July 8, and February 21, 1997 are hereby affirmed.

Dated, Washington, DC
November 30, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member