U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSHA L. PLUNKETT and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

Docket No. 02-344; Submitted on the Record;
Issued August 28, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2), effective August 12, 2000 on the grounds that she refused suitable work; and (2) whether appellant sustained a recurrence of disability due to her accepted conditions.

In the present case, the Office accepted that appellant, then a 35-year-old flat sorter machine operator, sustained a right hand tendinitis and approved a right carpal tunnel release in claim number 25-0482520.[1] Within a year, the Office accepted the subsequent conditions of bilateral carpal tunnel syndrome, cervical radiculopathy, thoracic outlet syndrome on the left side and a left shoulder strain in claim number 25-0509878.[2] After appellant's initial medical treatment, she worked light duty and eventually returned to full-time duty in March 1998. Appellant worked until January 21, 2000 when she experienced a recurrence of pain. The Office accepted her claim for recurrence of disability.[3]

On March 22, 2000 Dr. Terrence O'Donovan, a Board-certified orthopedic surgeon and appellant's treating physician, advised that she could return to light duty with restrictions even with her conditions of cervical sprain/strain and carpal tunnel syndrome. He advised that appellant could work 8 hours a day, 5 days a week with restrictions of no more than 10 pounds of intermittent lifting, pulling/pushing and simple grasping for 8 hours a day and no more than 10 pounds of intermittent reaching above the shoulder for 3 to 4 hours a day. A high back chair was also recommended.

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[1] The date of injury is noted as June 1, 1995.

[2] The date of injury is noted as February 4, 1996.

[3] It is unclear from the record exactly when the Office combined appellant's claims. However, both claim files referenced in this decision are currently before the Board on this appeal.

By letter dated March 23, 2000, the employing establishment offered appellant a limited-duty job position as a modified distribution clerk. The position involved light-duty tasks such as making slides for automation, verifying mail, counting and logging mail volumes and was based upon the medical restrictions outlined by Dr. O'Donovan in the work restriction evaluation form dated March 22, 2000 as well as a functional capacity evaluation, which was performed on March 3, 2000. The assignment was effective March 23, 2000.

By letter dated April 24, 2000, the Office advised appellant that the position of modified distribution clerk offered by the employing establishment was suitable to her work capabilities. The Office indicated that appellant had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).[4]

The record contains several reports of telephone calls appellant made to the Office expressing her disagreement with the job offer. She argued that the position was outside her craft and she did not like it; the position involved continuous repetitive use of her wrist but could not provide specifics; and expressed her fears of reinjury.

The Office considered appellant's allegations and, in a letter dated May 8, 2000, requested that the employing establishment provide a position description and verification of the exact physical requirements of the position. During that time, the Office received a June 9, 2000 attending physicians report, wherein Dr. O'Donovan advised that he reviewed the job description and opined that appellant could perform the duties outlined.

In a letter dated June 8, 2000, the Office advised appellant that her reasons for refusing the position were unacceptable and that she had 15 days to accept the job offer. If she did not accept the offer within that time, appellant was further advised that the Office would proceed with a final decision.

Appellant did not introduce any additional argument or supply any medical evidence.

In a July 25, 2000 decision, the Office found that appellant had declined a suitable work offer and terminated her entitlement to wage-loss and schedule award benefits as of August 12, 2000 pursuant to 5 U.S.C. § 8106(c).[5] The Office noted that appellant had received a schedule award which demonstrated a permanent impairment of 31 percent to her right arm.[6]

[4] 5 U.S.C. § 8106(c)(2).

[5] The Board notes that the record contains a duplicate decision dated July 19, 2000. However, as subsequent decisions issued by the Office referred to the July 25, 2000 decision, the Board will also refer to the July 25, 2000 decision.

[6] An August 28, 2000 decision awarded appellant a 31 percent permanent loss of use to her right upper extremity. The period of the award ran from March 22, 2000 through January 29, 2002. By letter dated August 29, 2000, the Office advised appellant that pursuant to its July 25, 2000 decision, her entitlement to the schedule award would end on August 12, 2000.

Subsequent to the Office's July 25, 2000 termination decision, appellant requested an oral hearing and new medical reports and factual evidence were associated with the case file. In her testimony before the Office hearing representative, appellant argued that she had a nonwork-related medical condition, which prevented her from accepting the job offer. She testified that after her requests for a schedule change to work the day shift as opposed to the night shift were denied, she returned to work on September 22, 2000 at her full-time light-duty work as a mailhandler.[7] Appellant further testified that she had refused the offered job because her symptoms (pain and stiffness) were exacerbated by the constant blowing of cold air from the air conditioner.

Additional medical evidence was associated with appellant's claim. In an August 16, 2000 report, Dr. M. Eyad Dughly, a Board-certified neurologist, advised that appellant was a new patient, provided his examination findings and diagnosed carpal tunnel syndrome bilaterally; fibromyalgia; cervical pain, probably of myogenic origin and probably related to the fibromyalgia; no clinical evidence of thoracic outlet syndrome. In a prescription note dated August 30, 2000, Dr. Dughly advised that appellant should work day shift for the next year. He continued to provide follow-up reports of appellant's condition, which eventually included additional diagnoses of ganglion to the right wrist, tendinitis, in both arms, fibromyalgia, chronic insomnia and chronic headaches. In a disability report dated October 5, 2000, Dr. Dughly advised that appellant could return to work on October 9, 2000 but could have no repetitive movements until November 5, 2000. In a Form CA-17, dated December 1, 2000, he noted that he had advised appellant that she could resume on November 15, 2000,[8] work with restrictions against repetitive movement. Dr. Dughly provided less restrictive limitations (20 to 40 pounds) than that of the March 23, 2000 position and additionally restricted appellant to no cold exposure. In his December 1, 2000 report, Dr. Dughly advised that appellant has fibromyalgia and it was important that she work in an environment without exposure to constant cool air. He stated that the over head air conditioner blower causes the upper extremities to spasms and stiffen. Dr. Dughly requested that appellant be allowed to work in an area where the temperature could be manually controlled. In a December 19, 2000 report, he reported that appellant has fibromyalgia, chronic headaches and chronic insomnia and advised that appellant would have difficulty working shift-work and working the night shift.

In a February 20, 2001 report, Dr. Dughly noted that appellant has difficulty getting adequate sleep during the day after working her shift on the night shift. He related that this reflected negatively on her fibromyalgia and resulted in an increase in pain and suffering. Dr. Dughly opined that it would be in appellant's best interest to do permanent daytime work and to avoid night work. In an April 20, 2001 letter, Dr. Dughly stated that appellant has carpal tunnel syndrome, fibromyalgia, tendinitis in both arms. He advised that she was not in a position

[7] Documentation from both appellant and the employing establishment were received pertaining to when appellant returned to work after the termination of her monetary benefits. The record additionally reflects that the employing establishment had offered appellant another job on June 15, 2000. The Board notes that appellant's benefits were terminated effective August 12, 2000. Although appellant alleged that she returned to work on September 22, 2000, the Office found that appellant had returned to work in October 2000 and stopped work on November 30, 2000, after which appellant filed a claim for total disability.

[8] The record file does not contain a report dated November 15, 2000.

to do any work that requires repetitive motion with her hands, because of the carpal tunnel syndrome appellant cannot work in a cold environment because of the fibromyalgia. Dr. Dughly further stated that appellant needed to have stable daytime work, predominantly because of the fibromyalgia and chronic pain syndrome.

In a decision dated April 5, 2001, an Office hearing representative affirmed the termination of appellant's compensation benefits pursuant to section 8106(c).

On June 14, 2001 appellant, through her representative, requested reconsideration of the termination of her entitlement to wage-loss benefits. New evidence and argument included: A January 30, 2001 report from Dr. Stephen D. Brown, a Board-certified orthopedic physician, who advised that appellant had been under his care since November 7, 2000. He related that he diagnosed bilateral carpal tunnel syndrome as well as a ganglion cyst of her right wrist. Dr. Brown noted that, at that time, appellant had objective findings, which showed that the condition was active and symptomatic for her. He opined that by appellant's history, as she had no problems with this mass prior to the work injury of June 1, 1995, the mass occurred subsequent to that injury and is related to the injury, secondary to her history. This report failed to address appellant's ability to perform the duties of the March 23, 2000 offered position.

In a letter dated January 23, 2001, the employing establishment reported that the output temperature of their HVAC system at each zone within their building for several times during January 22, 2001 averaged 73.73 degrees. The letter additionally indicated that appellant claimed she could not work due to the scheduling of medication.

In an April 26, 2001 letter, Mr. Hizon, a supervisor, wrote "[p]er mediation agreement, I am writing this letter to inform you that [appellant], is unable to perform the duties of the recent job we offered her. According to her latest documentation the job is not suitable because she cannot perform the job." From the record, it appears a copy of the Form CA-17, dated December 1, 2000 from Dr. Dughly was attached. In pertinent part, the April 19, 2001 settlement agreement form noted appellant's responsibility to supply to Mr. Hizon, medical documentation supporting her physical limitations and need for reassignment. It further noted Mr. Hizon's responsibilities to contact the proper channels to show that the job was not suitable and to facilitate the process of appellant's need for vocational rehabilitation and job reassignment.

In a June 1, 2001 report, Dr. Jeffrey Gelfand, an orthopedic surgeon, advised that he evaluated appellant for carpal tunnel syndrome as well as a ganglion cyst on the right wrist. He noted appellant's history of injury and provided his examination findings. Dr. Gelfand stated that appellant "may have a few things going on. She may have residual carpal tunnel syndrome." Dr. Gelfand informed appellant of her options and recommended an updated nerve conduction study.

On June 18, 2001 appellant filed a claim for recurrence of injury on and after April 19, 2001. She also continued to file Form CA-7, claims for compensation claiming a schedule award due to permanent impairment suffered from the effects of her accepted right tendinitis and carpal tunnel condition.

In a decision dated August 7, 2001, the Office denied modification of its April 5, 2001 decision terminating benefits because of the refusal of suitable work.

Also by decision dated August 7, 2001, the Office found the evidence failed to establish a causal relationship between appellant's accepted employment-related conditions and the claimed recurrence of disability on and after April 19, 2001.[9]

The Board finds that the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that she refused suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[10] 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.[11] Section 10.517(a), Part 20 of the Code of Federal Regulations[12] 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 showing before a determination is made with respect to termination of entitlement to compensation.[13] To justify termination, the Office must show that the work offered was suitable[14] and must inform appellant of the consequences of refusal to accept such employment.[15]

In the present case, the Office has properly terminated appellant's monetary compensation for refusing suitable work under 5 U.S.C. § 8106(c). On March 23, 2000 the employing establishment offered appellant a limited-duty position as a modified distribution clerk. In his reports dated March 22 and June 9, 2000, Dr. O'Donovan outlined physical restrictions which appellant was capable of performing and opined that the job description of the limited-duty position offered by the employing establishment were within appellant's physical requirements. On April 24, 2000 the Office complied with the procedural requirements by

[9] The Board notes that appellant filed her appeal to the Board on November 5, 2001. Subsequent to appellant's appeal to the Board, the Office issued a decision dated November 14, 2001 wherein it denied appellant's claim for a schedule award on the grounds that her entitlement to a schedule award terminated when she was advised through the Office's earlier decisions that her failure to accept suitable employment negated her entitlement to both monetary compensation benefits and a schedule award. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions that change the status of the decision on appeal are null and void. *Russell E.* Lerman, 43 ECAB 770 (1992); Douglas *E. Billings*, 41 ECAB 880, 895 (1990).

[10] 5 U.S.C. § 8106(c)(2).

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

[12] 20 C.F.R. § 10.517(a).

[13] *Camillo R. DeArcangelis, supra* note 11; *see* 20 C.F.R. § 10.124(e).

[14] *See John E. Lemker*, 45 ECAB 258 (1993).

[15] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997).

advising appellant of the suitability of the position offered, that the job remained open and that her failure to accept the offer, without justification, would result in the termination of her compensation. The Office provided appellant 30 days within which to either accept the position offered or submit her reasons for refusal. Appellant expressed her disagreement with the job offer through a series of telephone calls to the Office. The Office investigated appellant's allegations and wrote the employing establishment a letter on May 8, 2000 requesting clarification of the duties of the offered position. On June 8, 2000 the Office informed appellant that her reasons for rejecting the job offer were not justified and allowed her 15 days to accept the offered position prior to its final decision. Appellant did not further respond within that time. Thereafter, on July 25, 2000 the Office terminated appellant's compensation benefits effective August 12, 2000.

The Board finds that the Office properly determined that appellant rejected an offer of suitable employment and met its burden of proof in terminating appellant's monetary compensation benefits.[16] The evidence of record establishes that, despite providing appellant with an opportunity to accept the position following notification of the Office's suitability determination, the penalty for refusing to accept an offer of suitable employment and the insufficiency of her reasons for rejecting the job offer, appellant did not accept the job offer. She did not attempt to demonstrate, nor did she submit any evidence that the position was outside her physical limitations as recommended by her attending physician. Instead, the medical evidence from appellant's physician, Dr. O'Donovan, indicated that the offered position was suitable. At the time of termination, there was no medical evidence indicating that appellant could not perform the duties of the offered position.

Appellant failed to introduce any argument or any medical evidence establishing that she was not physically capable of performing the duties of the modified distribution clerk position as offered. Thus, the weight of the medical evidence rests with the opinion of Dr. O'Donovan, who found the limited-duty position offered by the employing establishment to be medically suitable. As the Office obtained medical evidence that appellant could perform the offered position and, as the Office met the procedural requirements of a suitable work termination, the Office properly terminated appellant's compensation for refusing an offer of suitable work. Consequently, the burden of proof shifted to appellant to show that the termination was improper.[17]

Subsequent to the Office's July 25, 2000 termination decision, appellant presented arguments that the offered position was unsuitable and medical evidence. Multiple reports and disability notes were received from Dr. Dughly. He essentially opined that appellant should have restrictions against repetitive movements because of her carpal tunnel syndrome, she should not be in a cold environment because of her fibromyalgia and she should work a day shift

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

[17] *See Ronald M.* Jones, 48 ECAB 600 (1997) (once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was justified). Inasmuch as the facts of this case indicate that appellant eventually returned to work after the termination based on refusal of suitable work, appellant's subsequent return to work does not negate the consequences of her refusal of suitable employment. *E.g., Henry P. Gilmore*, 46 ECAB 709 (1995) (holding that employment obtained after neglect of suitable work does not justify resumption of compensation for wage loss).

as opposed to the night shift because of her chronic headaches and chronic insomnia. The Board finds that none of Dr. Dughly's medical reports or disability notes contain a well-rationalized medical opinion which specifically addressed appellant's ability to perform the offered position of March 23, 2000, the date the position was effective, or provide a well-reasoned medical opinion as to why appellant could not perform the offered position at the time her monetary benefits were terminated. Additionally, there is no indication that Dr. Dughly reviewed the March 22, 2000 job offer or the position description of the offered job when rendering his opinions.

Although Dr. Brown causally related the ganglion cyst of appellant's right wrist to the original injury of June 1, 1995, his report of January 30, 2001 failed to address appellant's ability to perform the duties of the offered position at the time monetary benefits were terminated. Likewise, Dr. Gelfand, in his report dated June 1, 2001, failed to address appellant's ability to perform the duties of the offered position.

Thus, the medical evidence submitted after the Office's termination is insufficient to meet appellant's burden that she was incapable of performing the duties of the offered position at the time her monetary benefits were terminated.

Accordingly regarding appellant's recurrence claim, the Board notes that section 8106(c) serves as a bar to receipt of further compensation under section 8107 of the Act for a disability arising from the accepted employment conditions.[18] As such, the Office properly denied appellant's recurrence claim arising from her accepted conditions on August 7, 2001.[19]

[18] *Deborah Hancock*, 48 ECAB 606, 608 (1998); *Merlind K. Cannon*, 46 ECAB 581 (1995).

[19] The Board notes that appellant's additional medical conditions of chronic headaches, chronic insomnia and fibromyalgia have not been accepted by the Office as compensable.

The decisions of the Office of Workers' Compensation Programs dated August 7 and April 5, 2001 are hereby affirmed.

Dated, Washington, DC
August 28, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member