U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANN MABRY and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 00-460; Submitted on the Record;
Issued January 18, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that she sustained a recurrence of disability commencing July 10, 1998; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant had refused an offer of suitable work.

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and bilateral wrist strains causally related to her federal employment as a mail clerk. Appellant returned to a limited-duty job at four hours per day on January 20, 1998 and stopped working on July 10, 1998. By letter dated August 31, 1998, the employing establishment offered appellant a full-time modified distribution clerk position.

In a letter dated September 16, 1998, the Office advised appellant that the offered position was considered suitable; appellant was given 30 days to accept the position or provide reasons for refusing. The Office also advised appellant of the provisions of 5 U.S.C. § 8106(c)(2). Appellant submitted a report dated October 1, 1998 from Dr Michael J. Einbund, an orthopedic surgeon, opining that appellant was totally disabled. In a letter dated November 5, 1998, the Office found that appellant's refusal to accept the offered position was not justified, and she was given 15 days to accept the position.

By decision dated December 16, 1998, the Office determined that appellant had refused an offer of suitable work and terminated her compensation for wage loss. The Office also found that appellant had not established a recurrence of disability commencing in July 1998. In a decision dated July 15, 1999, an Office hearing representative affirmed the prior decision.

The Board finds that appellant has not established a recurrence of disability.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a limited- or light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the

weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[1]

In this case, the record does not contain any probative evidence that the limited-duty position exceeded appellant's work restrictions.

Further, there is no probative medical evidence establishing a change in appellant's physical condition as of July 10, 1998. In a report dated July 13, 1998, Dr. Graham Scott, a family practitioner, diagnosed bilateral carpal tunnel syndrome and stated that appellant was disabled from July 10 through 13, 1998. However, he did not address the cause of disability or link it to a worsening of her accepted carpal tunnel syndrome. In a report dated July 29, 1998, Dr. Krishnama Raju, a family practitioner, indicated that appellant was released to light duty with no repetitive hand motions or prolonged typing. Dr. Raju did not provide an opinion establishing a specific period of total disability and merely noted that appellant's condition had "improved a lot."

The Board accordingly finds that appellant has not established a recurrence of total disability commencing July 10, 1998.

The Board further finds that the Office did not meet its burden of proof in terminating compensation based on a refusal of suitable work.

Section 8106(c) provides in pertinent part: "A partially disabled employee who … (2) 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 has the burden of showing that such refusal to work was justified.[4]

The Office found that the offered position of modified distribution clerk was medically suitable. The Office noted that a second opinion referral physician, Dr. Fredrick J. Lieb, opined in a May 14, 1998 report that appellant could work light duty with no rapid and repetitive use of the hands. The offered position does appear to be responsive to Dr. Lieb's restrictions, since it states that such activities are to be performed at appellant's own pace to avoid rapidity and repetition. On the other hand, appellant submitted an October 1, 1998 report from Dr. Einbund, opining that appellant was totally disabled. The Office erred in finding that this report was not

[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

[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. § 10.124(c).

sufficient to create a conflict,[5] because there is a difference between repetitive use of the hands at appellant's own pace and no repetitive use at all.[6]

Further, the Board has held that the medical evidence should be clear and unequivocal with respect to the medical suitability of an offered position.[7] The report from Dr. Einbund is of sufficient probative value to create doubt as to whether appellant could perform the offered position. In this case, the Office should have further developed the record and secured a medical opinion, based on a complete background and review of the job duties of the offered position, on whether the offered position was within appellant's medical restrictions. The Office did not obtain such a report and thus finds that it failed to meet its burden of proof to terminate compensation under section 8106(c)(2).

The decisions of the Office of Workers' Compensation Programs dated July 15, 1999 and December 16, 1998 are affirmed with respect to a recurrence of total disability commencing July 10, 1998, and reversed with respect to refusal of suitable work.

Dated, Washington, DC
January 18, 2001

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[5] 5 U.S.C. § 8123(a) provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.

[6] There is a September 16, 1998 report from Dr. Walter Morgan stating that appellant can work light duty with no prolonged typing or repetitive hand motion; there is also, however, an October 16, 1998 report from Dr. Morgan stating that appellant was totally disabled.

[7] *See Annette Quimby*, 49 ECAB 304 (1998); *see also Barbara R. Bryant*, 47 ECAB 715 (1996).