U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MERCEDES CRESPO and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 00-2482; Submitted on the Record;
Issued June 22, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 10, 2000, on the grounds that she refused an offer of suitable work; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the Office improperly terminated appellant's compensation effective April 10, 2000 on the grounds that she refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."[1] However, to justify such termination, the Office must show that the work offered was suitable. An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[2]

In February 1994 appellant, then a 54-year-old distribution clerk, claimed that she sustained an employment-related back injury due to her work injuries. Appellant began working in a limited-duty job for four hours per day and returned to full duty in July 1994. The Office accepted that appellant sustained an employment-related lumbosacral sprain and paid compensation for periods of disability. The Office later accepted that on October 18, 1995

[1] 5 U.S.C. § 8106(c)(2).

[2] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

appellant sustained an employment-related aggravation of her chronic lumbosacral sprain.[3] She returned to working in a limited-duty job at the employing establishment for four hours per day.[4]

On July 30, 1999 the employing establishment offered appellant a limited-duty job as modified distribution clerk for eight hours per day.[5] The position involved casing mail, emptying mail trays and sweeping mail cases and required sitting, standing, pushing and pulling for up to two hours. On August 9, 1999 appellant refused the offered position. By letter dated November 9, 1999, the Office advised appellant of its determination that the offered position was suitable. Appellant continued to assert that her medical condition prevented her from working more than four hours per day in her limited-duty position. By decision dated April 10, 2000, the Office terminated appellant's compensation effective April 10, 2000 on the grounds that she refused an offer of suitable work. The Office based it determination of appellant's physical ability to perform the modified distribution clerk position on the opinion of Dr. Robert R. McIvor, a Board-certified orthopedic surgeon who served as an impartial medical specialist. By decision dated June 12, 2000, the Office denied appellant's request for merit review.

The Office properly determined that there was a conflict in the medical evidence regarding appellant's ability to work and referred appellant to an impartial medical specialist.[6] In several reports dated in early and mid 1998, Dr. Alfredo F. Fernandez, an attending Board-certified orthopedic surgeon, indicated that appellant could only work four hours per day in a limited-duty position. In contrast, Dr. John LaVorgna, a Board-certified orthopedic surgeon, who served as an Office referral physician, determined in a September 8, 1998 report that appellant could work six hours per day in a limited-duty job with an increase to eight hours per day after three months.

[3] The Office had previously accepted that appellant sustained an employment-related low back injury in February 1989. In mid 1998 the Office accepted that appellant sustained an employment-related temporary aggravation of tinnitus. The files for appellant's various injuries have been combined in the present file.

[4] Appellant worked for six hours per day for a period and then returned to working four hours per day. Her limited-duty position limited her lifting to 15 pounds and restricted her from pushing or pulling.

[5] The hours of work were from 10:30 p.m. to 7:00 a.m.

[6] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a). In situations where there exist 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 upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

In a report dated June 10, 1999, Dr. McIvor, the impartial medical specialist, diagnosed lumbosacral strain with preexisting disc degeneration of the lumbar spine and determined that appellant could work eight hours per day in her current limited-duty position. He noted that appellant exhibited some back limitations on examination and stated:

> "It seems to me that from an orthopedic standpoint she would be capable of working eight hours per day in view of the rather static condition of her lower back. In other words, there is no sign of nerve root pressure or irritation. There is chronic back pain which is on the basis of the degenerated discs and I see no reason that she could not in fact increase her hourly work to the full eight hours if she were so inclined and economically motivated."

The Board finds that the weight of the medical evidence on the relevant issue of the present case is not entitled to rest with the opinion of Dr. McIvor. The opinion of his does not clearly show that appellant could perform the modified distribution clerk position at the time it was offered in mid 1999. As noted above, Dr. McIvor indicated that appellant could increase her hours in the limited-duty position at employing establishment from four to eight hours. In mid 1999 appellant was working 4 hours per day in a limited-duty position, which limited her lifting to 15 pounds and restricted her from engaging in pushing or pulling. However, the modified distribution clerk position offered to appellant required pushing and pulling of up to two hours per day.

Moreover, the description of the modified distribution clerk position does not indicate the weight that appellant would be required to lift and it remains unclear whether appellant would have to engage in lifting above the 15-pound restriction that Dr. McIvor indicated should remain in place.[7] In addition, he did not adequately explain how appellant's condition had changed such that Dr. McIvor would be able to increase her hours from four to eight hours per day.[8] Dr. McIvor's opinion does not contain adequate medical rationale and specificity regarding the extent of appellant's ability to work.

For these reasons, the Office did not meet its burden of proof to establish that appellant could perform the duties of modified distribution clerk position when it was offered in mid 1999. Therefore, it did not show that the position was suitable or that it was proper to terminate appellant's compensation effective April 10, 2000 for refusing an offer of suitable work.[9]

[7] In fact, Dr. McIvor did not provide specific work restrictions. He indicated that appellant's current work restrictions should remain in place but that his hours should be increased from four to eight hours per day.

[8] Dr. McIvor had taken note of the "static" nature of appellant's condition. He also suggested that appellant had emotional problems, which would affect her ability to work but Dr. McIvor did not further discuss this matter. The record also contains a December 17, 1998 report, in which a physician with an illegible signature indicated that appellant could not work at night due to her tinnitus and vertigo. The modified distribution clerk position would have required appellant to work at night.

[9] Given the Board's disposition of the merit issue in the present case, it is not necessary for it to consider the nonmerit issue.

The April 10, 2000 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
June 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member