

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAIL E. SAUNDERS and U.S. POSTAL SERVICE,
POST OFFICE, Jewett City, CT

*Docket No. 02-194; Submitted on the Record;
Issued August 16, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable employment.

On January 10, 1994 appellant, then a 43-year-old letter carrier, slipped on ice and snow injuring her left arm, shoulder, neck and lower back while she prevented herself from falling on several occasions during the day. She stopped working on January 13, 1994. Appellant received continuation of pay for the period January 13 through February 26, 1994. The Office initially rejected appellant's claim in a March 9, 1994 decision. It subsequently accepted appellant's claim for cervical and lumbar strains, multiple contusions and subluxations at the C5 and C6 vertebrae and began payment of temporary total disability compensation.¹

In a February 12, 1997 decision, the Office terminated appellant's compensation on the grounds that appellant had recovered from her employment-related disability. She requested a hearing before an Office hearing representative. In a November 12, 1997 decision, an Office hearing representative found that there existed a conflict in the medical evidence on whether appellant had any disability causally related to her employment injury and remanded the case for referral of appellant to an appropriate impartial medical specialist.

On June 30, 1997 appellant underwent a diagnostic and surgical arthroscopy of the left shoulder, including an anterior acromioplasty.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Michael E. Opalak, a Board-certified neurosurgeon, to resolve the conflict in the medical evidence. In a February 24, 1998 report, Dr. Opalak commented that appellant appeared to have decreased sensation in the median nerve distribution in the left arm although she had

¹ Appellant had previously filed a claim for an April 20, 1989 injury to her back and neck while lifting trays of mail. The claim was accepted for a subluxation of the L4 vertebra.

negative Tinel's and Phalen's signs. He found spasms in the lumbar paraspinal muscles. Dr. Opalak noted that magnetic resonance imaging (MRI) scans showed degeneration and osteophytes at C3-4 and C5-6, degeneration at L4-5 and contralateral disc herniation at L5-S1. He diagnosed atypical migraines, chronic sprain with disc degeneration of the cervical spine, left carpal tunnel syndrome and chronic lumbar sprain with herniated disc at L5-S1. Dr. Opalak stated that appellant's chronic cervical sprain, which would also be called myofascial pain syndrome and chronic lumbar spine with a herniated disc were causally related to the employment injury. He indicated that appellant's migraines were more complex and noted that he had a hard time relating them to appellant's employment injury. Dr. Opalak suggested that it was possible that chronic muscle spasms of the neck could lead to posterior headaches at the level of the insertion of the muscles into the cranium. He commented, however, that it was rare to have migraine-like syndromes with temporal dominance on a basis of cervical sprain. Dr. Opalak stated that appellant's myofascial pain syndrome, lumbar sprain and disc herniation were still actively causing appellant's objective symptoms. He indicated that appellant denied any preexisting condition. Dr. Opalak commented that unless MRI scans done prior to the employment injury revealed the preexistence of the cervical and lumbar conditions, one had to assume that appellant's current conditions were related to the employment injury. He stated that appellant's condition disabled her from performing the physical requirements of her preinjury job. Dr. Opalak stated that appellant could perform light-duty work given appropriate seating capacity and the capacity to get up and move around every 20 to 30 minutes. In an accompanying work-capacity evaluation form, Dr. Opalak indicated that appellant could sit for two hours a day, walk for one hour a day, stand for one hour a day, kneel for one hour a day and climb for one hour a day. He indicated that appellant could not reach above her shoulder, twist, operate a motor vehicle, perform repetitive movements, push, pull, lift or squat. Dr. Opalak advised that appellant should take breaks every 25 to 30 minutes.

The Office accepted appellant's claim for left carpal tunnel syndrome and chronic lumbar strain with a herniated L5-S1 disc. The Office reinstated her temporary total disability compensation. On May 28, 1998 appellant underwent surgery for carpal tunnel release on the left arm.

In a July 31, 1998 letter, the employing establishment offered appellant a position as a limited-duty letter carrier for four hours a day. The employing establishment stated that a job description was attached to the letter. In an August 28, 1998 letter, the Office indicated that it had reviewed the job offered to appellant and found it suitable to her work capabilities. The Office gave appellant 30 days to respond to the job offer or provide an explanation of her reasons for refusing the job offer. The Office indicated that, if appellant failed to accept the position, any explanation or evidence she provided would be considered prior to determining whether her reasons for refusing the position were justified. The Office warned appellant that, if she refused the position and failed to demonstrate that her reasons for doing so were justified, her compensation would be terminated.

In a letter received by the Office on September 29, 1998, appellant requested an extension of time for responding to the job offer. She indicated that she had only received the cover letter on the employing establishment's letter and had not received a copy of the job description. The employing establishment sent a copy of the job description. The employing establishment indicated that the position was for four hours a day in which she would be

verifying bank deposits, ordering postal supplies, writing up notices, maintain records for the boxing section, separating mail from flats, occasionally canceling mail, answering the telephones and performing other sedentary duties as assigned. In a September 30, 1998 letter, appellant indicated that she had just received the job offer. She stated that she was refusing to either accept or decline the position until she consulted with her physician. Appellant requested a 60-day extension in which to review the job offer. In an October 26, 1998 report, appellant stated that the job duties listed by the employing establishment would violate the physical restrictions of her physician and Dr. Opalak against repetitive motions of the wrists and elbows. She claimed that rapid, repetitive movement was required to verify bank deposits. Appellant commented that sorting letters from flats also required repetitive movements. She stated that the employing establishment was more than a 25-minute drive which exceeded the restriction. Appellant noted that her physician had not released her for work.

In a January 12, 1999 letter, the Office informed appellant that her reasons for refusing the position were not sufficient to establish that she was unable to perform the duties of the offered position. The Office gave appellant 15 days to accept the position and return to work.

In a January 29, 1999 decision, the Office terminated appellant's compensation effective January 30, 1999 for refusal to accept suitable employment.

Appellant requested a hearing before an Office hearing representative, which was conducted on August 25, 1999. Her representative repeated appellant's claim that verifying bank deposits involved repetitive motions of the hands. He also claimed that appellant was restricted by Dr. Opalak to no driving at all and stated that there was no public transportation available which could take appellant to work. Appellant testified that the restrictions on repetitive motion affected both hands. Her representative indicated that, if appellant returned to work, she would be required to have 20-minute breaks every 25 to 30 minutes.

In a September 14, 1999 letter, the employing establishment indicated that verifying bank deposits would take no more than 20 minutes a day and did not require rapid repetitive movements. It questioned appellant's restrictions on driving, noting that she lived in a rural area that required driving more than 15 minutes each way. It stated that appellant's migraine headaches and right hand symptoms had not been accepted as causally related to appellant's employment injury. It commented that Dr. Opalak's reports showed that he was recommending breaks totaling 20 minutes in a 4-hour day.

In a September 15, 1999 report, Dr. Diane Wirz, a Board-certified neurologist and internist, stated that she imposed a limit on appellant's traveling because she would often get incapacitating headaches. She commented that, if appellant got a headache at work, someone would have to drive her home. Dr. Wirz indicated that it would be unrealistic to think that someone would be willing to drive her more than 15 to 20 minutes. She concluded, therefore, that a 15- to 20-minute driving distance each way would hold for appellant whether she was a driver or passenger. She stated that the headaches could not be predicted ahead of time.

In a November 10, 1999 decision, the Office hearing representative found that the job offered to appellant was suitable. She noted that appellant's migraine headaches, shoulder condition, right wrist condition and right leg conditions had not been accepted as causally

related. The hearing representative, therefore, affirmed the Office's January 29, 1999 decision to terminate appellant's compensation.

In a February 14, 2000 letter, appellant's representative requested reconsideration. He contended that the Office hearing representative had erred in failing to require the Office to ascertain the actual physical requirements of the limited-duty job offered. Appellant's representative also claimed that the hearing representative had erred in failing to consider subsequent conditions or disability in determining whether a position was suitable. He argued that the hearing representative had failed to take into consideration appellant's commute to and from work in assessing the suitability of the offered position.

In a May 16, 2000 merit decision, the Office denied appellant's request for modification of its prior decision.

In a May 15, 2001 letter, appellant's representative again requested reconsideration. He submitted a November 2, 2000 report from Dr. John A. Magaldi, a Board-certified rheumatologist, who diagnosed chronic pain disorder with failing pain management. He noted that appellant had problems with chronic migraines and difficulty in driving for any length of time for fear of headaches aggravating her situation. Dr. Magaldi noted appellant's work restrictions but stated that appellant's return to work was unlikely because of the amount of atrophy and deconditioning. He suggested a work-hardening program.

In a May 1, 2001 report, Dr. Wirz stated that appellant started having migraine headaches after the employment injury when she reached out with her arm to stop a fall and twisted her neck. She indicated that the headaches would occur several times a week and could occur up to 20 days out of a 30-day month. Appellant stated that, prior to the employment injury, she did not have significant headaches more than once a year. She indicated that the headaches met the definition for migraine headaches because they were at times associated with nausea, vomiting, dizziness and occasional diarrhea, as well as photophobia, preceded by a visual aura. Dr. Wirz reported that the headaches responded to medication for migraines and were often incapacitating. She related appellant's headaches to the employment injury to her neck. Dr. Wirz noted that medical data showed that neck problems could trigger migraine headaches. She stated that appellant could perform light-duty work but could not commute more than 15 to 20 minutes each way. Dr. Wirz indicated that, if appellant traveled more than 20 minutes in a car, her neck would tighten which could precipitate a migraine headache. She reported that a cervical MRI scan showed degenerative changes and osteophytes at several levels in her neck and had trigger points in her neck, suggesting myofascial dysfunction. Dr. Wirz stated that the myofascial dysfunction contributed to appellant's post-traumatic headaches.

In a July 11, 2001 merit decision, the Office denied appellant's request for modification of its decision.

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work

after suitable work is offered is not entitled to compensation.”² 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.³

Dr. Opalak indicated that appellant could work four hours a day with restrictions of two hours sitting, one hour walking and one hour standing and with no repetitive motions. The employing establishment offered appellant a position which complied with those restrictions as it was a sedentary position, four hours a day with no significant lifting required. Appellant contended that some of the duties, particularly verifying bank deposits and sorting letters from flats, involved repetitive motions. There is no indication from the record that these activities would involve numerous, constant, repeated motions of the hands or arms in a period of time to perform. Appellant’s objections to these job duties, therefore, are not sufficient to establish that she could not perform these duties. She has not submitted any medical evidence to show that she would be physically unable to perform these specific job duties. Dr. Magaldi expressed doubt that appellant could return to work because of atrophy and deconditioning. His opinion, however, was equivocal and, therefore, had insufficient probative value to conflict with Dr. Opalak’s report on appellant’s ability to return to work.

Appellant also claimed that the job was unsuitable because she could not travel to the job site due to her migraine headache condition. Office procedures provide that inability to travel to a job provides a valid reason for refusing an offered position.⁴ Dr. Opalak indicated that he could not determine whether appellant’s migraine condition was related to the employment injury. Dr. Wirz concluded that appellant’s migraine condition was due to the injury to appellant’s neck. However, it is not necessary to determine, for the purposes of this case, whether appellant’s migraine condition was caused by the employment injury because, under the procedure manual, a subsequent medical condition that prevents an employee from working is an acceptable reason for refusing to accept offered employment.⁵ It is, therefore, unnecessary to determine whether appellant’s migraine was causally related to the employment injury or was a subsequent condition, so long as the medical evidence shows that the condition prevents appellant from working or commuting to work. Drs. Opalak and Wirz stated that appellant was able to perform limited-duty work even with the migraine condition. Dr. Wirz, however, stated that appellant could not travel more than 15 to 20 minutes due to the migraine condition. She stated that, after more than 20 minutes in a car, appellant’s neck would stiffen and could trigger a migraine. This rationale, however, is speculative and expressed in equivocal terms. Dr. Wirz did not indicate that travel for more than 20 minutes would invariably and inevitably cause migraine headaches which would keep appellant from working. Her opinion, therefore, is insufficient to show that the job offered to appellant was unsuitable. Appellant, therefore, has not demonstrated that the position offered to her was unsuitable. The Office, therefore, properly terminated appellant’s compensation.

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.124.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (December 1993).

⁵ *Id.* at Chapter 2.814.10.

The decision of the Office of Workers' Compensation Programs dated July 11, 2001 is hereby affirmed.

Dated, Washington, DC
August 16, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member