U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARNET OKLESON and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 99-1653; Submitted on the Record;
Issued October 15, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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 appellant established that she sustained an emotional condition causally related to factors of her employment; and (3) whether appellant developed a consequential psychiatric condition resulting from her July 9, 1996 work injury.

On July 9, 1996 appellant, then a 49-year-old distribution clerk, began to experience respiratory problems after a chemical was released to clean the air conditioning ducts in her office and she was exposed to the fumes for approximately one hour. Appellant was initially seen in the emergency room at St. Vincent Charity Hospital on July 9, 1996 and released for follow up with her family physician.[1] The Office accepted appellant's claim for inhalation of noxious fumes and asthmatic bronchitis. Appellant stopped work on July 10, 1996 and has not returned.

In a report dated July 19, 1996, Dr. Berhanu Getahun, a Board-certified internist, indicated that appellant had inhaled fumes that were released from the air conditioning ducts at her worksite on July 9, 1996. Physical findings included inflammation and reddening of the eyes and throat, wheezing and severe coughing during the examination. He opined that appellant's respiratory symptoms were causally related to the noxious fume exposure at work and that she was disabled for an indefinite time.

In an August 5, 1996 letter, the employing establishment set forth the circumstances leading up to appellant's exposure, explaining that on July 9, 1996 at approximately 9:00 a.m., maintenance cleaned the air ducts in the air conditioning with "PB B'laster" because the HVAC

[1] Appellant was cleared for work as long as it was in an environment free of the fumes to which she had been exposed at the onset of her asthma attack. Appellant, however, refused to return to work until she was examined by her family physician.

airhandlers locked up and could not be unlocked with manual manipulation. The employing establishment reported that no further episodes had occurred with the air conditioning unit.

In a November 4, 1997 report, Dr. David M. Weiner, a Board-certified internist, advised that appellant had been under his care for treatment of severe asthmatic bronchitis originating from exposure to noxious fumes at work on July 9, 1996. Dr. Weiner noted that appellant suffered from intermittent wheezing and shortness of breath. He opined that appellant was unable to return to her last job as the prior work environment would continue to irritate her airways. Dr. Weiner indicated that appellant's asthmatic bronchitis would be a lifetime condition requiring intermittent courses of systemic steroids.

In a report dated November 21, 1997, Dr. Joseph A. Sopko, a Board-certified respiratory specialist and Office referral physician, stated that physical findings and pulmonary functions tests completed in his office confirmed that appellant could perform sedentary work. He noted that appellant's work restrictions would be to avoid odors, vapors, or fumes beyond a normal office environment.

The Office determined that a conflict existed in the record and referred appellant for an impartial medical evaluation with Dr. David M. Berzon on April 13, 1998. Dr. Berzon diagnosed that appellant had asthma precipitated by her exposure to fumes at work. He discussed appellant's physical findings and the results of pulmonary function testing. Dr. Berzon concluded that appellant's respiratory condition had stabilized such that she could return to work in a sedentary position for eight hours per day so long as she was not exposed to further noxious fumes.

The employing establishment offered appellant a modified position as a clerk based on the medical restrictions set forth by Dr. Berzon. The hours of the position were listed as 12:00 p.m. to 8:30 p.m. for five days a week. Appellant's job duties were listed as answering the telephones, computer data entry, preparation of mail for quality checks, printing class labels and mailing edit sheets. It was noted that appellant could not lift more than five pounds and that she was to have no exposure to noxious fumes, temperature extremes or a dusty environment.

In an August 25, 1998 letter, the Office determined that the job was suitable and advised appellant that she had 30 days to either accept the position or to provide justification for refusing the job offer or else she risked termination of her compensation benefits.

Appellant rejected the job on September 23, 1998 and submitted a September 14, 1998 report from Dr. Weiner. He described appellant's history of injury and respiratory symptoms. Dr. Weiner specifically noted that appellant's symptoms were worse at night and resulted in a fitful sleep that adversely affected her normal activities. He opined that appellant had reached maximum medical improvement and stated as follows:

> "The accepted medical condition, asthmatic bronchitis, has had a serious adverse impact on [appellant's] overall fitness and ability to perform necessary daily life activities. With this in mind, I reviewed the [job offer] and opinion [sic] that it is not suitable. She experiences bronchial reactivity that is worse at night and it is important to keep these symptoms under control as much as possible. Under no

> circumstances should [appellant's] regular work schedule incorporate any evening hours. Maximum benefits derived from prescribed medications would be diminished and successful therapeutic regimes designed to relieve her nocturnal symptoms would be undermined. She is also prohibited from working a regular schedule that exceeds a 5-day week or includes disjunctive off days. Other restricted activities included strenuous exercise, continuous lifting over 5 pounds, pulling, pushing, climbing or being involved in an area where there are noxious odors, fumes, temperature extremes, or a dusty environment."

Dr. Weiner further noted that appellant's limited-duty job was to be in the same building where appellant previously inhaled the irritant that was introduced into the ventilating system causing her asthma. He stated that he would need access to more detailed information regarding the ventilation system of the proposed work site, maintenance protocols involving the use of any respiratory irritants in that area of the building and recent air samples to ascertain whether appellant was able to return to the proposed work site.

On September 27, 1998 appellant filed a CA-2 claim for an emotional condition. She alleged that she had been harassed by the employing establishment since filing her original claim for the July 9, 1996 work injury and that she suffered from anxiety and depression which stimulated her asthmatic condition.

In an October 2, 1998 letter, the Office notified appellant that her reasons for refusing the offer of suitable work were unacceptable. Appellant was given an additional 15 days to accept the job offer or else her compensation would be terminated.

Appellant responded with additional medical evidence. In an October 7, 1998 report, Dr. Weiner noted that the scheduled hours of the offered limited-duty job would not provide appellant with enough sleep because she typically would be awake approximately 3 to 4 times a week from 1:30 a.m. to 4:30 a.m. with asthmatic symptoms. He stated, "[c]learly, the proposed scheduling, including days off, would substantially decrease [appellant's] already too few hours of uninterrupted, symptom free sleep." Dr. Weiner further related that an esophagram done in August 1996 demonstrated that appellant had esophageal reflux and that working her proposed schedule 12:00 p.m. to 8:30 p.m. would mean that appellant's "heaviest meal would be eaten sometime after 9:30 p.m. and she would then go to sleep on a full stomach." He also related that appellant was anxious about working in a relatively deserted building during the evening hours.

In an October 10, 1998 letter, appellant set forth alleged employment-related incidents, which she felt contributed to her emotional condition.

In an October 19, 1998 decision, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

In a decision dated November 19, 1998, the Office denied appellant's claim the grounds that she failed to establish that she sustained an emotional condition in the performance of duty.

Appellant filed a request for reconsideration on November 23, 1998. Appellant submitted a lengthy statement outlining why she disagreed with the November 19, 1998

decision. She also stated that she was now claiming that her emotional condition was consequential to the accepted asthma condition.

In support of her consequential injury claim, appellant submitted an October 28, 1998 report from Dr. James Pretzer, a clinical psychologist. Dr. Pretzer noted that appellant suffered from anxiety and stress, which sometimes precipitated her breathing problems and aggravated her asthmatic condition. He noted that there was no history of clinical problems with anxiety prior to the onset of appellant's breathing problems at work on July 9, 1996. Dr. Pretzer stated:

> "It is not unusual for the sudden onset of breathing difficulties to leave individuals feeling vulnerable and fearful and it appears that this was the case with [appellant]. Subsequent conflict with her supervisor and interactions with persons handling her workers' compensation claim have aggravated the situation. Thus, it appears that her anxiety problems are a consequence of her chemical exposure at work and her subsequent interactions with persons associated with her job…."

In a decision dated February 24, 1999, the Office found that appellant's depression was not a consequential condition causally related to the July 9, 1996 work injury. The Office also refused to modify the November 19, 1998 decision, finding that appellant's emotional condition was not causally related to work factors of her employment.[2]

Appellant next filed for reconsideration on March 19, 1999.

In an April 7, 1999 decision, the Office noted that case file numbers A9-4117746 and A9-0445022 had been combined for consideration but that the evidence on reconsideration was insufficient to warrant modification.

The Board initially finds that the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

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.[6] To

[2] The case file A9-445022 was doubled with case file A9-417746.

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

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

[6] *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 his refusal to accept such employment.[7]

In this case, the employing establishment offered appellant a position as a modified clerk based on the restrictions set for by the impartial medical specialist.[8] Since the job was listed as being sedentary and without exposure to noxious fumes, the Office properly determined that it was suitable and followed Office procedure in allowing appellant 30 days to accept the job. Appellant, however, refused to accept the position and submitted two reports from her treating physician, indicating that she was unable to work the hours stated for the job and challenging whether or not the work site was within appellant's medical restriction.

The Board notes that while Dr. Weiner opined that appellant could not work the scheduled shift of 12:00 p.m. to 8:00 p.m. as a modified clerk, his opinion is not reasoned. The Board acknowledges that appellant experiences an increase of her asthmatic symptoms from 1:00 a.m. to 4:30 a.m., which would interfere with a normal sleep pattern, however, there is no reason to suspect that a change in appellant's work hours to an early morning day time shift would give her any more hours of sleep or help prevent the asthmatic symptoms in the middle of the night. He has provided no medical rationale for concluding that an early morning day shift is better suited for appellant than a late day shift. If appellant works the hours scheduled in the proposed modified job she will have just as many hours for sleep as she would for any alternative schedules.[9]

Dr. Weiner also raised the question of whether or not appellant would be exposed to the same noxious fumes since her offered job as a modified clerk was to take place in the same building where she was exposed to chemicals on July 9, 1996. The employing establishment has indicated that any future maintenance with respect to the ventilation system would be performed after hours when the building was closed to employees. Consequently, appellant is not at risk in the proposed job to exposure to the irritant that precipitated her asthma attack. Furthermore, although Dr. Berzon requested air samples, there is no reason to expect that appellant would not be able to return to work at her prior worksite since she worked there for a number of years without incident, until the chemical exposure on July 9, 1996. Absent that exposure, the Board considers her worksite to be within the medical restrictions provided by Dr. Berzon.

Lastly, although appellant apparently is afraid to work a late day shift in what she terms a "deserted building," that fear does not warrant refusal of an offer of suitable work.[10] Appellant's desire to work in a particular environment is not relevant to whether or not the offered position is suitable to her medical restrictions.

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

[8] The Board notes that appellant's treating physician is in agreement that appellant can perform sedentary work so long as she is not exposed to noxious fumes or irritants at her worksite.

[9] The Board finds that Dr. Weiner also did not provide a reasoned opinion for insisting that appellant workdays not be disjunctive, which we interpret as a recommendation that appellant work consecutive days. There is also no basis for concluding that appellant could not schedule her evening meals to accommodate her reflux condition.

[10] *See Salvey DiNovo*, 32 ECAB 1908 (1981).

The Board's review of the record shows 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 her that the reasons for refusing the position were unacceptable and gave her an additional 15 days to accept the position or risk having her compensation terminated. Thus, the Office acted within its discretion in finding that appellant refused an offer of suitable work and thereby terminated appellant's compensation.

The Board also finds that appellant's emotional condition was not causally related to factors of her employment or consequential to the July 9, 1996 work injury.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her employment.[11] This burden includes the submission of a detailed description of the employment conditions or factors, which appellant believes caused or adversely affected the condition for which he or she claims compensation.[12] This burden also includes the submission of rationalized medical opinion evidence, based upon a complete and accurate factual and medical background of appellant, showing a causal relationship between the condition for which compensation is claimed and the implicated factors or conditions of her federal employment.[13]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are not found to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Act.[14]

Appellant alleges that beginning July 9, 1996, when she stopped work after an asthma attack at work, the employing establishment undertook actions against her that constituted harassment. She alleges the following as acts of harassment: (1) that on July 9, 1996 she was directed by acting manager John Crow to take a cab back to work after she was treated at the hospital for her asthma attack; (2) that she was harassed with frequent telephone calls made by her manager during the six weeks following the July 9, 1996 work injury; (3) that she was expected to give an explanation for scheduling a hairdresser appointment prior to her first doctor's appointment; (4) that the employing establishment controverted the claim; (5) that she

[11] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[12] *See generally* 20 C.F.R. § 10.115-116 (1999).

[13] *See Ruth C. Borden*, 43 ECAB 146 (1991).

[14] *Lillian Cutler*, 28 ECAB 125 (1976).

was questioned about her injury at the hospital; (6) that she became the focus of a postal inspector investigation and was photographed and followed on several occasions; (7) that the employing establishment withdrew a job offer that had been extended to her in June 1988, thereby forcing her to file an Equal Employment Opportunity complaint; and (8) that the employing establishment assigned two temporary workers to perform the same duties that appellant had been assigned prior to the July 9, 1996 work injury.

Most of appellant's allegations concern administrative actions by the employing establishment and are not compensable. The remaining allegations have not been proven as factual or are not relevant to her claim. Although appellant has cited several incidents of surveillance by unidentified individuals who followed her, by the same, she has submitted no corroborating evidence that any of the individuals she believed to watching her were associated with the employing establishment or that the incidents occurred as alleged. There is also no factual support for her allegation that her telephone was tapped, that her children were questioned without her permission, that her adult children were questioned in public places, that her family's safety was compromised or that "postal management went ahead and devised a reign of terror designed to frighten and harass" her.

Mere perceptions of harassment alone are not sufficient to establish compensability under the Act.[15] Because appellant has failed to corroborate her allegations of harassment with factual support in the record, she has failed to allege a compensable factor of employment. Therefore, the Office properly determined that her emotional condition did not arise in the performance of duty.

Lastly, the Board finds that appellant's emotional condition was not a consequential condition related to the July 9, 1996 work injury.

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[16]

Although appellant contends that her emotional condition is a consequential injury, she provided no reasoned medical evidence to establish a causal relationship between her anxiety and depression and the work-related asthmatic condition. Although Dr. Pretzer suggests that it is not unusual for patients to become anxious with fear that they could suffer an asthma attack, this statement is generalized and does not specifically focus on appellant's diagnosed condition. Moreover, he states that appellant's asthmatic symptoms are often triggered by her anxiety attacks, therefore, by definition, her emotional condition could not be considered consequential of the work injury. Because Dr. Pretzer does not discuss with appropriate medical rationale how appellant's emotional condition is a consequence of her July 9, 1996 work injury, appellant has failed to carry her burden of proof. Thus, the Office properly denied compensation based on appellant's claim for an emotional condition.

[15] *Anna C. Leanza*, 48 ECAB 115 (1996).

[16] *See Charlet Garrett Smith*, 47 ECAB 562 (1996).

The April 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 15, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member