U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA J. GODFREY and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 00-502; Submitted on the Record;
Issued August 27, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

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

On September 27, 1979 appellant, then a 34-year-old distribution clerk, sustained employment-related lumbar and cervical strains and a herniated nucleus pulposus in a motor vehicle accident. On November 1, 1993 she returned to work as a modified distribution clerk. She again stopped on April 29, 1994, and on May 3, 1994 filed an occupational disease claim, alleging that her neck, back and extremity pain and numbness were caused by her employment injury. On September 26, 1994 the Office accepted that she sustained a permanent aggravation of her herniated nucleus pulposus, cervical strain and spondylosis and placed her on the periodic rolls.[1]

The Office continued to develop the claim, finding that a conflict in the medical evidence existed between the opinions of Dr. Jack Southern, a Board-certified orthopedic surgeon, who had provided a second opinion evaluation for the Office, and appellant's treating physician, Dr. B.J. Wright, a Board-certified orthopedic surgeon. By letter dated September 18, 1996, the Office referred appellant to Dr. Page W. Nelson, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

By letter dated December 26, 1996, the Office proposed to terminate appellant's compensation, based on the opinion of Dr. Nelson and, in a January 27, 1997 decision, finalized the termination of appellant's compensation. Following appellant's request for a hearing, in a decision dated August 13, 1997, an Office hearing representative vacated the January 27, 1997

[1] Appellant returned to work for six hours on July 17, 1995 and for six hours per day on October 11, 1995. She stopped work on October 16, 1995 and has not returned.

decision and remanded the case to the Office to reinstate benefits, finding that the opinion of Dr. Nelson was insufficient to meet the Office's burden to terminate appellant's compensation.[2]

On remand, the Office prepared an updated statement of accepted facts and again referred appellant to Dr. Nelson. In a report dated November 21, 1997, Dr. Nelson noted that he had reexamined appellant and advised that, upon review, appellant's magnetic resonance imaging (MRI) studies appeared unchanged and, thus, her herniation was stable. He also indicated that she had recovered from her back and neck sprains and opined that her continuing symptoms "are probably due to" old degenerative disc disease which she had at the time of the 1994 employment injury. He concluded that she continued to have residuals. In an accompanying work capacity evaluation, Dr. Nelson advised that appellant could work 8 hours per day with permanent limitations on kneeling, bending, twisting and lifting of 2 to 3 hours per day and advised that she should not lift over 25 pounds.

Appellant was referred for vocational rehabilitation and, by letter dated October 30, 1998, the employing establishment offered her a permanent position as a limited-duty distribution clerk, based on the restrictions provided by Dr. Nelson. In a letter dated November 6, 1998, the Office advised appellant that it found the offered job to be suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond. In response, appellant submitted additional medical evidence. By letter dated December 14, 1998, the Office advised appellant that her reasons for refusing the offered position were not acceptable, and she was given an additional 15 days to respond. By decision dated January 4, 1999, the Office terminated appellant's wage-loss compensation on the grounds that she declined an offer of suitable work. The instant appeal follows.

The Board finds that the Office did not meet its burden of proof in terminating appellant's wage-loss compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an

[2] Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment. *See Patricia A. Keller*, 45 ECAB 278 (1993).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.[7] 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.[8] Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9] Lastly, if the employee is required to move to a certain area, isolated or otherwise, because of health conditions which were caused by the injury or which predated it, the issue of availability must be considered with respect to the new area of residence.[10] Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.[11]

In this case, in response to the job offer, appellant submitted[12] a report dated November 5, 1998 in which Dr. Wright, appellant's treating Board-certified orthopedic surgeon, advised that a September 1998 MRI of the lumbar spine showed a dramatic increase in the size of the disc herniation at the L4-5 level which caused a worsening of her condition.[13] He concluded:

> "[Appellant] cannot work for the following reasons: (1) Severe pain that limits lifting, bending, walking, working and performance of daily activities; (2) [she] has a condition that would likely be aggravated by work activities; (3) [her]

[6] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Susan L. Dunnigan*, 49 ECAB 267 (1998).

[9] *Id.* at Chapter 2.814.4(b)(4) (June 1996).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (June 1996); *see Edward J. Stabell*, 49 ECAB 566 (1998).

[11] *See Deborah Hancock*, 49 ECAB 606 (1998).

[12] Appellant also submitted additional medical evidence from Dr. Thaddeus W. Hume, a Board-certified orthopedic surgeon, and Dr. S. Ali Mohamed, an anesthesiologist, who treated appellant with lumbar epidural injections. Neither physician provided an opinion regarding her ability to perform the offered position.

[13] A September 26, 1998 MRI of the lumbar spine was interpreted by Dr. Curtis Sutton, a Board-certified radiologist, as showing a diffuse L4-5 disc bulge with superimposed broad-based posterocentral disc protrusion with moderate thecal sac indentation and central spinal stenosis with an anterior-posterior diameter of 6 to 7 millimeter (mm); a mild L3-4 disc bulge with no significant thecal sac indentation or central spinal stenosis and no evidence of central spinal stenosis at any other level with multilevel facet joint hypertrophy, most marked at L5-S1 and L4-5 with osseous foraminal narrowing, as noted above. There was questionable abutment of the posterior surface of the L4 exiting nerve roots bilaterally by facet joint hypertrophy with compression at either the L4-5 or L5-S1 level and marked L4-5 disc space reduction and discogenic vertebral body sclerosis. A September 28, 1994 MRI of the lumbar spine demonstrated moderate disc narrowing and degeneration at L4-5 with anterior and posterior endplate spondylosis and superimposed mild posterior annular bulge extending 3.5 mm posteriorly.

condition is not amenable to conservative, nonsurgical treatment; (4) [she] has failed to improve with pain management, physical therapy and medical treatment; [and] (5) light-duty work is not appropriate given the diagnosis."

In situations 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.[14] Here, Dr. Nelson, the impartial medical specialist, examined appellant for a second time on November 19, 1997 and advised that she could work eight hours per day with restrictions. Eleven months later, on October 30, 1998, the employing establishment offered appellant a limited-duty position, based on the restrictions provided by Dr. Nelson. In response, appellant submitted a report dated November 5, 1998 in which Dr. Wright noted that a more recent MRI of appellant's lumbar spine showed an increase in the size of the herniation at L4-5. He also advised that she could not work due to this diagnosis. The Board finds that the October and November 1988 reports from Dr. Wright, supported by the findings of the September 1998 MRI, create a new conflict with the opinion of Dr. Nelson regarding appellant's ability to work. The Office, therefore, did not meet its burden of proof to terminate appellant's compensation under section 8106(c).

The decision of the Office of Workers' Compensation Programs dated January 4, 1999 is hereby reversed.

Dated, Washington, DC
August 27, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[14] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).