U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON L. DEBERRY and U.S. POSTAL SERVICE,
POST OFFICE, South Orange, NJ

Docket No. 01-1046; Submitted on the Record;
Issued December 12, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work; (2) whether the Office properly denied authorization for low back surgery; and (3) whether the Office properly denied appellant's request for reconsideration without merit review of the claim.

The Office accepted that appellant sustained a herniated L5-S1 disc in the performance of duty on October 26, 1996 when she lifted a heavy package. She began receiving compensation for wage loss and medical benefits.[1] By letter dated July 23, 1999, the Office advised appellant that a job offer from the employing establishment was considered suitable. The Office noted the provisions of 5 U.S.C. § 8106(c) and informed appellant that she had 30 days to accept the position or provide reasons for refusing.

In an undated letter, appellant indicated that she could not accept the position until she contacted her physician. By letter dated September 1, 1999, the Office advised appellant that her reasons were insufficient to refuse the position and stated that her compensation benefits would be terminated in 15 days if she did not accept the position.

In a decision dated September 27, 1999, the Office terminated compensation for wage loss on the grounds that appellant had refused an offer of suitable work. By decision dated April 13, 2000, an Office hearing representative affirmed the September 27, 1999 decision. The hearing representative also directed the Office to refer appellant to a psychiatrist for an opinion as to whether appellant had a psychiatric condition causally related to the employment injury and to issue a decision with respect to a request for back surgery.

On August 2, 2000 the Office accepted a depression disorder as causally related to the employment injury.

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[1] Other than a brief return to work for approximately one week in January 1997, appellant remained off work.

In a decision dated December 21, 2000, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim. In a separate decision dated December 21, 2000, the Office denied appellant's request for authorization of low back surgery.

The Board finds that the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work. 5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[5] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[6]

In this case, the employing establishment offered appellant the position of distribution/window relief clerk, with a 40-pound lifting restriction. The work restriction was based on the reports of Dr. Robert Morrison, a Board-certified orthopedic surgeon. Although the Office refers to Dr. Morrison as an impartial specialist, the record does not establish a conflict in the medical record under 5 U.S.C. § 8123(a) with respect to work restrictions.[7] Dr. Morrison is, therefore, a second opinion referral physician.[8]

In a report dated December 28, 1998, Dr. Morrison provided a history and results on examination. He stated that appellant had recovered from her injury-related condition, noting that the disc herniations were degenerative in nature, rather than traumatic. Dr. Morrison diagnosed a chronic pain syndrome; he indicated that there were no physical findings that would

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[5] *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[6] *Id.*

[7] A conflict had been created on the issue of authorization for back surgery; attending physician Dr. Robert Weierman, an orthopedic surgeon, recommended back surgery, while Dr. Allen Glushakow, a second opinion referral orthopedic surgeon, opined surgery was not indicated. Dr. Glushakow stated only that he would encourage appellant to work some type of light duty, without providing work restrictions or other explanation. The medical evidence was not sufficient to create a conflict on any issue other than the authorization for back surgery.

[8] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

keep appellant from performing normal work, but appellant felt she was disabled and Dr. Morrison stated that appellant needed a work hardening program to return to work. Appellant argues that the offered position was not medically suitable, since Dr. Morrison had recommended work hardening prior to a return to work. The work restriction evaluation (Form OWCP 5c) submitted by Dr. Morrison, however, recommended a 40-pound lifting restriction and stated that "after a work hardening program appellant will have no work restrictions." This indicates that the work hardening program was designed to return appellant to her date-of-injury position, but did not preclude a return to work in a modified position with appropriate lifting restrictions.

Dr. Morrison provided a complete report based on an accurate background and the offered position was within the reported work restrictions. Appellant did not submit any medical evidence indicating that she could not perform the offered position. Based on the probative medical evidence, the offered position was within appellant's physical restrictions at that time and is properly considered a suitable position.

As noted above, the Office must adhere to certain procedural requirements before terminating appellant's compensation. In this case, they advised appellant by letter dated July 23, 1999, that the offered position was deemed suitable, notified her of the consequences of failure to accept a suitable position and provided an opportunity to respond. Appellant indicated that she was not physically able to perform the position, but did not submit any probative medical evidence opining that the position was unsuitable. The Office informed appellant that her reasons were not sufficient and again provided an opportunity to accept the position. The Board finds that the Office properly followed established procedure in this case.

The record indicates that the offered position was medically and vocationally suitable and appellant failed to provide an acceptable reason for refusing the position. Pursuant to 5 U.S.C. § 8106(c), the Office properly terminated appellant's compensation.

The Board further finds that the Office properly denied authorization for back surgery.

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[9] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[10]

[9] 5 U.S.C. § 8103(a).

[10] *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

As noted earlier, the medical evidence was in conflict on the issue of back surgery authorization. To resolve the conflict, the Office referred appellant to Dr. Gregory Gallick, a Board-certified orthopedic surgeon. In a report dated February 11, 1998, he opined that surgery was not recommended, noting a lack of neurologic deficits. The Office subsequently asked Dr. Gallick to review a May 1998 magnetic resonance imaging (MRI) scan, but he did not appear to respond. The Office then referred appellant to Dr. Morrison. In his December 28, 1998 report, he opined that surgery was not indicated, noting that with a chronic pain syndrome, surgery may actually increase symptoms. On this issue, Dr. Morrison is considered an impartial specialist. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[11] Accordingly, the Board finds that the weight of the probative evidence indicates that surgery was not recommended in this case. The Office, therefore, did not abuse its discretion in denying authorization for surgery.

The Board further finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[13] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[14]

In an October 23, 2000 reconsideration request, appellant argued that she was entitled to continuing compensation for wage loss because the Office had now accepted a depressive disorder. The underlying issue, however, is whether the Office properly determined that appellant refused an offer of suitable work. The medical report on which the Office based its acceptance of depressive disorder is a June 15, 2000 report from a second opinion referral physician, Dr. Soloman Miskin, a psychiatrist. He does not indicate that appellant was unable to perform the offered position; his only statement on disability is that appellant can work without restrictions. The acceptance of a consequential injury based on Dr. Miskin's report is not relevant to the issue of whether appellant could perform the offered position as of September 27, 1999. The Board finds that appellant did not advance a legal argument with a

[11] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[12] 5 U.S.C. § 8128(a)(providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[13] 20 C.F.R. § 10.606(b)(2).

[14] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

reasonable color of validity and, therefore, it is not sufficient to require a merit review of the claim.[15]

It is also noted that the record contains a brief note from Dr. Morrison dated August 16, 1999, stating that "due to her present condition [appellant] will not be able to attend job training" on August 17 and 18, 1999.[16] This report was not date stamped as received by the Office until after the April 13, 2000 decision and, therefore, it is new evidence. Dr. Morrison does not discuss the offered position itself, provide new work restrictions, or otherwise address the relevant suitable work issues in this case. It is, therefore, not relevant and pertinent evidence to the issue presented. The Board finds that appellant has not met any of the requirements of section 10.606(b)(2) and, therefore, the Office properly denied the request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated December 21 and April 13, 2000 are affirmed.

Dated, Washington, DC
December 12, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[15] *See Sherry A. Hunt*, 49 ECAB 467, 475 (1998).

[16] Dr. Morrison indicated that appellant was under his care and, therefore, his report is considered an attending physician's report.