U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA E. GALLAGHER and U.S. POSTAL SERVICE,
POST OFFICE, Southampton, PA

Docket No. 01-1477; Submitted on the Record;
Issued June 13, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 5, 2000, on the grounds that she refused an offer of suitable work.

On October 18, 1995 appellant, then a 33-year-old letter carrier, filed an occupational disease claim alleging that she developed synovitis and flexor tendinitis in her wrists due to her federal employment. The Office accepted the claim for bilateral carpal tunnel syndrome and de Quervain's disease, and subsequently approved corrective surgery.

On June 6, 1997 the Office referred appellant to Dr. Herbert Stein, a Board-certified orthopedic surgeon, for an impartial examination to resolve the conflict in the medical evidence between Dr. Aron Wahrman, appellant's treating orthopedic surgeon, and Dr. John M. Bednar, a second opinion Board-certified orthopedic surgeon, regarding the issue of appellant's work capability and whether she continued to suffer any residual disability from her accepted employment conditions.

In a report dated July 18, 1997, Dr. Stein diagnosed post bilateral carpal tunnel syndrome, de Quervain's tenolysis and possible ulnar nerve entrapment with ulnar neuropathy. He opined that appellant required electromyography (EMG) and nerve conduction studies to rule out ulnar neuropathy of the right upper extremity, but that based on the objective findings on examination, she was capable of performing light-duty work that did not require heavy lifting.

On December 7, 1997 appellant underwent the additional testing recommended by Dr. Stein. In a follow-up report dated June 4, 1998, Dr. Stein reviewed the test results and stated that, objectively, there was no evidence of nerve damage to explain appellant's continuing complaint of numbness in her upper extremities, that he could not establish a diagnosis of carpal tunnel syndrome and that objectively, there was no evidence of disability regarding that condition. He further stated that it was also difficult to establish an objective diagnosis with respect to her de Quervain's tenosynovitis, as there was a significant functional overlay or at

least an exaggeration of symptoms, which clouded any objective diagnosis. Dr. Stein concluded that he continued to agree with his original conclusion, that appellant was capable of working light duty, such as casing mail eight hours a day, provided she did not have to do any repetitive heavy lifting with her upper extremities. He also stated that he did not feel appellant would benefit from any further treatment.

On May 23, 1998 appellant, who had been performing light duty, four hours a day, three days a week since October 10, 1997, stopped work and subsequently filed a claim for a recurrence of disability. In a report dated July 14, 1998, Dr. Wahrman, appellant's treating physician, stated that appellant had noticed increasing problems with achiness of her hands and thumbs with accompanying swelling over the dorsal compartment and occasional triggering of the fifth finger. He noted that while there was no longer a Finklestein's sign or frank persistent numbness, appellant did have burning of her fingertips after prolonged repetitive use, problems with dropped objects and a progressive subluxation of her thumb joints. Dr. Wahrman concluded that appellant was totally disabled due to a recurrence of her chronic multifocal tendinitis and needed a rest.

On August 24, 1998 the Office referred appellant to Dr. Stein for a current physical examination and reevaluation. In a report dated September 23, 1998, Dr. Stein reported his findings on physical examination, reviewed the recent medical evidence and diagnosed status post carpal tunnel release and de Quervain's tenolysis, both wrists and carpal tunnel syndrome and de Quervain's disease, by history. Dr. Stein further stated:

> "Once again, there appears to be a significant degree of over reaction. The patient's sensory findings are completely unanatomic on the right side with decreased sensation just about stocking glove from fingers to the elbow. On the left side she has similar findings. Although she has a positive Tinels' sign over the carpal tunnel areas, the paresthesias go into the ulnar distribution and not a median nerve distribution which, once again, is not in normal anatomical expectation.
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> "The last EMG and nerve conduction study done in December 1997 showed no evidence of ulnar or median nerve neuropathy to account for her complaints of decreased sensation and paresthesias. She does have some residual symptoms in the de Quervain's area. In my opinion, this is not marked. She does not have a significant amount of tenderness. She does not have a strongly positive thumb and palm test for de Quervain's disease at this time.
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> "I, once again, do not feel that she is totally disabled for her work. She is certainly capable of working a light-duty capacity.
>
> "She may have had an exacerbation in that left wrist when she was working previously. She certainly has nothing now to indicate an exacerbation.
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> "I believe she is once again able to work in a light-duty capacity and I would think on a full-time basis. I would, however, once again, recommend as she did previously to work part time initially. However, based on what has occurred in

the past she does have residual symptoms and she may not tolerate full time. This would be on a subjective basis. I feel based on my findings she should be able to tolerate full-time work.

"I do not feel, again, that she has any residuals related to the carpal tunnel syndrome as a cause for her symptomatology."

In an accompanying work capacity evaluation form, OWCP-5, Dr. Stein answered "No" to the inquiry as to whether there was any reason appellant could not work eight hours a day, but added that she should initially start part time at four hours per day and gradually increase her hours to eight hours a day over a four- to six-week period. Dr. Stein further indicated that appellant was restricted from pushing, pulling or lifting more than five pounds and should restrict repetitive movements of the writs to four hours, initially.

On January 7, 1999 the employing establishment offered appellant a full-time limited-duty position, starting at four hours a day for two weeks, increasing to six hours a day for two weeks and then remaining at eight hours. The position did not require lifting over five pounds or repetitive movements of the hands.

In a letter dated January 12, 1999, the Office advised appellant that the offered job was suitable based upon the opinion of Dr. Stein, the impartial medical examiner, and advised appellant of the penalty provision under 5 U.S.C. § 8106(c)(2) for refusing a position found suitable. The Office allowed appellant 30 days to accept the position or to provide an explanation of the reasons for refusing it.

On January 25, 1999 Dr. Wahrman released appellant to part-time light duty and on February 1, 1999, appellant returned to work four hours a day, three days a week, in accordance with Dr. Wahrman's instructions.

In a decision dated March 12, 1999, the Office found that appellant had refused a suitable job offer by failing to work full time and terminated monetary compensation under 5 U.S.C. § 8106(c). In a letter dated March 25, 1999, appellant requested an oral hearing. By decision dated August 6, 1999, the hearing representative reversed the March 12, 1999 decision on the grounds that the Office had failed to follow all of the necessary procedures in terminating appellant's benefits.

In a report dated May 13, 1999, Dr. Wahrman stated that appellant could increase her hours to five hours a day, three days a week.

In a letter dated March 3, 2000, the employing establishment offered appellant a light-duty position as a carrier technician, with hours listed as eight hours a day, five days a week. The physical restrictions of the position included no more than four hours of repetitive movements of the wrist, initially and no lifting, pushing or pulling more than five pounds more than four hours a day.

In a letter dated March 6, 2000, the Office advised appellant that the offered job was suitable based upon the opinion of Dr. Stein, the impartial medical examiner and advised appellant of the penalty provision under 5 U.S.C. § 8106(c)(2) for refusing a position found

suitable. The Office allowed appellant 30 days to accept the position or to provide an explanation of the reasons for refusing it.

By letter received March 10, 2000, appellant reiterated that Dr. Wahrman had restricted her from working more than five hours a day, three days a week. In a letter dated April 6, 2000, the Office advised appellant that her reasons had been considered and found insufficient to justify the refusal of the offered position and instructed her that she had 15 days in which to accept the job offer or compensation payments would be terminated under 5 U.S.C. § 8106(c).

In a decision dated April 27, 2000, the Office found that appellant had refused a suitable job offer and terminated monetary compensation under 5 U.S.C. § 8106(c).

On May 1, 2000 appellant, through counsel, requested an oral hearing, which was held on November 29, 2000.

Subsequent to the hearing, appellant submitted additional notes and form reports from Dr. Wahrman, in which he reiterated his earlier conclusion that appellant was restricted to working five hours a day, three days a week. In a narrative report dated November 20, 2000, Dr. Wahrman disagreed with Dr. Stein's conclusions and reiterated his earlier conclusion that appellant could only work five hours a day, three days a week, performing purely nonrepetitive desk or telephone work. Dr. Wahrman stated that he did not feel appellant was remotely capable of performing the job as described in the limited-duty job offer, which included up to four hours of repetitive movement and pushing, pulling and lifting up to five pounds.

By decision dated February 22, 2001 and finalized on February 23, 2001, the hearing representative affirmed the April 27, 2000 decision terminating benefits for failure to accept a suitable position. The hearing representative noted that on November 7, 2000, appellant returned to work full time, eight hours a day and continued to successfully perform her duties. The hearing representative also found that the most recent report of Dr. Wahrman simply reiterated his earlier conclusion that formed part of the original conflict in medical opinion which Dr. Stein resolved.

The Board finds that the Office properly terminated appellant's compensation benefits effective May 5, 2000 on the grounds that she refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[1] 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.[2] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified,[3] and shall be provided with the opportunity to make such a showing

[1] 5 U.S.C. § 8123(a).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

The initial question in this case is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the carrier technician position was within appellant's physical limitations. Dr. Stein, a Board-certified orthopedic surgeon and the referee medical examiner found that appellant could work a normal eight-hour day at a light-duty position which did not require pushing, pulling or lifting more than five pounds for more than four hours a day and initially did not require more than four hours a day of repetitive movements of the wrists. The Office properly found that the limited-duty position offered by the employing establishment was within these restrictions. Although the March 3, 2000 job offer did not allow appellant to begin by working part time, four hours a day, and gradually increase to full time over a four- to six-week period, as recommended by Dr. Stein, the Board notes that as appellant had been successfully performing the duties of the offered position part time since February 1, 1999, this requirement was essentially met prior to the issuance of the March 3, 2000 job offer. The offered carrier technician position, therefore, appears to be consistent with Dr. Stein's recommendations.

A review of the above evidence indicates that there is substantial medical evidence to support a finding that the offered carrier technician position was within appellant's physical limitations. The weight of the medical evidence, as represented by Dr. Stein's referee medical opinion, establishes that the position offered was within appellant's physical limitations.

The Board has held that when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.[6] Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist.[7] Office procedures further direct that, if clarification or additional information is needed, the claims examiner will write to the specialist to obtain it. Under no circumstances should the claims examiner telephone the specialist for elaboration of the report as information obtained cannot be considered probative medical evidence and bias may be inferred as a result.[8]

[4] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[6] *James P. Robert*, 31 ECAB 1010 (1980).

[7] *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Talmadge Miller*, 47 ECAB 673 (1996).

[8] *Carol E. Swiggins*, 47 ECAB 667 (1996).

The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[9] The weight of the medical evidence in this case establishes that appellant was capable of performing the position offered to her on March 3, 2000. The Board finds that the Office properly found that Dr. Stein's referee opinion was sufficiently probative, rationalized and based upon a proper factual background and that it, therefore, constituted sufficient medical rationale to support the Office's February 22, 2001 decision, terminating appellant's compensation. The Office had originally referred appellant to Dr. Stein on June 6, 1997, to resolve the conflict in the medical evidence regarding the issue of appellant's work capability and whether she continued to suffer any residual disability from her accepted employment conditions and on April 20 and August 24, 1998, properly wrote to Dr. Stein requesting that he update and elaborate on his earlier opinion. Although appellant contends that she was medically unable to perform the offered job based on the opinion of Dr. Wahrman, the weight of the medical evidence, as represented by Dr. Stein's September 23, 1998 report and work capacity evaluation, indicates that the position offered was consistent with appellant's physical limitations. Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Moreover, at the time of Dr. Wahrman's most recent November 20, 2000 report, in which he stated that appellant was not remotely capable of performing the job described in the March 3, 2000 offer, appellant had already returned to work eight hours a day and was successfully performing the duties of the carrier technician position. Therefore, the refusal of the job offer cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation. Accordingly, the Board finds that the Office properly terminated appellant's compensation benefits on the basis that she refused on offer of suitable work.

The decisions of the Office of Workers' Compensation Programs dated February 22, 2001 and finalized on February 23, 2001 and April 27, 2000 are hereby affirmed.

Dated, Washington, DC
June 13, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

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