U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNDA L. OPPERMANN and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Denver, CO

Docket No. 99-985; Submitted on the Record;
Issued February 21, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

The Office accepted that appellant's April 18, 1991 motor vehicle accident resulted in cervical, thoracic and lumbar strains, as well as thoracic outlet syndrome and temporary depression. Appellant received compensation for total temporary disability. Appellant worked in a limited-duty capacity for two hours per day in the Washington Metropolitan area in early 1994 and returned to a light-duty clerk position at the employing establishment on December 11, 1994 working four hours per day with occasional increases in her work schedule.

On April 23, 1996 Dr. Judy C. Lane, a Board-certified neurologist and appellant's attending physician, advised that appellant reached maximum medical improvement for residuals due to the motor vehicle accident of April 18, 1991. A Form OWCP-5c work capacity evaluation provided permanent limitations which included sitting up to 90 minutes with 5 minute change in position; lifting limited to 15 pounds from all heights with a 10-pound limit on overhead lifting on occasional and frequent basis. Dr. Lane stated that within these limitations, appellant could perform sedentary work for 8 hours per day working no more than 40 hours per week. She recommended appellant to start work for six hours per day for a period of three weeks before initiating work at eight hours a day. Dr. Lane further related that the work restrictions were in part based on a physical capacity evaluation done by occupation therapy on January 23, 1996. She noted that as appellant did not put forth consistent effort, the test was to be considered appellant's minimal capabilities. Dr. Lane also noted that appellant had decreased her work hours to four hours a day because her job had been stressful in the past. She stated that although appellant had significant depression and fatigue, Dr. Howard J. Entin believed she could meet the work schedule if her medications were adjusted adequately. Dr. Lane further indicated that headache maintenance was needed.

By decision dated May 17, 1996, the Office determined that appellant's light-duty clerk position which she was performing represented her wage-earning capacity. Appellant subsequently requested reconsideration. By decision dated July 10, 1996, the Office denied modification of the wage-earning capacity determination, but allowed for payment of an additional period of disability.

On May 28, 1996 the employing establishment offered appellant a full-time limited-duty clerical position within the restrictions and work assignments described by Dr. Lane in her April 23, 1996 work capacity evaluation.

In a letter dated June 13, 1996, the Office advised appellant that it found the job offer to be suitable and that she had 30 days[1] to either accept the position or provide an explanation of the reasons for refusing the offer. It was noted the position conformed with appellant's physical limitations and restrictions.

On July 12, 1996 appellant contested that she could work a full-time, eight-hour day. She enclosed a report from Sonya K. Binstock, LCSW, BCD, her psychotherapist. In a May 25, 1996 report, Ms. Binstock stated that appellant's biggest fault was her perfectionism and her exceptional work ethic which have been misinterpreted as an ability to work more hours. She related that appellant has not yet been able to accept her physical limitations and would "do the job" at the expense of her own physical health. Based on her knowledge of the work situation, Ms. Binstock opined that appellant was not able to work more than four hours a day.

In a letter dated July 15, 1996, the Office indicated that it had considered the reasons offered by appellant for declining the job offer and found them unacceptable. It, therefore, gave appellant 15 days to accept the position.

By decision dated August 1, 1996, the Office terminated appellant's compensation finding that she refused to work after suitable work was offered pursuant to 5 U.S.C. § 8106(c).

Appellant's representative requested a hearing and took issue with the Office's loss of wage-earning capacity determination and the termination of appellant's compensation for refusing suitable work. Medical articles, a break down of the hours appellant had worked and letters from appellant's supervisor were submitted along with various medical reports.

In an April 28, 1997 report, Dr. Lane noted that appellant was last seen September 23, 1996 and appellant reported she was doing approximately the same regarding her headaches and moods. Dr. Lane further noted that appellant's main concern was statements made in her case closure report of April 23, 1996. Dr. Lane indicated that no changes in appellant's medication regime or treatment plan were warranted.

In an undated report, Dr. James A. Shane opined that appellant's symptoms of depression and anxiety were related to the physical injuries she suffered in her automobile accident and

[1] In a July 2, 1996 letter, the Office made clear that appellant had 30 days from the correspondence of June 13, 1996 to accept the agency's offer of work or provide reasons for refusal.

were very typical of patients who suffer chronic pain. Dr. Shane opined that appellant was permanently disabled by the accident and that her work aggravates her injuries.

In a May 9, 1997 report, Ms. Binstock reiterated her opinion that appellant was not able to return to work on a full-time basis last year. She also opined that appellant still has not recovered to the point where she can work full time.

In a May 9, 1997 office note, Dr. Kirk T. Quackenbush, a Board-certified family practitioner, stated that the injuries appellant sustained in her work-related motor vehicle accident resulted in chronic headaches, neck pain, fatigue and secondary depression. He stated that it was medically impossible for appellant to work eight hours a day as it resulted in increased fatigue, headaches and neck pain. Dr. Quackenbush concurred that appellant reached maximum medical improvement but stated that appellant would continue to have chronic pain and headaches.

In an April 28, 1997 medical report, Dr. Richard J. Hawkins indicated that appellant was at maximum medical improvement and discussed the possibility of a cervical discogram. In a June 10, 1997 letter, Kathy Jones, R.N., writing for Dr. Hawkins, advised that the physician felt it would be possible for appellant to work and her work schedule should be what she tolerates. He recommended that appellant begin with four hours of work to see whether she could tolerate that amount.

A May 14, 1997 functional capacity evaluation study revealed that based upon appellant's age, education and work history, appellant had the residual functional capacity to perform modified sedentary work. The study indicated, however, that due to appellant's pain and migraines, she was limited to part-time work at best with a flexible work schedule.

By decision dated August 5, 1997, the Office hearing representative affirmed the Office's August 1, 1996 decision terminating compensation finding appellant refused an offer of suitable work. The Office hearing representative further denied appellant's request for a hearing on the wage-earning capacity determination on the grounds that appellant had previously requested reconsideration of this issue and a formal decision dated July 10, 1996 had been issued.[2]

In a September 23, 1996 report, Dr. Lane noted that appellant returned to work full time. She noted appellant's complaints concerning her psychological condition and the occurrence of her headaches. Dr. Lane further noted that since appellant's office was in the process of being

[2] The Board notes that as the Office reviewed appellant's wage-earning capacity determination through the reconsideration process under section 8128 of the Federal Employees' Compensation Act, the Office hearing representative properly found that appellant was not entitled to a hearing as a matter of right. The Board further notes that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. In this case, the Office hearing representative exercised her discretionary authority and inherently concluded that appellant could submit additional evidence in support of her wage-earning capacity determination claim through the reconsideration process. Inasmuch as appellant does not contest this determination on appeal and the Office hearing representative properly exercised her discretionary authority in denying a hearing on the wage-earning capacity determination, the Board will not address this aspect of the case.

moved, the ergonomic changes which were part of appellant's maintenance plan have not been made yet. Dr. Lane discussed with appellant the difference between impairment and disability and her role in helping appellant maintain the maximum level of improvement. Adjustments to appellant's medication were made.

In a November 25, 1997 report, Dr. Lane noted that appellant had not worked since October 1, 1997 as the office situation was extremely stressful. Complaints concerning appellant's headaches and muscle pains were noted. Dr. Lane stated that it was unfortunate that appellant has gone out of work. She opined that having a meaningful existence is helpful in one's recovery and for one to do better. Dr. Lane stated that if there was some flexibility at work and less stress, appellant would have done well staying there. She further noted that in the past, she had reviewed the possibility of doing a work plus program for a more complete functional capacity evaluation to see how appellant looks day-to-day, but this has not been authorized by insurance. Dr. Lane further related that there was no update on work restrictions and appellant continued to be on a maintenance plan of medication.

On August 3, 1998 appellant's representative requested reconsideration. A narrative statement addressing the attached enclosures and presenting legal arguments was submitted. Appellant's representative contended that the Office erred and, therefore, did not meet its burden of proof in the termination of compensation by excluding the element of pain which is a realistic element in traumatic injuries. The enclosures consisted of a duplicative report of Dr. Quackenbush dated September 26, 1996, appellant's W-2's from 1996 and 1997 along with a July 18, 1998 leave and earnings statement and an August 1, 1993 article from the Rocky Mountain News. In an April 29, 1998 supervisor's statement signed by Terry L. Wong regarding disability retirement, it was noted that appellant was now unable to perform the full scope of the duties of her assigned position and the possibility of reassigning her was not feasible. Medical evidence was also submitted.

Two reports dated April 29, 1998 from Dr. Quackenbush were submitted. In one report, Dr. Quackenbush provided a history of appellant's work injury and noted that a 1992 magnetic resonance imaging scan of the brain was normal and appellant has been followed by neurologists, neurosurgeons, orthopedists and psychologists. He noted that appellant was doing poorly with daily headaches, neck pain and depression despite the medication. Dr. Quackenbush opined that because of these symptoms, appellant would never make a full recovery. He stated that the impact on her life have been understandably significant including her inability to work eight hours at her current job. Dr. Quackenbush stated that he believed appellant's pain control has been maximized through medication and that appellant's inability to work eight hours a day was permanent. He opined that appellant could either work four or less hours per day or could seek long-term disability, which he favored due to the chronicity of appellant's symptoms. In the other report, Dr. Quackenbush related that appellant's status had not changed and appellant should not return to work full time.

In a June 16, 1998 report, Ms. Binstock reiterated that appellant was disabled and not able to hold down a job at the present time.

In a March 22, 1998 report, Dr. Michael D. Mead, a clinical psychologist, noted the history of injury and indicated that he reviewed previous reports and medical records. After

performing a clinical evaluation along with a Wechsler Adult Intelligence Scale-Revised test, Dr. Mead opined that appellant was totally disabled. He related that appellant was unable to complete a normal workday and workweek without interruptions from her psychologically based symptoms nor perform at a consistent pace without an unreasonable number and length of rest periods. If required to work full time, Dr. Mead stated that appellant would be unable to perform activities within a schedule and be punctual within customary tolerance. Due to a predicted increase in her irritability, anger outbursts, anxiety symptoms and depressed mood, she could not reasonably be expected to interact appropriately with the general public, coworkers and supervisors. Her chronic fatigue would worsen and cause difficulties in maintaining regular and prompt attendance. Difficulties with indecisiveness would prevent appellant from being able to consistently make work-related decisions. Dr. Mead noted that, although appellant was able to maintain part-time employment doing a job with which she has great familiarity and for an employer she has been with over the last 20 years, it was doubtful she could make an adequate adjustment to new employment situations, even if she worked on only a part-time basis.

By decision dated September 29, 1998, the Office reviewed the merits of the case and denied modification of the prior decisions.

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

Section 8106(c)(2) of the 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 meet its burden of proof under this provision, the Office must establish 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] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation[7] 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.[8] To

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2).

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

[6] *See Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] 20 C.F.R. § 10.124(c).

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

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.[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]

In the present case, the record establishes that appellant was working approximately four hours a day in the light-duty clerk position when the Office determined that the medical evidence established that she was ready to increase her daily working hours from four to six hours, gradually working up to a full eight hour a day schedule. Appellant objected to the increase in hours on the basis that she could not perform such duties without pain and without medication. At the time the Office terminated compensation on August 1, 1996, the medical evidence of record consisted of the April 23, 1996 medical opinion of Dr. Lane, a neurologist and appellants attending physician. She found that appellant was capable of working eight hours a day based in part on the functional capacity evaluation which was to be considered appellant's minimal capabilities due to the lack of consistent effort. Dr. Lane's opinion was based upon a complete medical history and of appellant's complaints, including that appellant had found her job to be too stressful and had recently decreased her work hours to four hours a day.

The May 25, 1996 report of Ms. Binstock, a licensed clinical social worker, stated that appellant was not able to work more than four hours a day has no probative value inasmuch as a social worker is not a "physician" as defined under the Act and, therefore, is not competent to give a medical opinion.[12] Inasmuch as Dr. Lane provided a rationale opinion based on a complete medical and factual background, the Board finds that her medical report represents the weight of the evidence in this case and establishes that appellant was able to perform the full-time duties of the light-duty clerk position offered to her by the employing establishment. The Office, therefore, met its burden in terminating appellant's compensation effective August 1, 1996 on the grounds that appellant refused suitable work.

The additional medical evidence submitted by appellant is insufficient to outweigh Dr. Lane's determination that appellant could work in the light-duty clerk position.

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

[10] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] *See Connie Johns*, 44 ECAB 560 (1993).

[12] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989).

Additionally, appellant has not demonstrated that the offered position was outside her physical limitations as was found by her attending physician.

The undated report from Dr. Shane, which opined that appellant's work aggravates her injuries is of diminished value as there is no rationale to support which, if any, work duties or assignments would aggravate appellant's injuries and why. The opinion of Dr. Hawkins in the June 10, 1997 letter from his nurse which indicated that appellant was able to work at least four hours is of diminished probative value as there is no indication that Dr. Hawkins was aware of appellant's present job duties or her current work abilities. The May 14, 1997 functional capacity evaluation study indicating that appellant was limited to part-time work with a flexible work schedule is insufficient on its own to modify the Office's finding as it does not establish that appellant cannot work over four hours. Moreover, this is a subjective test as it relies on appellant's cooperation with the occupational therapist and the evaluation relies on the therapist's interpretation of appellant's responses to the examination.

Although Dr. Quackenbush opined in his reports that appellant could not work eight hours a day as it resulted in increase fatigue, headaches and neck pain, he provided no medical rationale or an explanation as to why appellant could not work in excess of four hours. Dr. Quackenbush is a family practitioner and not a Board-certified neurologist, like Dr. Lane.[13] Even after appellant stopped work in October 1997, Dr. Lane found in her report of November 25, 1997 that she would need a more complete functional capacity evaluation done to determine whether appellant could work a full work day. She noted, however, that there were no updates on appellant's work restrictions. Although the 1998 medical reports of record from Drs. Quackenbush and Mead state that appellant is now unable to work full time, appellant's change in medical condition at a later date does not change Dr. Lane's finding that appellant could work full time. Accordingly, there is insufficient evidence that appellant was unable to perform the duties of the offered position.

The Board further notes that appellant's representative's arguments regarding appellant's disability and inability to work due to pain is without merit. While continued pain and inability to perform one's work after an employment injury may be a compensable factor of employment, the weight of the medical evidence is represented by Dr. Lane who found that appellant could work full time in the offered position. The Board further notes that the articles and other nonmedical evidence which appellant submitted are not probative unless a physician shows the applicability of the general medical principles discussed in the text of the articles to the specific factual situation at issue in the case.[14]

[13] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning questions peculiar to that field than the opinions of other physicians).

[14] *See Durwood H. Nolin*, 46 ECAB 818, 821-22 (1995); *Ruby I. Fish*, 46 ECAB 276, 282 (1994).

The September 29, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 21, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member