U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERIN JOYCE and U.S. POSTAL SERVICE,
POST OFFICE, North Riverside, IL

Docket No. 00-456; Submitted on the Record;
Issued August 2, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 12, 1998 on the grounds that she refused an offer of suitable work.

On October 16, 1990 appellant, then a 33-year-old part-time flexible mail carrier, filed an occupational disease claim (Form CA-2), alleging that she was suffering from neck and back pain due to factors of her employment. The Office accepted appellant's claim for a herniated cervical disc C6-7. The claim was subsequently expanded to include adjustment. Appellant stopped working in March 1994, returned to part-time work briefly and again stopped working in April 1995.

By letter dated April 30, 1997, the Office sent appellant a copy of a job offer as a modified distribution clerk, which involved no overhead sorting of mail. An adjustable chair with armrest and back support would be provided to case mail. Assistance would be provided in bringing the mail to and from the workstation to eliminate lifting more than 30 pounds. The position required no twisting, no overhead work and no bending. However, appellant rejected the job offer, stating that it did not meet her current medical restrictions.

In April 1997, the Office authorized a new treating physician for appellant, Dr. Allison P. Henry, a Board-certified specialist in physical medicine and rehabilitation, who found that appellant was currently neurologically stable in a report dated April 2, 1997. In a report dated April 10, 1997, Dr. Henry recommended that appellant limit activities involving her neck and upper extremities, and not lift more than five pounds.

In a report dated May 29, 1997, Dr. Henry noted that appellant was only able to tolerate light-duty activities and should lift no more than 5 to 10 pounds as infrequently as possible. She also recommended that appellant avoid frequent bending and twisting of her trunk and neck.

The Office referred appellant to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for a second opinion. In a report dated September 3, 1997, Dr. Wehner opined that, due to appellant's deconditioned state, subjective complaints and asymmetry of her right shoulder, it was not possible for her to return to work as a letter carrier. However, Dr. Wehner stated that appellant was capable of doing the proposed job assignment of modified distribution clerk. She noted that the radiographic and electromyogram studies did not support any ongoing problem, and that there were multiple inconsistencies in her examination of appellant.

In a report dated September 24, 1997, Dr. Wehner indicated that, at the present time, appellant suffered only from chronic pain syndrome and did not have another orthopedic condition that could account for her continued complaints of pain. She stated that appellant had no underlying orthopedic condition that explained how she could participate fully in her activities at the gym yet show up at her office wearing a cervical collar and using a TENS unit.

By letter dated September 17, 1997, the Office forwarded appellant a job offer from the employing establishment, which was basically a reissuance of the earlier job offer. On October 13, 1997 appellant rejected this offer, noting that it did not meet her current medical restrictions.

In a report dated September 24, 1997, Dr. Henry found that appellant had chronic intractable mechanical neck pain with history of cervical herniated nucleus pulposus disc space narrowing, osteophytic formation and right C6-7 radiculitis, which symptoms dated back to her October 15, 1990 work injury. She noted that appellant still had "a significant degree of cervical muscle spasm and trigger points." Dr. Henry recommended physical therapy, a pain management clinic and continued use of Darvocet and Naprosyn. She did not recommend a return to work at this time, especially with a job description requiring lifting of up to 30 pounds.

Due to the conflict in medical opinions between appellant's physician, Dr. Henry, and that of the second opinion physician, Dr. Wehner, the Office referred appellant to Dr. James Elmes, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a medical report dated November 18, 1997, Dr. Elmes stated that he agreed with much of Dr. Wehner's evaluation. Dr. Elmes opined: "In view of the negative EMG [electromyogram] reports and lack of any positive neurological reflex deficit, as well as lack of muscle spasm or atrophy, on physical examination, I find no objective evidence to support the herniated C6-7 disc problem to still be active." He recommended that appellant do somewhat less physical demanding work, but opined that she was medically capable of performing the physical requirements of the limited-duty position of modified distribution clerk.

Dr. Elmes based his opinion on a review of her records, functional capacity evaluation, questionnaires and a video, which showed appellant exercising on four occasions at the local health club. Finally, he suggested that appellant see her psychologist on a regular basis to help with the adjustment disorder and subsequent depression.

Dr. Elmes completed a work capacity evaluation, in which he stated that appellant should avoid kneeling, crawling, twisting motions, climbing and lifting overhead. He indicated that appellant may lift 10 pounds frequently but no more than 30 pounds occasionally and no pulling,

pushing or carrying more than 30 pounds. Dr. Elmes noted that appellant should interrupt continuous long periods of sitting with standing for five minutes or even a half hour.

By letter dated December 8, 1997, the Office again notified appellant that the was offered position as a modified distribution clerk was suitable and provided 30 days within which to accept or reject the position. On January 5, 1998 appellant rejected the position because it did not meet her current medical restrictions as outlined by Dr. Henry.

In response to follow-up questions from the Office, Dr. Elmes submitted a December 22, 1997 report indicating that appellant was quiescent or essentially asymptomatic at the present time. He found various problems with her returning to work as a mail carrier, but stated that she had a much better chance of returning to the work force in the capacity of a distribution clerk. Dr. Elmes recommended ongoing workouts designed by a physical therapist and psychological counseling.

In a report dated December 23, 1997, Dr. Henry recommended a physical therapy program, a right upper extremity compressive glove and a right shoulder x-ray. She noted that if symptoms were still acute after physical therapy she would consider surgical evaluation to rule out increased nerve root compression.

By letter dated January 9, 1998, the Office proposed terminating appellant's compensation because her reasons for refusing a suitable work offer were insufficient and gave her an additional 15 days within which to respond. The Office noted that, if she did not return to work within 15 days, her compensation would be terminated.

By decision dated March 12, 1998, the Office terminated appellant's compensation. However, further medical treatment was authorized.

By letter dated March 30, 1998, appellant requested an oral hearing, which was held on March 24, 1999. At the hearing, she testified that she rejected the job offer because it did not meet the restrictions set by Dr. Henry. Appellant contended that neither the second opinion physician nor the independent medical examiner had complete information about her case and questioned their findings. She submitted a statement by her daughter in support of her claim.

Dr. Chrisann Schiro Geist also testified at the hearing and indicated that she had been seeing appellant since January 1994, that she had diagnosed adjustment reaction to her physical disabilities and the accompanying stress, and that, due to a combination of mental and physical impairment, appellant could not work at the time in any kind of competitive employment. Dr. Geist believed that, if appellant accepted the position, she would exacerbate her mental condition.

In further support of her claim, appellant submitted a February 26, 1998 report by Dr. Henry who repeated her recommendation that appellant abide by a 10-pound weight limit and not return to the job whose description was presented by the Office.

After the hearing, appellant submitted an April 2, 1999 medical report from Dr. William McNabola, a Board-certified surgeon, who opined that appellant's current job offer of modified distribution clerk did not meet sedentary restrictions. He listed appellant's restrictions as no

lifting more than 5 pounds, no overhead lifting, avoid reach over shoulder level or below knee level, alternating periods of sitting, walking and standing, no driving more than 20 or 30 minutes, and no repetitive activity.

By decision dated July 9, 1999, the hearing representative affirmed the Office's March 12, 1998 decision terminating appellant's compensation because of her failure to accept suitable work.

The Board finds that the Office properly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[1] Section 8106(c) of the Act states: "a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal of work was justified."[2]

To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[3] Further, an employee who refuses or neglects to work after suitable work has been offered or secured 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 compensation is terminated.

In this case, the Office had accepted appellant's claim for herniated cervical disc C6-7 and adjustment pain disorder. On numerous occasions and most recently by letter dated December 8, 1997, the Office sent appellant notification that the employing establishment had offered suitable employment. On these occasions, the Office provided 30 days for appellant to accept or reject the position, and advised appellant that, if she refusal to accept the offered position and demonstrate that her refusal was justified, her compensation would be terminated. The Board therefore finds that the Office properly notified appellant of the consequences of her refusal to accept suitable work.

Whether an employee has the physical ability to perform the duties of a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[4] Section 8123(a) of the Act provides that, if there is a 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 examination.[5] In situations

[1] *Henry W. Sheperd, III*, 48 ECAB 382, 384 (1997); *Shirley B. Livingston*, 24 ECAB 855 (1991).

[2] 5 U.S.C. § 10.124; *see also Vivian J. Walker*, 51 ECAB _____ (Docket No. 98-799, issued April 4, 2000).

[3] *Linda Blue*, 50 ECAB ____ (Docket No. 98-2178, issued January 28, 1999).

[4] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[5] 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

In this case, Dr. Henry opined that appellant was only able to tolerate light-duty activities and should lift no more than 5 to 10 pounds. He recommended that appellant not work as a modified distribution clerk, because the job as it required lifting up to 30 pounds. Dr. Wehner, the physician to whom the Office referred appellant for a second opinion evaluation, found appellant capable of performing the job of modified distribution clerk. Because of this conflict, the case was referred to an impartial medical examiner, Dr. Elmes. He examined appellant, considered her medical records and reviewed the videotape of appellant exercising. Dr. Elmes completed a work capacity evaluation form indicating that appellant should avoid kneeling, crawling, twisting motions, climbing and lifting overhead, and that she may not lift, push or pull more than 30 pounds. Dr. Elmes opined that appellant was medically capable of performing the physical requirements of the modified distribution clerk position. The description of this position prohibited appellant from twisting, overhead work and bending, and stated that assistance would be provided for lifting any items weighing more than 30 pounds. Accordingly, contrary to appellant's claims, Dr. Elmes' opinion that appellant was capable of performing this job was rational and well reasoned. As the designated impartial medical examiner, his opinion is accorded decisive weight.

The more recent medical evidence does not change this conclusion. Dr. McNabola's report supported of Dr. Henry's findings, but Dr. McNabola provided no rationale to explain how appellant continued to exhibit symptoms in the absence of objective findings and years of treatment. Accordingly, his report is not sufficient to overcome the special weight afforded to the medical opinion of the impartial medical specialist.

Although Dr. Schiro Geist testified at the hearing that appellant's continued need for psychological counseling impacted on her ability to return to work, her failure to provide supporting medical reports, coupled with the absence of any reference to appellant's emotional state as a reason for her failure to return to work, makes Dr. Geist's opinion less persuasive. Consequently, the Board finds that the Office properly terminated appellant's wage-loss compensation on the grounds that appellant refused an offer of suitable work.[7]

[6] *See Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[7] As appellant's entitlement to compensation was properly terminated on March 12, 1998, she is not entitled to a subsequent schedule award. *See Henry P. Gilmore*, 46 ECAB 709 (1995) (Section 8106 of Act serves as a bar to a claimant's entitlement to further compensation for total disability, partial disability or permanent impairment arising out of an accepted employment injury.)

The decision of the Office of Workers' Compensation Programs dated July 9, 1999 is affirmed.

Dated, Washington, DC
August 2, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member