U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE M. DONNELAN and U.S. POSTAL SERVICE,
POST OFFICE, North Reading, MA

Docket No. 01-83; Submitted on the Record;
Issued August 20, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused suitable work; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On August 3, 1994 appellant, then a 39-year-old carrier, filed a claim alleging that she developed a back condition when she lost her footing on a step and fell. She stopped work on July 18, 1994 and returned to light-duty work, eight hours per day on January 9, 1995; on January 31, 1995 her hours were reduced to four hours per day and then on April 26, 1995 appellant returned to light duty, eight hours per day and stopped work completely on July 18, 1996. The Office accepted the claim for herniated disc at L5-S1 and authorized microsurgical discectomies on September 15, 1994 and July 18, 1996. Appellant was paid appropriate compensation for all periods of disability.

Appellant submitted various records from Dr. Alec Danylevich, a Board-certified neurologist, dated August 11 to September 15, 1994; a magnetic resonance imaging (MRI) scan dated August 12, 1994; and an operative note dated September 22, 1994. Dr. Danylevich noted a history of appellant's injury and his subsequent treatment for a lateral disc rupture at L5-S1. The MRI scan revealed a disc herniation at L5-S1. The operative report of September 22, 1994 indicated that appellant underwent a microsurgical discectomy at L5-S1. Dr. Danylevich diagnosed appellant with left L5-S1 herniated nucleus pulposus (HNP)-free fragment.[1]

On January 3, 1995 the employing establishment offered appellant a limited-duty position as a modified carrier which was in compliance with appellant's medical restrictions. The position was eight hours per day. Appellant accepted the position and returned to work on

[1] The record reflects that appellant submitted notices of recurrence of disability dated February 2 and May 15, 1995. The Office accepted these recurrences of disability and appropriate compensation was paid.

January 9, 1995. On January 31, 1995 her work schedule was decreased to four hours per day limited duty on the recommendation of her physician. On April 26, 1995 appellant's hours were increased to eight hours per day, limited duty. On May 15, 1995 her hours were again decreased to seven hours per day, limited duty on the recommendation of her physician and she continued to work until approximately July 18, 1996 when she underwent a second surgery and did not return thereafter.

Appellant filed several reports from Dr. Danylevich dated January to April 1996; and an MRI report dated February 23, 1996. In his report dated January 9, 1996, Dr. Danylevich noted appellant's complaints of stiffness and aching in her back and diagnosed her with sacroiliac inflammation and bursitis. His notes from March 6, 1996 indicated that appellant was getting worse over the last three weeks in a slow fashion. Dr. Danylevich noted that appellant sustained a recurrent disc rupture which was causally related to her original work injury of July 5, 1994. The MRI scan revealed a recurrent left-sided herniation at the L5-S1 disc.

The case was referred to the district medical adviser who recommended appellant undergo a wide incision and exploration with evacuation of the remainder of the L5-S1 disc.

In an operative note dated July 18, 1996, Dr. Danylevich performed a left L5-S1 discectomy and decompression. He diagnosed appellant with recurrent left L5-S1 HNP and degeneration. Dr. Danylevich's progress notes thereafter indicated appellant's recovery and noted that appellant continued to experience radiculopathy and stiffness. In his report dated October 15, 1996, he expressed his concern over appellant's slow recovery and recommended a repeat MRI scan. The MRI scan performed October 29, 1996 revealed no evidence of recurrent disc herniation at L5-S1.

On November 11, 1996 appellant underwent a work capacity evaluation which indicated that appellant would be unable to return to her position as a mail carrier as she demonstrated a physical demand level of sedentary whereas the job of mail carrier is rated at light to medium.

Appellant submitted a June 30, 1997 follow-up report from Dr. Danylevich indicating appellant continued to experience limited mobility.

On August 26, 1997 the Office referred appellant for a second opinion to Dr. Steven H. Sewall, Board-certified in orthopedics. In a medical report dated September 22, 1997, Dr. Sewall diagnosed appellant with post-laminectomy syndrome which was characterized by tenderness in the low back, limited back motion, positive straight leg raising on the left, weakness of the left lower extremity and an absent ankle reflex on the left. He noted appellant had reached a medical end point and was permanently partially disabled from this injury which was a direct result of her injury of July 5, 1994. Dr. Sewell noted that appellant was not totally disabled and could do light-duty work such as her previous duties at the employing establishment with restrictions of no prolonged sitting, standing or walking; and no lifting over 10 pounds.

In a supplemental report dated October 3, 1997, Dr. Sewall indicated that appellant could work eight hours a day in a light-duty capacity.

By letter dated November 19, 1997, the employing establishment offered appellant a permanent position as a modified PTF clerk. The restrictions included no sitting, standing or

walking more than 1 half hour at a time; no lifting greater than 10 pounds; and no climbing, bending or twisting. The duties of appellant included verifying UBBM mail, occasional sorting of mail; distributing accountable mail; clearing carriers of accountable mail; answering telephones; responding to customer inquiries; reviewing and correcting mis-sent mail for zip code and bar code errors; computer input as needed; and photocopying. The hours of employment were eight hours a day, from 7:00 a.m. to 3:30 p.m., Monday through Friday. The employing establishment indicated that appellant's annual salary was $36,442.00 based on an eight-hour workday.

By letter dated November 26, 1997, the Office notified appellant that the position as modified PTF clerk was found to be suitable to her work capabilities. The Office indicated that appellant had 30 days to accept the position or provide further explanation for refusing it. The Office advised appellant that, if she did not accept the offered position or did not demonstrate that her refusal to accept was justified, her compensation would be terminated under 5 U.S.C. § 8106(c).

Appellant submitted a letter from Dr. Danylevich dated December 3, 1997 and date stamped December 9, 1997, which indicated that appellant came into the office for a work capacity evaluation which she could not complete last year. He indicated the evaluation was partially done at a rehabilitation facility and that she was returning to the facility on his recommendation to complete the evaluation.

On January 20, 1998 the Office terminated disability compensation on the grounds that appellant refused an offer of suitable work, which the medical evidence established she was capable of doing.

By letter dated January 23, 1998, appellant requested reconsideration and submitted a personal statement and a work capacity evaluation dated December 31, 1997. She indicated that she wanted to wait for the work capacity evaluation to be completed prior to responding to the job offer. The evaluation indicated that appellant would be unable to return to her position as a mail carrier as she demonstrated a physical demand level of sedentary whereas the job of mail carrier is rated at light to medium.

In a decision dated April 24, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence in support of the application was insufficient to warrant modification of the prior decision.

In a letter dated May 5, 1998, appellant requested reconsideration of the Offices decision and submitted a report from Dr. Danylevich dated May 1, 1998. Dr. Danylevich indicated that based on the work capacity evaluation "she is not capable of performing these duties."

In a letter dated June 19, 1998, the Office requested that Dr. Danylevich comment on appellant's ability to perform the light-duty position offered to her in November 1997. In a letter dated July 8, 1998, he indicated that the work capacity evaluation noted that appellant was not demonstrating maximal efforts based on inappropriate illness behavior testing and he recommended that this evaluation be repeated before he commented on the suitability of the offered position.

In a decision dated July 31, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence in support of the application was insufficient to warrant modification of the prior decision.

In a letter dated August 27, 1998, appellant requested reconsideration of the Offices decision and submitted a report from Dr. Danylevich dated August 14, 1998. Dr. Danylevich indicated that appellant did not have the capability to return to work as a modified clerk and would be at medical risk. He concluded appellant was disabled.

In a decision dated November 13, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence in support of the application was insufficient to warrant modification of the prior decision.

In a letter date stamped January 19, 1999, appellant requested reconsideration of the Offices decision. In a February 22, 1999 report, Dr. Danylevich indicated that appellant could not do the light-duty work she performed at the employing establishment previously. He indicated that appellant needed to avoid continuous sitting, repetitive movements of the arms, legs; no pushing or pulling, bending, twisting or climbing; no lifting greater than 10 pounds; avoid carrying; avoid prolonged standing and walking. Dr. Danylevich indicated that appellant could start working at two hours per day and gradually increase as tolerated under the above restrictions.

On March 10, 1999 the Office determined that a conflict in medical evidence was present between Dr. Danylevich, appellant's treating physician, who indicated that appellant could not perform the duties of a modified clerk and the second opinion physician, Dr. Sewall, who determined that the modified position was suitable and referred the case to a referee physician, Dr. William C. Walsh, a Board-certified orthopedist, to resolve the conflict.

In a medical report dated April 7, 1999, Dr. Walsh noted that he reviewed the medical records provided and performed a medical examination of appellant. He diagnosed appellant with status post L5-S1 left herniated disc with a recurrence; status post discectomy times two; and subsequent perineural fibrosis. Dr. Walsh indicated that appellant was permanently partially impaired as evidenced by the limitation of the range of motion of the back, absent left Achilles reflex, sensory deficit in the left lower extremity and discomfort. He noted that appellant could perform the duties of a modified PTF clerk provided the 10 pound restriction was infrequent and that all other restrictions were meticulously adhered to. In a supplemental report dated May 20, 1999, Dr. Walsh indicated that appellant could have returned to her duties as a modified PTF clerk as of the end of 1997 because there appeared to be no substantial change in her condition from that date to the date of his evaluation. He noted that the position appeared to be within her capabilities. Dr. Walsh further indicated that the 10-pound lifting requirement was acceptable.

In a decision dated June 16, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence in support of the application was insufficient to warrant modification of the prior decision. The Office indicated that the weight of the medical evidence lies with the impartial medical examiner Dr. Walsh who determined that at the time the modified position was offered to appellant it was suitable and within her medical restrictions.

In a letter dated August 24, 1999, appellant requested a hearing before an Office hearing representative.

In a decision dated October 5, 1999, the Office denied appellant's request for an oral hearing on the grounds that appellant had already requested reconsideration under section 8128 and was not entitled to an oral hearing on the same issue. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

By letter date stamped June 14, 2000, appellant requested reconsideration of the Office's decision and submitted additional medical evidence. She indicated that the modified duty offered to her was not within her restrictions and she would not be able to perform the duties required of her. She submitted a report from Dr. Shankar L. Garg, an internist, dated October 19, 1999; a report from Dr. Roland R. Caron, an internist, dated November 23, 1999; a report from Dr. Donald Statuto, Board-certified in preventative medicine, dated January 18, 2000 and a social security disability determination. Dr. Garg's report indicated a history of appellant's work-related injury and diagnosed appellant with low back pain secondary to her ruptured disc; degenerative changes at L4-5; with some symptoms of left side radiculopathy and weakness of the left lower extremity. He indicated that appellant's "ability to perform tasks such as sitting, standing, walking, lifting and carrying are limited to the extent that she is unable to perform and gain employment at this time." Dr. Garg noted that appellant was mildly depressed and would have difficulty working with coworkers and withstanding the pressures of work. The report from Dr. Caron noted a history of appellant's work-related injury. His findings upon physical examination revealed no muscle atrophy of her low back; mild tenderness of the left lumbar paralumbar muscles; the left sacroiliac joint was tender; there was pain in the sciatic notch; flexion was 50 degrees; extension was 20 degrees; and there was positive straight leg raises. Dr. Caron indicated that he reviewed the job description of the modified clerk offered appellant and noted that appellant was totally and permanently disabled from doing the work she was doing in the past but not totally disabled in that she do light-duty work where she could stand, sit and move about at will with a weight lifting restriction of five pounds. He further noted that appellant would have to be on a restricted schedule of four hours a day for three months and then gradually increase her schedule once every month one hour at a time. The letter from Dr. Statuto to nurse Pease of the employing establishment, indicated that he also acted as an impartial medical examiner for the employing establishment. He indicated that he agreed with the restrictions of Dr. Caron and suggested that these accommodations be made for appellant's return to work. The social security disability determination indicated that appellant was considered disabled and eligible to receive social security. Appellant also submitted three reports from Dr. Joseph Celona, a Board-certified internist, however, these reports were from 1994 and predate the November 1997 modified job offer to appellant.

By decision dated September 8, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

The Board finds that the Office did not meet the burden of proof in terminating appellant's disability compensation for refusal of suitable employment.

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.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a 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 which must be narrowly construed.[5]

Section 10.516 of the implementing regulation[6] provides in pertinent part:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable."[7]

Section 10.517 of the regulation[8] further provides:

> "(a) 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.
>
> "(b) After providing the two notices described in sec[tion] 10.516, OWCP will terminate the employee's entitlement to further compensation under 5 U.S.C. 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103."[9]

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[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

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

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[6] 20 C.F.R. § 10.516(a).

[7] *Id.*

[8] 20 C.F.R. § 10.517(a)(b).

[9] *Id.*

The Board finds that the Office, in a letter dated November 26, 1997, properly advised appellant that it had found the offered work to be suitable and afforded her 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. The record indicates that appellant provided a letter to counter OWCP's finding of suitability from her treating physician Dr. Danylevich dated December 3, 1997, received in the Office on December 9, 1997. Dr. Danylevich indicated that appellant reported for a work capacity evaluation which she could not complete last year and noted that the evaluation was partially done at a rehabilitation facility and that she was returning to the facility on his recommendation or to complete the evaluation. However, the Board finds that the Office failed to acknowledge or respond to this letter provided by appellant on December 9, 1997 and OWCP neither made a determination that the reasons were unacceptable, nor did it notify appellant that she had 15 days in which to accept the offered work without penalty.

In the case of *Maggie L. Moore*,[10] the Board held that when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision. FECA Bulletin No. 92-19, issued on July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job and advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).[11]

The Office did not follow these procedures and therefore did not afford appellant the protections set forth in *Moore*.[12] The Office gave appellant a reasonable opportunity to accept the offer of employment, notified her of the penalty provision of 5 U.S.C. § 8106(c), however, failed to properly considered her reasons for refusing. The Office never made a determination as to whether appellant submitted probative evidence to support her contentions and did not extend appellant another 15 days to accept the offer.[13]

[10] 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB __ (Docket 00-2711, issued August 20, 2001).

[11] See 20 C.F.R. §§ 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d), 2.814.5(d)(1) (July 1997).

[12] *See Maggie L. Moore, supra* note 10.

[13] *See Linda Hilton, supra* note 10.

Therefore, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).[14]

The September 8, 2000 and October 5, 1999 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
August 20, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[14] The Board finds that it is unnecessary to address the second issue in this case in view of the Boards disposition of the first issue.