U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA L. CHIEN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Santa Ana, CA

Docket No. 00-1646; Submitted on the Record;
Issued June 7, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant was not entitled to compensation after August 14, 1999 on the basis that she refused an offer of suitable employment; and (2) whether the Office properly terminated appellant's compensation, including medical benefits, on August 5, 1999 on the basis that she had no residuals of her employment-related condition.

The Office accepted that appellant sustained bilateral carpal tunnel syndrome in the performance of her duties as a letter sorting machine (LSM) operator and paid compensation for disability during her absences from work, the longest of which was from November 15, 1987 to May 13, 1988. On January 28, 1992 appellant accepted an employing establishment offer of limited duty as a modified distribution clerk for four hours per day. Appellant's duties were sweeping and repairing damaged mail.

By decision dated August 10, 1992, the Office found that appellant's position as a part-time modified distribution clerk fairly and reasonably represented her wage-earning capacity.

On April 2, 1998 the Office referred appellant, her prior medical reports and a statement of accepted facts to Dr. Thomas R. Dorsey for a second opinion on her condition, its relationship to her employment and her ability to work. In a report dated April 27, 1998, Dr. Dorsey diagnosed bilateral carpal tunnel syndrome and right cubital tunnel syndrome and stated these conditions "would be considered to be temporarily aggravated during her six months of working the LSM. The activities that she has done since at least January of 1992, involving repair of damaged mail and sweeping damaged mail for four hours per day, would not be considered enough of a repetitive stress to cause any aggravation of carpal tunnel syndrome." He concluded that "any disability due to any work-related orthopedic conditions would have ceased three months following discontinuance of working on the LSM," that appellant required no treatment for any work-related condition and that she was capable of working six hours per day, though not as an LSM operator.

The Office determined that the opinion of Dr. Dorsey created a conflict of medical opinion on the number of hours appellant was able to work with that of appellant's attending physician, Dr. Steve T. Hwang, who concluded in a March 6, 1998 report that appellant could perform limited duty only four hours per day. To resolve this conflict, the Office referred appellant, the case record and a statement of accepted facts to Dr. Raymond M. Takahashi. In a report dated October 9, 1998, Dr. Takahashi set forth appellant's history, complaints and findings on examination and reviewed the prior medical evidence. He diagnosed "multiple upper extremity somatic complaints, a portion of which are consistent with the diagnosis of bilateral carpal tunnel syndrome" and "history and findings consistent with unexplained myofascitis." In a supplemental report dated November 10, 1998, prepared after another normal nerve conduction velocity study, Dr. Takahashi stated that he did not understand appellant's disability or the "reason for her multiple complaints from an orthopedic viewpoint," and concluded that absent any objective findings, Dr. Takahashi would offer no work restrictions such as decreased hours from an orthopedic point of view.

On January 9, 1999 the employing establishment offered appellant a position as a modified clerk for eight hours per day, with duties of hand stamping and repairing damaged mail.[1] By letter to the employing establishment dated January 14, 1999, appellant stated that she could not accept the January 9, 1999 offer because her attending physician stated that she could not work eight hours and because the offer was not in accordance with procedural standards.

On January 26, 1999 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence showed that appellant had no residuals of her employment-related condition.

By letter dated February 22, 1999, appellant objected to the proposed termination of her compensation and submitted a February 17, 1999 report from Dr. Kelvin Lee setting forth her history, complaints and findings on physical examination. Dr. Lee diagnosed bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and bilateral mild adhesive capsulitis of both shoulders. He concluded that appellant's "problem has been industrially caused," and that she should perform light work no more than four hours per day.

By decision dated March 3, 1999, the Office terminated appellant's compensation, including medical benefits, effective March 27, 1999, on the basis that the weight of the medical evidence showed that her condition at that time was not related to her employment. As indicated by a March 16, 1999 letter to appellant's congressional representative and a March 23, 1999 Office memorandum, the Office vacated this termination on two bases: that the timely evidence appellant submitted in response to the Office's proposed termination was not considered; and that the newly submitted medical evidence created a new conflict of medical opinion.

By letter dated March 16, 1999, the Office advised appellant that it had found the January 9, 1999 offer of limited duty from the employing establishment suitable and that she had 30 days to accept the offer or provide an explanation for refusing it. By letter dated April 8, 1999, appellant contended that the offer was not suitable, as Drs. Hwang and Lee stated that she could not work eight hours per day.

[1] The offer incorrectly listed this as a modified custodian position.

On April 6, 1999 the Office referred appellant, the case record and a statement of accepted facts to Dr. Joseph S. Swickard, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion of whether appellant had residuals of her employment-related condition. In a report dated May 19, 1999, Dr. Swickard set forth appellant's history, complaints and findings on examination and reviewed the prior medical evidence. He stated:

> "According to the accepted fact, the condition accepted is bilateral carpal tunnel syndrome. Per Dr. [Hwang], one of the physicians that has been following her for years, that problem has resolved.
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> "There are multiple complaints and claims of various other maladies about the upper extremities. However, there are no objective evidence of any disease or problem related to her upper extremities. There are findings that are inconsistent. When I examined her merely having her externally rotate her shoulders with her arms at her side and her elbows bent she reported that caused numbness in the little and ring finger. There is nothing anatomically that could cause that symptom from that maneuver."
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> "She would only demonstrate a very limited wrist motion yet when I did the Phalen's test her wrist was flexed much greater than that without any resistance on the part of the patient. There is no evidence of any structural problem that would prohibit her from having that good a motion. In fact, some of the examinations by her treating physicians would indicate she has better range of motion than she would demonstrate for me. So the range of motion appears to depend upon the examining situation. If it is with her regular physicians or whether it is somebody who is examining her specifically for the basis of determining if she is disabled for the U.S. Department of Labor."
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> In response to Office questions, Dr. Swickard stated:
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> "The patient had subjective reports of pain. However, pain is purely subjective; there is no way for any examiner to know if there is pain present or not. You have to rely totally on the patient's veracity. And this is a patient whose physical findings suggest there may be a problem with her veracity. Her grip strength when I saw her indicates she really must not have been putting out maximum effort, in fact, it appears she hardly put out any effort when I tried to get her to do the three rapid. And Dr. Takahashi came up with the same observation."
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> "She has more muscle mass than I would expect for the strength she appears to be attempting to demonstrate or demonstrating. So her muscle mass would indicate she does not have the weakness these numbers are coming up with. My observation of her muscle mass compared to her size I would not expect her to really have any loss of strength in her upper extremities."

Dr. Swickard also noted that appellant had "patchy nondermatomal sensory change and not consistent with a peripheral nerve distribution." He concluded that there was "no evidence of a disabling problem work or nonwork related," "no medical problem documented that requires further treatment," and "no documented work-related medical residuals. Thus nothing to base any restrictions or any reason to say she is not capable of performing any activity."

By letter dated June 9, 1999, the Office advised appellant that the reasons she offered for refusing the employing establishment's January 9, 1999 offer of limited duty were not justified, as the impartial medical specialist stated that she could work full time. The Office allotted appellant 15 days to accept the offer or have her compensation terminated.

On June 10, 1999 the Office issued a notice of proposed termination of compensation, including medical benefits, on the basis that the weight of the medical evidence showed no residuals of her employment-related condition.

By decision dated August 4, 1999, the Office terminated appellant's compensation, effective August 14, 1999, on the basis that she refused an offer of suitable employment. The Office found that the opinion of Dr. Swickard constituted the weight of the medical evidence on whether the offered position was suitable.

By decision dated August 5, 1999, the Office terminated appellant's compensation, including medical benefits, on the basis that the weight of the medical evidence established that she had no residuals of her employment-related condition.

By letter dated August 31, 1999, appellant requested a review of the written record.

By decision dated December 22, 1999, an Office hearing representative found that Dr. Swickard's report constituted the weight of the medical evidence and established that appellant had no residuals of her employment-related condition. This decision also found that the Office properly found that appellant had refused an offer of suitable employment. The Office hearing representative found that the report of Dr. Takahashi lacked probative value and could not be afforded special weight on any issue in the case because this physician apparently did not review the Office's statement of accepted facts and did not address all of appellant's medical conditions.

The Board finds that the Office properly terminated appellant's compensation, including medical benefits, on August 5, 1999 on the basis that she had no residuals of her employment-related condition.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

There was a conflict of medical opinion between appellant's attending physicians, Drs. Hwang and Lee, and the Office's referral physician, Dr. Takahashi,[3] on whether appellant continued to have residuals of her employment-related condition. To resolve this conflict, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[4] referred appellant, the case record and a statement of accepted facts to Dr. Swickard, a Board-certified orthopedic surgeon. In a report dated May 19, 1999, he concluded that appellant had no residuals of her employment-related condition and thus no basis for restrictions. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[5] As Dr. Swickard's report was based on a proper factual background and contained rationale for the conclusions reached, it constitutes the weight of the medical evidence and is sufficient to establish that appellant's disability and need for further medical care related to her accepted employment-related condition ended.

The Board finds that the Office improperly found that appellant refused an offer of suitable employment.

Under section 8106(c)(2) of the Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[6] To justify termination of compensation, the Office must establish that the work offered was suitable.[7] Section 10.516 of the Code of Federal Regulations[8] 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.[9]

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[3] The referral to Dr. Takahashi was to resolve a conflict of medical opinion on the number of hours appellant could work, even though the second opinion examiner, Dr. Dorsey, concluded that appellant's carpal tunnel syndrome was only temporarily aggravated by her employment and that her disability ended within three months after she discontinued working with the LSM. The Office determined that the report of Dr. Lee, submitted in response to the Office's notice of proposed termination of compensation created a new conflict of medical opinion with the report of Dr. Takahashi.

[4] 5 U.S.C. § 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[5] *James P. Roberts*, 31 ECAB 1010 (1980).

[6] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[7] *David P. Camacho*, 40 ECAB 267 (1988).

[8] 20 C.F.R. § 10.516.

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

On March 16, 1999, the date the Office advised appellant that the employing establishment's January 9, 1999 offer was suitable, there was a conflict of medical opinion on whether appellant continued to have disabling residuals of her employment-related condition. An Office hearing representative, in a December 22, 1999 decision, found that the reports of Dr. Takahashi were not entitled to special weight on any issue in the case. As Dr. Takahashi's October 9 and November 10, 1998 reports were not sufficient to resolve the conflict of medical opinion, that conflict still existed at the time of the Office's March 16, 1999 finding that the offer of limited duty by the employing establishment was suitable. Because of this conflict of medical evidence, the Office cannot rely on its March 16, 1999 letter finding that the offered position was suitable.

The Office's August 4, 1999 decision found that the opinion of Dr. Swickard constituted the weight of the medical evidence on whether the position offered by the employing establishment was suitable. However, the May 19, 1999 report of Dr. Swickard cannot retroactively validate the March 19, 1999 letter finding that the offered position was suitable. This letter cannot be used by the Office as a basis of a decision that appellant refused an offer of suitable work.

Whether the offer was in fact suitable was not resolved until the Office received the May 19, 1999 report of Dr. Swickard. At this point, the Office should have given appellant 30 days to accept the offer or explain her refusal to do so, in light of an impartial medical specialist's conclusion that she had no work restrictions.

The December 22, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed with regard to the Office's termination of compensation on the basis that her employment-related disability had ended. With regard to the Office's determination in this decision that appellant refused suitable work, the December 22, 1999 decision is reversed, as is the Office's August 4, 1999 decision. The Office's August 5, 1999 decision is affirmed.

Dated, Washington, DC
June 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member