U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA TRIPLETT and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket No. 01-1271; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused suitable work.

On January 20, 1999 appellant, then a 38-year-old mail distribution clerk, filed a traumatic injury claim alleging that on January 14, 1999 she experienced mid and lower back pain after working on a DBCS machine, continually, for two hours. The Office accepted the claim for acute lumbosacral strain. Appellant stopped work on January 15, 1999 and returned to limited duty on February 23, 1999.

Following the original injury, Dr. Gary Ogurkiewicz, appellant's treating physician, restricted appellant to lifting up to five pounds, with no bending, stooping, kneeling, climbing, twisting, pushing/pulling, reaching above shoulders. He also limited appellant to standing and walking from ½ hour up to 8 hours and sitting from 3 hours up to 8 hours with indoor temperature range in 70 degrees.

On July 8, 1999 appellant filed a claim alleging that she experienced residuals of the January 14, 1999 injury. She stopped work on July 8, 1999. The Office accepted the claim for thoracic sprain. Appellant submitted disability slips from Dr. Ogurkiewicz, which noted that appellant could not work from July 8 through November 8, 1999 due to her accepted back condition.

On November 11, 1999 the Office referred appellant to Dr. Richard Sidell, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated November 30, 1999, Dr. Sidell indicated that there was no direct medical connection between appellant's current medical condition and her employment injury of January 14, 1999. He stated that appellant's pain condition was a chronic preexisting condition with temporary aggravation and that appellant should be able to return to her work activity with restrictions within six weeks

of the time of recurrence. Dr. Sidell concluded that, based on examination, there was no reason why appellant could not return to her preinjury work status.

On December 6, 1999 the Office received another disability slip from Dr. Ogurkiewicz which indicated that appellant was disabled from work through January 5, 2000 due to the accepted conditions.

On February 15, 2000 the Office referred appellant to Dr. David Appert, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a report dated April 14, 2000, Dr. Appert reviewed appellant's medical history and employment injuries and noted that she had not worked since July 9, 1999. He related that appellant had continual pain in her low back, sometimes more on the right than left and that she had some discomfort in the left knee. He further discussed his findings on examination.

Dr. Appert also noted that appellant had a recent magnetic resonance imaging (MRI) scan and x-rays of the lumbar and thoracic spine which were essentially normal, with the exception of facet arthropathy L4-S1 and subchondral sclerosis. In a duty status report dated May 18, 2000, Dr. Appert reported that appellant could return to work for four hours a day with limited standing, pushing, pulling and lifting.

In a clarifying report dated May 15, 2000, Dr. Appert indicated that appellant was predisposed to chronic recurrent low back pain based on her physical development and work setting, and that there was a continuing medical connection to appellant's condition and her employment injury, since her work setting may have aggravated or brought on recent back pain. He noted, however, that appellant was not totally disabled and should be able to work light duty four hours a day, five days a week. He further noted that with job rehabilitation and conditioning, she could possibly increase her endurance and tolerance for work.

In an updated report dated July 11, 2000, Dr. Appert indicated that the x-ray findings showed that appellant had congenital abnormalities, which was one of the reasons for her back pain. He further stated that when appellant was initially examined, she was only able to work four hours a day because of the amount of pain of which she was complaining. However, since there had been a significant lapse of time, appellant might be pain free and able to work longer hours.

On July 19, 2000 the Office requested that appellant's employing establishment format a rehabilitation position for appellant based on work restrictions outlined by Dr. Appert. Notwithstanding, the record reflects that Dr. Ogurkiewicz continued to submit disability slips and medical reports, which indicated that appellant remained totally disabled since July 8, 1999 due to the accepted conditions.

On December 13, 2000 the employing establishment offered appellant a limited-duty position as a modified mail processor, tailored to meet her physical restrictions. The duties were listed as: perform tray verification of mail from automation areas, perform quality checks on automated mail for validation purposes, receive and transport mail from automation to down-flow operations within the weight/lifting/pushing/pulling limitations. The hours were from 3:00 to 7:00 a.m. Appellant rejected the job offer by signature on December 13, 2000.

By letter dated January 9, 2001, the Office notified appellant that a rehabilitation position was available, suitable to her work capabilities and that she had 30 days to either accept the position or provide justifiable explanation of the reasons for refusing it or her compensation entitlement would be terminated.

On January 11, 2001 appellant informed the employing establishment of her reasons for refusing the job offer. She argued that she continued to have extremely sharp pain throughout her lower back and spine whenever she performed repetitive activities and that if she continued to sustain recurrences she might suffer paralysis for life. Appellant further argued that if she accepted the offered position, she would have to travel by public transportation, which would cause her stiffness, swelling and pain and that her return from work would be unsafe due to her neighborhood conditions.

In a letter dated February 12, 2001, the Office advised appellant that it had considered her reasons for refusing the position and found them to be unacceptable. The Office further advised that appellant had an additional 15 days within which to accept the light-duty position or a final decision would be rendered. Appellant did not accept the position or return to work.

By decision dated March 1, 2001, the Office terminated appellant's entitlement to compensation based upon her refusal to accept a suitable offer of employment.

The Board finds that the Office properly terminated appellant's compensation on the grounds that she refused suitable work.

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.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate 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.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation 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 a showing before entitlement to compensation is terminated.[5] To

[1] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

[2] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516, 517 (1999).

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

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

[5] 20 C.F.R. § 10.516-517 (1999).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6]

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.[7] In assessing 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.[8]

In this case, a conflict in medical opinion arose between Dr. Ogurkiewicz, appellant's attending physician who noted that appellant was totally incapacitated from work and Dr. Sidell, the second opinion physician who found no reason why appellant could not return to her preinjury work status. Dr. Appert, the impartial examiner referred by the Office to resolve the conflict, provided a thorough medical opinion evidence addressing whether appellant could perform the duties of a modified mail processor. Dr. Appert reported that, although appellant had chronic recurring back pain related in part to her work environment, appellant was not totally disabled from work. She could work on a reduced schedule with restrictions and that over time, with rehabilitation, appellant could possibly increase her work tolerance beyond her restrictions.

Therefore, the Board finds that the weight of the medical evidence establishes that the mail processor position was within appellant's physical restrictions since Dr. Appert, the impartial specialist, provided an accurate history of injury, performed a thorough examination of appellant and detailed work limitations, and provided a well-rationalized opinion regarding disability.

The medical evidence indicates that the job offered to appellant was consistent with her physical limitations, and there is no support for appellant's stated reasons in declining the job offer. Therefore appellant's refusal of the job offer cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation.

[6] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

[7] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[8] *See Connie Johns*, 44 ECAB 560 (1993).

The decision of the Office of Workers' Compensation Programs dated March 1, 2001 is affirmed.

Dated, Washington, DC
January 25, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member