

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATTY L. LIPPINCOTT and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Fort Meade, SD

*Docket No. 99-1036; Submitted on the Record;
Issued February 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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; and (2) whether the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On January 8, 1985 appellant, then a 34-year-old nursing assistant, sustained a traumatic injury to her forearms while she was trying to restrain a patient in the performance of duty. The Office accepted the claim for myofascitis bilateral forearms. Appellant received compensation for intermittent periods of wage loss between January 8 until October 17, 1985, when she was placed on the periodic rolls.

In a February 5, 1985 report, Dr. John D. Sabow, a Board-certified neurologist, related that appellant was seen for treatment of upper arm pain beginning in 1983 when she was doing a lot of work on her ranchette, including digging 50 to 60 fence posts with the aid of a machine that caused swelling and aching in her right upper arm. He noted that appellant later aggravated her arm discomfort on several occasions at work when she used her arms to restrain patients. Dr. Sabow diagnosed that appellant suffered from chronic cervical strain syndrome "sometimes known as chronic myofascitis."

In a series of CA-20 attending physician's reports, dating from January to December 1985, appellant was diagnosed with "atypical connective tissue disorder or myositis initiated by stress," which was attributed to appellant's work injury.

Appellant ultimately underwent a series of trigger point injections, physical therapy and was assigned to a pain management clinic for her symptoms of myofascial pain. She was treated by numerous physicians over the years, including Dr. James Engelbrecht, a rheumatologist, who certified her as totally disabled as of October 13, 1985.

In order to facilitate a return to work, the Office assigned appellant to a vocational rehabilitation specialist. Numerous job searches did not result in employment. Appellant also sustained a nonwork-related injury, which preclude her return to work.¹ She went back to college to obtain a Bachelor of Arts degree as part of the rehabilitation plan approved by the Office.

In an Office form dated March 7, 1994, Dr. Steven K. Goff, an Office referral physician, indicated that appellant could perform sedentary work with a 10-pound lifting restriction. He noted that appellant “probably” could not work for eight hours a day as that would worsen her symptoms of pain. Dr. Goff, however, also related that appellant was able to perform physical activities on her ranchette, which included grooming and feeding horses.

In a June 28, 1995 report, Dr. Jeffrey J. Sabin, a Board-certified orthopedist, and Office referral physician, noted that appellant had trigger points consistent with fibromyalgia. He opined that the condition was most likely related to appellant’s January 1, 1985 work injury. Dr. Sabin indicated that appellant should not perform any frequent lifting or bending and that she had a five-pound lifting restriction. Although the Office requested that he complete an OWCP-5c work evaluation form, the physician did not comply with that request.

In a June 12, 1997 report, Dr. Engelbrecht noted that appellant was originally seen in 1985 for a severe shoulder sprain, which subsequently resulted in a severe myofascial syndrome and generalized fibrositis. He noted that appellant was at high risk for osteoporosis given the notable number of her relatives who had that disease and were under “Fosamax” therapy. Dr. Engelbrecht further noted that appellant demonstrated some of the classic signs of fibromyalgia.

The Office referred appellant for a second opinion evaluation on September 8, 1997 with Dr. Stephen Dinenberg, an orthopedic surgeon.

In a report dated September 8, 1997, Dr. Dinenberg noted that appellant sustained strains to her forearms during January 1985, at which time she sustained a “flare-up” of her “compartment syndrome previously diagnosed several years before in 1983.” He discussed appellant’s prior medical history, symptoms and recorded physical findings on examination. Dr. Dinenberg stated:

“The diagnosis of compartment syndrome may carry with it injury to nerves and to muscle tissue. If this is an accepted diagnosis as per the patient’s 1983 injury, then one would think that the problems in 1985 are aggravating circumstances for the preexisting problem. On examination one finds some hypersensitivity of the ulnar nerve. This is the only hard evidence by examination of any injury. Fibromyalgia is a rheumatologic condition that can give aches and pains anywhere and there is seldom any objective evidence for this as is such in this patient.”

In an Office work evaluation form dated September 8, 1997, Dr. Dinenberg opined that appellant could work eight hours per day so long as she limited her repetitive movements to five

¹ The record indicates that, during 1993, appellant fell from a horse and broke a cervical vertebrae.

wrist and elbow bends per hour. He indicated that the work restrictions were permanent and lifelong.

On November 13, 1997 the employing establishment offered appellant a job as a light-duty clerk in accordance with the medical restrictions provided by Dr. Dinenberg. The physical requirements of the job were listed as lifting/carrying (1 to 10 pounds 3 hours intermittently); sitting (5 hours intermittently); standing, walking, climbing stairs, kneeling, bending, twisting and fine manipulation (one hour or less intermittently); and simple grasping (2 hours intermittently). The employing establishment also noted that the position was sedentary, that appellant would be “free to move about the office, sit or stand at anytime” and that she would have a headset for using the telephone.

On December 16, 1997 appellant declined the job offer, stating: “I cannot do 40 hours per week. I am not jeopardizing my Office of Personnel Management (OPM) pension by returning to Federal Service.”

In a December 18, 1997 letter, the Office determined that the position of a light-duty clerk that was offered to appellant constituted suitable work. The Office advised appellant that she had 30 days either to accept the position or to provide an acceptable reason for refusing the job offer or else she risked termination of her compensation.

In a December 20, 1997 letter, appellant advised the Office that she wished to begin drawing on her OPM disability retirement annuity. She noted that she disagreed with Dr. Dinenberg’s opinion regarding her work capabilities and requested a schedule award.

Appellant also submitted additional medical records from Dr. Engelbrecht. In the December 2, 1997 treatment note, Dr. Engelbrecht opined that appellant’s condition had evolved into fibromyalgia, which precluded repetitive use of the fingers, wrists and elbows except on an “extremely limited basis.” He noted that appellant suffered from osteoarthritis, but did not discuss the etiology of that condition. Dr. Engelbrecht recommended that appellant continue with “limited use of the hands and the arms as before.” He stated, “I do n[o]t think that realistically she [i]s probably employable in any situation because of the risk of further aggravation of the underlying condition.”

On January 20, 1998 the Office informed appellant that her reasons for refusing the job offer were unacceptable. She was advised that she had 15 days to accept the position or her compensation would be terminated.

In a decision dated February 4, 1998, the Office terminated appellant’s compensation effective February 28, 1998 on the grounds that she refused an offer of suitable work.

On March 2, 1998 appellant requested a review of the written record.

Appellant next submitted an emergency room note dated April 4, 1996, which indicated that she had been diagnosed with chest pain of unclear etiology.

She also submitted a February 19, 1998 report, by Dr. Engelbrecht that stated as follows:

“I want to make it clear that on this, it is my feeling that you clearly had the work-related injury back in 1985, which resulted in the myofascial pain syndrome. That was the reason then and currently is still the reason that you are disabled from any type of employment. Complicating this has been the development of the fibromyalgia over the years. A separate and unrelated problem is osteoporosis, which is being addressed. In the final analysis, however, the original injury with the ensuing myofascial pain syndrome was the reason then for the disability and continues to be the reason now that you are still disabled. I think in your appeal you should make that clear to those reviewing your case.”

In a decision dated July 9, 1998, an Office hearing representative affirmed the Office’s February 4, 1998 decision.

By letter dated October 5, 1998, appellant requested reconsideration. In conjunction with her reconsideration request, appellant submitted an Internet article entitled “Mediguide to Inflammatory Diseases,” copies of medical documents that were already of record and a July 24, 1998 report from Dr. Engelbrecht.²

In a decision dated October 14, 1998, the Office denied appellant’s request for reconsideration on the merits.

The Board finds that the Office properly denied appellant’s compensation on the grounds that she refused an offer of suitable work.³

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.⁴ Section 8106(c)(2) of the Federal Employees’ Compensation Act⁵ provides that the Office may terminate compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁶ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁷

² Dr. Engelbrecht noted “myofascial pain syndrome with persistent low grade trigger points, but overall better control.” He diagnosed that appellant has secondary fibromyalgia with “still some widespread pain and tender points but overall I think we [ha]ve had significant improvement in the overall condition.” Dr. Engelbrecht also noted that appellant was on medication for early osteoporosis.

³ Although appellant submitted additional medical evidence along with his hearing request, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision.

⁴ *Karen L. Mayewski*, 45 ECAB 219 (1993); *Betty F. Wade*, 37 ECAB 556 (1986).

⁵ 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516–517 (1999).

⁶ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁷ *Stephen R. Lubin*, 43 ECAB 564 (1992).

The implementing regulation 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 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

In the instant case, the employing establishment offered appellant a position as a limited-duty clerk based on the work restrictions provided by the Office referral physician, indicating that appellant could perform sedentary work for eight hours per day with no repetitive use of her arms, wrists or hands. The Board notes that these restrictions are essentially the same as was provided by appellant's treating physician, Dr. Engelbrecht, except that Dr. Engelbrecht feels that any type of employment might aggravate appellant's diagnosed condition of fibromyalgia. The Board, however, has held that fear of future injury may not be the basis for finding a claimant disabled from work.¹⁰ Since the employing establishment provided appellant with a sedentary job where she is at liberty to perform tasks at her own leisure and has only very limited use of her arms, wrists and hands, consistent with the medical restrictions set forth by the Office referral physician, the Board finds that the Office properly deemed the position to be suitable work.¹¹

The Board also finds that Office procedures were properly followed in notifying appellant of the penalties for refusing an offer of suitable work. The Office correctly issued a notice of suitability regarding the job offer. After appellant refused to accept the position of a limited-duty clerk, the Office properly notified appellant that her reasons for refusing the position were unacceptable and gave her an additional 15 days to accept the position or risk having her compensation benefits terminated. Thus, the Office acted within its discretion in finding that appellant refused an offer of suitable work and thereby terminated appellant's compensation effective February 28, 1998.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.¹²

⁸ 20 C.F.R. § 10.516-517 (1999).

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

¹⁰ Disability compensation is payable only for an employment injury, which causes disability for work; fear of a recurrence of disability if the employee returns to work is not a basis for compensation. *William A. Kandel*, 43 ECAB 1011 (1991); *see also Mary A. Geary*, 43 ECAB 300 (1991).

¹¹ There is no medical support for appellant's contention that she is unable to work for eight hours per day in sedentary work.

¹² Although appellant submitted additional medical evidence while the case has been pending on appeal, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹³ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁴ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁶ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁷ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁸

The Board finds that appellant failed to show that the Office erroneously applied or interpreted a point of law. She also failed to advance on reconsideration a point of law or a fact not previously considered by the Office.

Although appellant submitted some new evidence along with her reconsideration request, that evidence is not sufficiently relevant and probative to warrant a merit review. The Internet article is generalized and does not focus on appellant. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship to establish that a claimed condition is related to an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.¹⁹

The Board also notes that the July 24, 1998 medical report from Dr. Engelbrecht fails to address appellant's ability to work as a light-duty clerk. Dr. Engelbrecht did not discuss the job offer and stated only that appellant's medical condition on the date of examination was "improved" and in "overall better control." Thus, because appellant did not satisfy the requirements of section 8128, the Office properly denied her request for reconsideration.

¹³ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁴ 20 C.F.R. § 10.138(b)(1).

¹⁵ 20 C.F.R. § 10.138(b)(2).

¹⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁷ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁸ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

¹⁹ *William C. Bush*, 40 ECAB 1064 (1989).

The decisions of the Office of Workers' Compensation Programs dated October 14 and July 9, 1998 are hereby affirmed.

Dated, Washington, DC
February 26, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member