

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA T. ARNEY and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 00-1659; Submitted on the Record;
Issued February 8, 2002*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective July 18, 1999, on the grounds that she refused an offer of suitable work.

On November 17, 1989 appellant, then a 48-year-old flat sorter operator, filed a notice of traumatic injury and claim for compensation of pay/compensation (Form CA-1), alleging that she experienced sharp wrist pain while loading boxes. The Office accepted the claim for a left wrist sprain and somatoform pain disorder. Appropriate medical and wage-loss benefits were paid.

In a December 15, 1995 medical report, Dr. Marvin M. Mitchell, a Board-certified orthopedic surgeon and Office referral physician, advised that appellant had no objective physical findings to substantiate her subjective complaints of pain. He opined that on the basis of his examination, there was no reason why appellant would not be able to perform the duties of the flat sorter operator, appellant's date-of-injury position. Dr. Mitchell noted, however, that objective studies such as arthrogram and bone scan have not been done and were recommended.

In a May 6, 1996 letter, Dr. Ralph D'Auria, Board-certified in physical medicine and rehabilitation and appellant's treating physician, stated that he agreed with Dr. Mitchell's assessment of appellant. Dr. D'Auria advised that a March 28, 1996 arthrogram of the wrist revealed a tear of the triangular fibrocartilage and recommended appellant be seen by a hand surgeon. He also advised that the March 28, 1996 bone scan was positive. Dr. D'Auria advised that his main concern was the development of post-traumatic arthritis in the wrist which would make the likelihood of secondary involvement and secondary trauma of the shoulder, neck and upper extremity more likely to occur as time went on. He stated that, as the Office had not accepted the diagnosis of cervical radiculopathy or cervical problems as part of appellant's diagnosis, he was concentrating his attention on appellant's left wrist problem. Dr. D'Auria advised that he would like appellant considered for vocational rehabilitation to return her to a gainful activity and to avoid any possibility of any somatoform pain disorders.

The record reflects that appellant never sought treatment by a hand surgeon.

By decision dated January 29, 1998, the Office awarded compensation for a 12 percent permanent impairment of the left upper extremity, which covered the period January 4 to September 28, 1998.

In a response to an August 24, 1998 Office letter, Dr. D'Auria indicated that appellant could return to her former job as a flat sort operator, but indicated that he needed a job description. In an October 9, 1998 report, Dr. David G. Hollifield, Board-certified in physical medicine and rehabilitation and an associate of Dr. D'Auria, advised that he reviewed the job description of flat sort operator and opined that appellant's injuries would prevent her from returning to her previous duties. A functional capacity evaluation was recommended to provide an accurate assessment of appellant's abilities.

In a November 17, 1998 medical report, Dr. D'Auria indicated that an October 8, 1995 electromyography was positive for right C6 radiculopathy. He indicated that appellant was to undergo a functional capacity evaluation which would address appellant's various complaints in addition to the work-related left wrist complaint attributed to the work injury of November 17, 1989.

A November 17, 1998 functional capacity evaluation indicated that appellant was able to sit continuously for 1 hour and stand for 20 minutes continuously without complaint. She was slightly restricted in standing with arms raised overhead and to shoulder level; slightly restricted in stooping, crouching and kneeling. Appellant was considered unable to lift 10 pounds frequently through any range of motion. She was reliable for right handed power grip and pinch tests, but unreliable for same tests using left hand. The evaluation indicated that appellant was capable of working below the sedentary PDC level with restrictions. It was noted that appellant was self-limiting in her lifting behavior and utilized poor body mechanics and poor posture throughout the left side capacity testing.

On December 7, 1998 the employing establishment offered appellant a rehabilitation duty assignment as a modified maintenance support clerk. The position was consistent with the restrictions outlined in the November 17, 1998 functional capacity evaluation.

By letter dated June 3, 1999, the Office informed appellant that it found the light-duty position to be suitable and informed her of the penalty provisions of 5 U.S.C. § 8106(c) and allowed her 30 days to accept the position or offer her reasons for refusal.

The record reflects that appellant never replied to the December 7, 1998 job offer, did not return to work and did not reply to the Office's June 3, 1999 suitability letter.

By decision dated July 7, 1999, the Office terminated appellant's compensation benefits, including the schedule award, effective July 18, 1999 as she refused an offer of suitable work.

By letter dated July 8, 1999, Dr. D'Auria reviewed a copy of the November 17, 1998 functional capacity evaluation along with the December 7, 1998 job offer and indicated that appellant could perform the job.

The Office issued another decision dated July 12, 1999, terminating appellant's compensation benefits, including the schedule award, effective July 18, 1999 as she refused an offer of suitable work.

In an August 10, 1999 letter, appellant requested an oral hearing. She indicated that she was under psychotherapy and argued that no one saw fit to consider her medical condition since April 1995. Appellant also asserted that she did not respond to the job offer as she was no longer an employee and on the agency's rolls since April 1995.

In a September 14, 1999 medical report, Dr. D'Auria provided the results of the neurological/sensory examination. Diagnoses of right C6 cervical radiculopathy and tear to the left wrist fibrocartilage were provided. Trigger points were noted in the left cervical and trapezious regions. A reference to a total right hip replacement tentatively scheduled for October 22, 1999 was also noted.

In a December 8, 1999 report, Gail Hammond, a licensed social worker and Dr. Gregory Melieste, a Board-certified psychiatrist, stated that appellant had been disabled from work since 1995 due to physical problems as well as depression and anxiety. It was noted that appellant has ongoing periods of confusion with episodic hallucinations, depressed mood and anxiety, insomnia and poor concentration. The physicians opined appellant was indefinitely disabled and unable to work.

In an October 5, 1999 report, Dr. Jane St. Clair, an associate of Dr. D'Auria, noted appellant's November 17, 1989 work injury and advised that appellant has been documented to have a cervical radiculopathy which was found in October 1994. In March 1996, appellant's arthrogram of the left wrist revealed a tear in the fibrocartilage of the wrist and appellant's cervical symptoms persisted. Dr. St. Clair noted that on the independent medical examiner's examination, the work injury was viewed as an acute injury; therefore, there is a possibility of cervical radiculopathy. She opined that appellant's neck pain and cervical radiculopathy may have stemmed from the initial insult. An MRI scan of the cervical spine was requested to rule out the possibility of herniated disc which may have occurred due to compensating for the wrist pain.

A January 20, 2000 medical report from Dr. Gary Keogh, an associate of Dr. D'Auria's, diagnosed left de Quervain's tendinitis, left wrist weakness, left wrist pain due to the work injury of November 17, 1989. It was noted that appellant was scheduled for a right hip surgery on February 16, 2000.

By decision dated March 6, 2000, the Office hearing representative affirmed the termination of benefits and found that appellant had refused an offer of suitable employment. The Office hearing representative found that the evidence submitted by appellant was insufficient to establish that the offered position was unsuitable. The Office hearing representative advised that appellant's functional capacities as a whole, even taking into account any nonwork-related conditions, was what determined her ability to work.

The Board has duly reviewed the case on appeal and finds that this case is not in posture for decision.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.¹ This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.²

Under section 8106(c)(2) of the Federal Employees' Compensation Act³ the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁴ Section 10.517(a) of Part 20 of the Code of Federal Regulations⁵ 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.⁶ To justify termination, the Office must show that the work offered was suitable⁷ and must inform appellant of the consequences of refusal to accept such employment.⁸

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 medical evidence.⁹ In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁰

In the instant case, appellant asserted that she refused to return to work due to numerous medical conditions. The evidence of record demonstrates that appellant has appeared to develop other medical conditions subsequent to her accepted conditions of left wrist strain and

¹ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

² *See Leonard W. Larson*, 48 ECAB 507 (1997).

³ 5 U.S.C. § 8106(c)(2).

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

⁵ 20 C.F.R. § 10.517(a).

⁶ *Camillo R. DeArcangelis*, *supra* note 4; *see* 20 C.F.R. § 10.516.

⁷ *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

⁸ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (July 1997).

⁹ *Marilyn D. Polk*, 44 ECAB 673 (1993).

¹⁰ *Connie Johns*, 44 ECAB 560 (1993).

somatoform pain disorder. These includes, but are not limited to, an emotional condition, cervical radiculopathy and a hip condition for which surgical intervention is planned.

The Board notes as early as May 6, 1996 appellant had nonwork-related conditions of a possible cervical radiculopathy or cervical problems, a tear of the triangular fibrocartilage and a positive March 28, 1996 bone scan. By November 17, 1998, the Office was clearly notified that appellant's October 8, 1995 electromyography was positive for a right C6 radiculopathy. This evidence was submitted prior to the Office's termination decisions of July 1999. The Office rejected appellant's reasons for refusing the job offer, finding that all her medical conditions were taken into account with the functional capacity evaluation. However, under the Office's procedures pertaining to suitable work, if the file documents a medical condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable, even if the subsequently acquired condition is not work related.¹¹ Although it is not clear whether appellant's cervical radiculopathy and hip conditions arose since the compensable injury, the evidence was clearly before the Office that appellant had other conditions affecting her ability to work prior to the termination decision. Although the Office became aware of appellant's emotional condition following the termination decision, the medical evidence clearly reflects that appellant developed an emotional condition which her psychiatrist opined rendered appellant totally disabled for work. Once the Office became aware of appellant's other conditions, and appellant's disability due to her depression was raised by Dr. Melieste, the Office erred by not obtaining a medical opinion that appellant could perform her duties as described in the offered position due to these conditions. As it is the Office's burden of proof to establish that appellant refused a suitable position without reasonable justification, the Office did not meet its burden of proof in this case.¹²

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) provides that "If medical reports in the file document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related."

¹² See *Barbara R. Bryant*, 47 ECAB 715 (1996) (the Board reversed a suitable work determination for failure to address the shift hours recommended by appellant's physician).

The March 6, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
February 8, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member