U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGELA K. DICK and DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Dallas, TX

Docket No. 01-40; Oral Argument Held September 10, 2002; Issued December 19, 2002

Appearances: *Beth R. Foerster, Esq.*, for appellant*; Marcia L. Harris, Esq*., for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. 8106(c) based on her refusal to accept suitable employment.

The Office accepted appellant's claims for tendinitis in the right wrist and right wrist strain, which were combined in one claim. Appellant worked intermittently after her employment injury from September 30 through December 20, 1994, when she stopped working. On November 28, 1995 appellant's treating physician, Dr. E. Bruce Toby, a Board-certified orthopedic surgeon, performed surgery on appellant consisting in part of neurolysis of the ulnar nerve and excision of the pisiform. Dr. Toby found that there was no fracture at the time of surgery. On January 30, 1996 he released appellant to return to sedentary work, but the employing establishment did not have sedentary work available. Appellant, who had two years of education in veterinary technology, returned to school at Kansas State University to complete a four-year program. While in school she worked part time in the dispensary pharmacy and in May 2000, worked on a research project. Appellant graduated on May 15, 1999 and as a registered veterinary technician obtained employment assisting with research projects at Kansas State University.

In a report dated July 1, 1998, Dr. Toby stated that appellant was having problems with heavy activities involving the right hand. On physical examination, he found no swelling, excellent range of motion, the flexor carpi ulnaris tendon appeared to be "quite good" and the scar well healed. Dr. Toby stated that there was minimal tenderness to palpation, that appellant had full flexion/extension of her fingers and her intrinsics were working well. He diagnosed excision of the pisiform with a permanent partial impairment from that entity. Dr. Toby opined that appellant could not perform heavy work but could lift up to 20 pounds on a frequent basis.

On November 23, 1998 the employing establishment offered appellant the job of food inspector for poultry slaughter, which required lifting up to 10 pounds. On December 16, 1998 Dr. Toby approved the job for appellant.

By letter dated February 10, 1999, the Office advised appellant that the employing establishment offered her the job of food inspector for poultry slaughter, which was found suitable to her work capabilities. The Office gave appellant 30 days to accept the job or provide reasons for refusing it.

By letter dated March 10, 1999, appellant's attorney stated that appellant was unable to accept the job offer because: (1) when she returned to Dr. Toby in December 1998 he could not explain the continued pain in her right arm; (2) appellant had not reached maximum medical improvement since Dr. Lynn D. Ketchum, a Board-certified plastic surgeon, recommended an arthrogram based on his diagnosis of probable tear of triangular fibrocartilage; and (3) Form OWCP-5 had not been provided and appellant was concerned that the job exceeded Dr. Toby's work restrictions.

By letter dated March 16, 1999, the Office stated that appellant's reasons for refusing the position were unacceptable and gave appellant 15 days to accept the job offer.

By decision dated April 9, 1999, the Office terminated appellant's compensation benefits, effective April 15, 1999, stating that appellant refused a job offer of suitable work and the penalty provision of section 8106(c)(2) was applicable.

On May 4, 1999 appellant requested an oral hearing before an Office hearing representative, which was held on April 20, 2000. At the hearing, appellant described her medical history and stated that, after the surgery, when the employing establishment had no light work for her, she returned to college. Appellant stated that the surgery Dr. Toby performed did not heal her condition because the repetitive work she performed in the dispensary pharmacy of opening pill bottles caused her severe pain. Appellant also stated that she had to restrict her time on computers because the repetitive motion caused her pain and she felt the loss of wrist strength as in having difficulty pushing open doors or pushing herself off the ground. Appellant stated that the reasons she refused the job offer were that she was getting ready to graduate and the work of poultry inspector involved repetitive motion. Appellant stated that she started a job in the summer of 1999 and was not claiming any wage loss after she graduated from Kansas State University. Appellant stated that she went to see another physician (*i.e.*, Dr. Ketchum) after Dr. Toby because he could not explain the continuing pain in her arm.

Appellant submitted additional medical evidence consisting of reports from Dr. Ketchum dated May 12 and 17, 2000, office notes dated February 12 and May 21, 1999 and an arthrogram dated March 22, 1999 which was negative.

In his February 12, 1999 report, Dr. Ketchum stated that, a week prior to her visit, appellant was working with her computer on-line and felt a pop when she supinated her wrist. He stated that there was no swelling or bruising but appellant felt numbness on the ulnar side of the hand and was unable to hold anything and that the condition continued during the week. On examination, Dr. Ketchum stated that appellant could not do a push-up without feeling pain

going across the dorsum of her wrist, which was suggestive of a triangular fibrocartilage tear and a carpal ligament tear, which classically produced paresthesias in the ulnar nerve distribution.

In his May 21, 1999 report, Dr. Ketchum stated that appellant's flexor carpi ulnaris was healing, but appellant had a positive test for extensor digiti manus syndrome, which meant appellant had a latent dorsal wrist ganglion. He noted that appellant had tenderness over the scapholunate joint on deep palpation. Dr. Ketchum stated that, if there was nothing in any of appellant's medical records prior to February 1999 of a latent dorsal wrist ganglion, he would have to assume it was a new injury.

In the May 12, 2000 report, Dr. Ketchum stated that appellant was doing a research project where if she had a problem with pain in her wrist she could stop working and get someone to do her job but "if she returned to doing a poultry inspector job, she would be trapped in that position and would be doing repetitious work at least eight hours a day." He stated that doing the repetitious work would exacerbate appellant's wrist pain, which was a residual of her September 28, 1994 employment injury and the pain occurred on a daily basis although it was not as severe. Dr. Ketchum stated that on examination appellant's main pain was over the area where the pisiform was removed, that he could not elicit any tenderness over the scapholunate joint where she felt pain when doing repetitious work and stated that he felt her pain was from synovitis of the radiocarpal joint, secondary to overuse of that area.

In his May 17, 2000 report, he stated that, if appellant were to perform the poultry inspector job, she would suffer further injury or perpetuate her present complaints because of the September 28, 1994 employment injury, which involved a pisiform fracture.

Appellant's attorney contended that Dr. Ketchum's opinion was entitled to more weight than Dr. Toby's because Dr. Ketchum evaluated appellant's continued complaints after she returned to her student employment and Dr. Toby had not treated appellant since July 1998. Appellant's attorney stated that appellant's refusal to accept the job offer was justified because Dr. Ketchum opined that appellant would suffer further injury if she performed the job of a poultry inspector. Appellant's attorney also contended that appellant was entitled to a schedule award.

By decision dated June 22, 2000, the Office hearing representative affirmed the Office's April 9, 1999 decision.

The Board finds that the Office properly terminated appellant's compensation effective April 15, 1999, based on her refusal to accept suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[1] Under section 8106(2) of Federal Employees' Compensation Act, the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2]

[1] *H. Adrian Osborne*, 48 ECAB 556 (1997).

[2] *Henry W. Sheperd, III*, 48 ECAB 382 (1997); *Patrick A. Santucci*, 40 ECAB 151 (1988).

The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[3] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[4]

In this case, the opinion of appellant's treating physician, Dr. Toby, that appellant could perform the job of food inspector for poultry slaughter, which is within the 20-pound lifting restriction he placed on her constitutes the weight of the evidence. Appellant is also vocationally qualified to perform the job. In his July 1, 1998 report, on physical examination, Dr. Toby found no swelling, excellent range of motion, the flexor carpi ulnaris tendon was "quite good" and the scar from the surgery had healed well. He found minimal tenderness to palpation, appellant had full flexion and extension of her fingers and her intrinsics were working well. His opinion that appellant could not perform heavy work, could lift up to 20 pounds and that she could perform the job of food inspector, which had a 10-pound lifting requirement is supported by the evidence of record and is well rationalized. Dr. Ketchum's opinion that the repetitious work of a poultry inspector would exacerbate appellant's wrist pain is not supported by any objective evidence. The March 22, 1999 arthrogram was negative. On physical examination, he had no objective evidence of appellant's ongoing pain.

In his May 21, 1999 report, Dr. Ketchum suggested that appellant might have sustained a new injury. Further, he did not provide a rationalized medical opinion explaining how appellant's current wrist condition was caused by her employment. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[5] Dr. Toby's opinion that appellant could perform the job of food inspector for poultry slaughter, which is complete and well rationalized, supports the Office's termination of benefits.[6]

Moreover, the fact that appellant was going to graduate in May 1999, approximately three months after the Office offered appellant the food inspector job and she theoretically would have had a wage-earning capacity equal to if not greater than that of a food inspector, is not an acceptable reason for refusing the Office's job offer.[7]

At the time the Office offered appellant the food inspector job through the time of her graduation on May 15, 1999, appellant was not working at a job which fairly and reasonably represented her wage-earning capacity. While the record indicates that appellant was employed at the time of the suitable work termination, the Office properly determined that appellant's employment did not fairly and reasonable represent her wage-earning capacity. The Office

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

[4] *See John E. Lemker*, 45 ECAB 258 (1995); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[5] *Annie L. Billingsley*, 50 ECAB 210, 213 (1998).

[6] The Board declines to address the issue of whether appellant is entitled to a schedule award as the Office did not adjudicate the issue. *See John F. Dunleavy*, 45 ECAB 891-92 (1994).

[7] *See Arthur C. Reck*, 47 ECAB 339, 344-45 (1996).

found that appellant was employed part time with sporadic hours as a student research assistant. Appellant could not refuse a job offer based on prospective future earnings or on increase in her wage-earning capacity.[8] Since appellant's reasons for refusing the job offer were not valid, the Office properly terminated appellant's compensation benefits effective April 15, 1999.

The June 22, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 19, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *See Alfred Gomez*, 53 ECAB ___ (Docket No. 00-1817, issued October 9, 2001).