U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOU BARRETT and U.S. POSTAL SERVICE,
POST OFFICE, El Paso, TX

Docket No. 00-2468; Submitted on the Record;
Issued September 4, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Appellant, a 57-year-old mailhandler, filed a notice of occupational disease on March 26, 1997 alleging that she developed lumbosacral pain due to factors of her federal employment. The Office accepted appellant's claim for lumbar strain, cervical strain, left knee and left ankle strains as well as myofacitis. On December 1, 1997 the Office entered appellant on the periodic rolls. On July 17, 1999 the Office reduced appellant's compensation for failure to undergo vocational rehabilitation.

The employing establishment offered appellant a light-duty position on July 21, 1999. Appellant declined the position on July 29, 1999 stating that she was medically unable to perform the duties. On August 3, 1999 the Office conducted a telephone conference with appellant and the employing establishment. Appellant again refused the offered position. On September 7, 1999 the Office informed appellant that her reasons for refusing the position had been considered and that she had 15 days to accept the position. On September 15, 1999 appellant responded and thanked the Office for its consideration. In a letter dated September 24, 1999, the Office informed appellant that the offered position was suitable and allowed her 30 more days to accept the position or provide her reasons for refusal. By decision dated October 25, 1999, the Office terminated appellant's compensation benefits finding that following the September 24, 1999 letter appellant had not submitted a response.

On October 26, 1999 the Office received a statement from appellant dated October 20, 1999 stating that she was unable to work four hours a day. Appellant requested reconsideration on March 21, 2000. By decision dated May 17, 2000, the Office denied modification of its October 25, 1999 decision. Appellant requested reconsideration on June 23, 2000. By decision dated July 10, 2000, the Office again denied modification of its October 25, 1999 decision.

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

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Sections 516 and 517 of the applicable regulations[3] provide 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

Appellant's attending physician, Dr. Anthony F. Valdez, Jr., a Board-certified internist, listed her work restrictions as lifting 2 pounds intermittently, sitting for 1 hour intermittently, standing for 15 minutes intermittently, fine manipulation for 1 hour intermittently and reaching above the shoulder for 1 hour intermittently on August 27, 1997.

Dr. E. Chester McDanald, a Board-certified internist, examined appellant on March 31, 1998 and found that she could proceed with a functional capacity evaluation. Appellant underwent a functional capacity evaluation on April 2, 1998 and the results indicated that she tested at below sedentary level.

Dr. Valdez recommended a work-hardening program on April 8, 1998. Appellant did not complete the program due to chest pain. On December 1, 1998 he stated that appellant could not return to the work-hardening program due to unspecified chest pain.

Dr. McDanald completed a work restriction evaluation on August 31, 1998 based on appellant's performance during the 16 days completed in the work-hardening program. He indicated that appellant could sit for 30 minutes, walk for 30 minutes, stand for 30 minutes and could lift for 30 minutes intermittently. Dr. McDanald indicated that appellant could lift up to 10 pounds and that she could work 4 hours a day in a sedentary position.

Dr. Valdez submitted a report on April 9, 1999 and stated that appellant could not sit, stand, bend or stoop for more than 30 minutes duration and that she was unable to lift more than 10 pounds. He opined that appellant was totally disabled. In response to a request from the

[1] *Mohamed Yunis,* 42 ECAB 325, 334 (1991).

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

[3] 20 C.F.R. §§ 516, 517.

[4] *Arthur C. Reck,* 47 ECAB 339, 341-42 (1995).

vocational rehabilitation counselor regarding selected sedentary positions, Dr. Valdez released appellant to "attempt this type of employment."

The employing establishment offered appellant a limited-duty position of modified mailhander on July 21, 1999, which required 4 hours a day with sitting intermittently, standing intermittently for 30 minutes or less, walking intermittently for 30 minutes or less, simple grasping, fine manipulation and lifting intermittently 10 pounds or less. The position allowed appellant to alternate sitting, standing and walking as needed within her restrictions. Appellant refused this position on July 29, 1999 stating that she was physically unable to comply with the offer. In a telephone conference dated August 3, 1999, with the employing establishment and the Office, appellant again declined the position stating that she did not feel able to work.

In a letter dated September 7, 1999, the Office stated that it had previously informed appellant that the offered position was suitable, that it had considered the reasons given by appellant for refusing the position and that the reasons given were unacceptable. The Office allowed appellant 15 days to accept the position and stated that it would not consider any additional reasons for refusal.

Appellant responded on September 15, 1999 and stated that she appreciated the consideration given her reasons for refusing the offered position. Appellant stated that she feared additional injury if she returned to work.

In a letter dated September 24, 1999, the Office informed appellant that the position offered by the employing establishment was suitable, that the position was currently available and that she had 30 days from the date of the letter to accept the position or offer her reasons for refusal. The Office informed appellant of the penalty provision of section 8106 of the Act. Appellant did not respond to this letter prior to the Office's October 25, 1999 decision terminating her compensation benefits.

In this case, the medical evidence established that appellant was capable of working four hours a day with restrictions on sitting, walking, standing and lifting. The employing establishment offered appellant a limited-duty position, which corresponded to the work restrictions provided by appellant's attending physician, Dr. Valdez. Based on the medical evidence, the Office properly found that appellant had received an offer of suitable work. The Office provided appellant with notice that the position was suitable on September 24, 1999 and allowed her 30 days for a response. Appellant did not respond to this letter within the allotted time and the Office properly terminated appellant's compensation benefits.

Following the Office's October 25, 1999 decision, appellant requested reconsideration and submitted additional factual and medical evidence. In a statement dated October 20, 1999 and received by the Office on October 26, 1999, appellant stated that she was unable to work four hours a day. In support of her allegation, appellant submitted medical reports from Dr. Joseph Neustein, a Board-certified orthopedic surgeon and appellant's attending physician. On January 3, 2000 Dr. Neustein diagnosed discogenic disease at L5-S1 and indicated that this condition was related to appellant's January 31, 1997 employment injury. He did not indicate that appellant was totally disabled and did not provide any work restrictions. In a separate note dated January 6, 2000, Dr. Neustein stated that appellant had a work-related condition and that

she could not resume work. In a report dated March 13, 2000, he diagnosed degenerative disc disease of the lumbar spine at L4-5 and L5-S1 as well as hemangioma L3 vertebra, depression and radiculitis on the left without radiculopathy. Dr. Neustein stated that appellant sustained a back injury on January 31, 1997, that she had residual discomfort and that she was unable to work four hours a day due to her severe post-traumatic pain syndrome. These reports are not sufficient to establish that the offered position was not suitable. He did not provide any medical reasoning for his conclusion that appellant's pain prevented her from returning to work for four hours a day. This reasoning is necessary given that appellant's prior attending physician had released her to return to work with restrictions.

In a report dated January 10, 2000, Dr. Leonardo Svarzbein, a neurosurgeon, examined appellant at Dr. Neustein's request. He noted her history of injury and performed a physical examination. Dr. Svarzbein diagnosed low back pain, evidence of radiculalgia, chronic pain syndrome, weakness of the left side of the body, degenerative disc disease, hemangioma of the vertebral body L3 and depression. He did not offer an opinion on appellant's ability to work. This report is not sufficient to establish that the offered position was not suitable.

On June 23, 2000 appellant again requested reconsideration and submitted a report from Dr. Neustein dated June 15, 2000. He performed a physical examination and diagnosed discogenic disease at L5-S1. Dr. Neustein stated that appellant could not return to gainful employment due to severe post-traumatic back injury with objective discogenic abnormality at L5-S1. He stated that appellant could not sit for more than 10 minutes, could not function reasonably or safely under the prescribed medication for pain, could not operate a vehicle safely or safely walk without the help of a cane, could not sit or stand for 4 hours a day, could not concentrate while using pain medication and that appellant required a back brace, which she could tolerate for only 2 hours a day. Dr. Neustein reported that appellant experienced pain when standing, sitting or walking and that she was unable to work as she would be unable to fulfill her responsibilities due to preoccupation with her medical needs.

Although Dr. Neustein provided a detailed report listing the reasons he feels that appellant is not able to work, he did not provide any medical reasons why her diagnosed condition would prevent her from performing limited-duty activities. A detailed medical report is necessary to establish that at the time of the suitable limited-duty job offer, appellant could not perform these duties. Appellant's current disability for work does not have bearing on her capacity to perform the duties of the offered position in 1999. Dr. Neustein must explain why he believes that appellant could not sit, stand or walk within the restrictions provided by Drs. Valdez and McDanald at the time of the job offer.

The July 10 and May 17, 2000 and October 25, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 4, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member