U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARY HATTER and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

Docket No. 00-1719; Submitted on the Record;
Issued March 8, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 30, 1999 on the grounds that she refused an offer of suitable work.

The Office accepted that appellant, then a 36-year-old part-time flexible clerk, sustained a left shoulder strain and brachial plexus syndrome of the left shoulder as a result of a June 19, 1992 work injury. Appropriate compensation benefits were received. The Office further authorized a brachial plexus neurolysis and trapezius fasciotomy, which appellant underwent on June 8, 1998.

On August 25, 1998 the Office referred appellant to Dr. John Stasikowski, an orthopedic surgeon, for a second opinion evaluation. In a report dated September 3, 1998, he noted that appellant last worked light duty on April 14, 1998, reviewed appellant's medical records along with objective tests of record. Examination revealed a negative Adson test as well as negative Phalen and Tinel signs. The left shoulder examination revealed full range of motion with variability of reaction. Impingement sign was negative. There was no evidence of inflammatory reaction. Neurovascular status was intact and the shoulder felt stable. Dr. Stasikowski opined that appellant was status-post left sided neck surgery with a well-healed incision at the base of the neck on the left. He further opined that appellant was able to resume her date-of-injury position with no restrictions.

On August 28, 1998 appellant's attending physician, Dr. Ronnie D. Shade, an orthopedic surgeon, released her to part-time restricted work.

On September 22, 1998 the employing establishment offered appellant a limited-duty job as a flat sorting machine operator to start on October 3, 1998. She was expected to work standing in the box unit scanning priority mail, answer the telephone as needed and perform other duties as assigned within her prescribed limitations as established by Dr. Shade's medical release dated August 28, 1998. Physical restrictions noted: lifting no more than 15 pounds; no

prolonged repetitious use of left arm; and limited duty ½ days for 4 weeks. On September 28, 1998 appellant accepted the limited-duty job offer.

On September 25, 1998 Dr. Shade stated that he last examined appellant on August 28, 1998 and she had complaints of gradual recurrence of her left lateral neck and shoulder girdle symptoms as well as complaints of mild weakness of her left hand and paresthesias. He further stated that appellant was dropping objects at the present time. Physical examination findings revealed mild weakness of the left extremity with a mild sensory loss. Dr. Shade recommended a functional capacity evaluation (FEC) with manual muscle testing of the upper extremities. He further stated that prior to assigning appellant to a full-duty position, she would have permanent limitations and the job modification was indicated as well as accommodations.

The Office found a conflict in the medical opinion evidence between Drs. Shade and Stasikowski regarding appellant's ability to return to work. The Office referred appellant, together with a statement of accepted facts, a list of specific questions, a description of the original position of distribution clerk and medical records, to Dr. James E. Swink, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an October 15, 1998 report, Dr. Swink noted appellant's history and reported findings on examination. He noted that range of motion of the neck was essentially normal. The left shoulder showed some restriction from full range of motion with appellant demonstrating abduction to 100 degrees, flexion to 130 degrees, adduction to 50 degrees, extension 50 degrees, internal rotation 30 degrees, external rotation 30 degrees. The anterior incision of the left shoulder was well healed. Appellant had generalized weakness of grip. Reflexes were 1+, biceps and triceps. There was no muscle atrophy. Examination showed generalized weakness to grip of the left arm. No sensory deficit was noted. Good pulses in the arms were noted. Dr. Swink provided a diagnosis of postoperative brachial plexus syndrome. He noted that appellant had residuals from the work-related injury being the restriction to full movement of the left shoulder and generalized weakness of the left arm. Dr. Swink noted that appellant had a FEC in early March and was scheduled for another one next week. The earlier study indicated that appellant was capable of only sedentary or light-duty work, should not lift over 20 pounds, should not do overhead work and should not do repetitive tests. Dr. Swink opined that with these restrictions, appellant would be unable to return to her preinjury position as distribution clerk. He opined, however, that appellant was capable of sedentary or light-duty work. Dr. Swink further opined that appellant's restrictions were of a permanent nature and completed a Form OWCP-5c designing such.

On October 27, 1998 appellant stopped her limited-duty assignment.

In a report dated November 6, 1998, Dr. Shade noted that appellant was unable to complete the FEC secondary to elevation of her blood pressure. He recommended that appellant be off work for two weeks.

By letter dated November 10, 1998, the Office informed appellant that the limited-duty flat sorter machine operator position offered to her was suitable to her work capabilities. The Office informed appellant that she had 30 days in which to contact the employing establishment regarding the enclosed job offer. The Office further explained that if appellant did not accept the

position or provide an explanation for refusing it, the Office would issue a final decision terminating compensation and she would not be entitled to any further compensation for wage loss or schedule award.

In a report dated November 23, 1998, Dr. Shade recommended that appellant be off work for an additional two weeks.

On December 3, 1998 appellant declined the job offer. She stated that the job was not sedentary, consisted of repetitive work and was very physical.

By letter dated December 14, 1998, the Office determined that the limited-duty position constituted a suitable job offer and instructed appellant 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 December 15, 1998 report, Dr. Louis E. Deere, a psychiatrist, noted a history of the work injury and performed a mental status examination. He ruled out major depression with psychotic features, ruled out generalized anxiety disorder, ruled out delusional disorder and ruled out malingering. He found intractable pain, essential hypertension, migraine, cephalgia by history, duodenal ulcer by history along with chronic pain, job dysfunction and financial crisis. A complete psychiatric evaluation was recommended along with emergency psychiatric care. No definitive diagnosis was provided and there was no indication that appellant's current condition was the result of or related to the June 19, 1992 work injury.

In a December 16, 1998 report, Dr. Shade stated that he reviewed the independent medical evaluation report. He noted that appellant felt the job was too physical and too repetitious. Dr. Shade released appellant to return to limited-duty work on December 21, 1998 with lifting not to exceed five pounds and no prolonged repetitive use of the left upper extremity. Subsequent reports indicated that appellant should continue with limited duty.

By decision dated January 29, 1999, the Office terminated appellant's compensation effective January 30, 1999, based on her refusal to accept a suitable job as a modified flat sorter machine operator. The Office found that Dr. Swink's opinion represented the weight of the medical evidence.

Following appellant's termination, additional reports from Dr. Shade noted that appellant could continue at limited duty but a nonmail processing job was recommended. An assessment of chronic pain syndrome was provided.

In a letter dated October 27, 1999, appellant requested reconsideration. Attached with her request was an October 1, 1999 report from Dr. Shade noting her initial diagnoses of June 19, 1992. He further advised that appellant was placed in an off work status from October 27 through December 21, 1998 because of her chronic pain symptoms. He noted that Dr. Swink had evaluated appellant on October 15, 1998 and had reviewed the prior FEC which stated that appellant was capable of only sedentary type work. He also noted that Dr. Swink felt that appellant had permanent problems and could not return to her preinjury job. Dr. Shade opined that in view of appellant's limitations and excerbation of pain symptomology, appellant was incapable of working from October 27 through December 21, 1998. He further opined that

appellant should be under the care of a psychiatrist/psychologist and treated in a chronic pain clinic.

By decision dated January 14, 2000, the Office denied modification of its prior decision.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] This includes cases in which the Office terminates 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 under section 8106(c)(2).[2] 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 medical evidence.[4]

Section 10.517(a)[5] 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 and shall be provided with an opportunity to make such a 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 suitable[7] and must inform appellant of the consequences of the refusal to accept such employment.[8] According to the Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[9]

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a 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

[1] *Mohammed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

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

[4] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[5] 20 C.F.R. § 10.517(a) (January 4, 1999).

[6] *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon*., 43 ECAB 818 (1992).

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

[8] *See Maggie L. Moore*, *supra* note 6; *see also* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[9] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1997).

examination.[10] 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.[11]

In this case, the Office found a conflict in the medical opinion evidence between Dr. Shade, appellant's treating physician and Dr. Stasikowski, a second opinion physician, concerning appellant's ability to perform the duties of her original job position as a distribution clerk. The Office properly referred appellant to Dr. Swink for an impartial medical evaluation pursuant to section 8123(a) of the Act. The Office then found that the modified position of flat sorter machine operator was suitable as the duties were within appellant's medical restrictions.

In terminating appellant's compensation, the Office properly relied on Dr. Swink's October 15, 1998 medical report. In this medical report, he indicated a history of appellant's June 1992 employment injury and medical treatment and a review of medical records. Dr. Swink stated that he had reviewed a description of the original distribution clerk position and that appellant could no longer return to that job. He noted that a FEC in early March indicated that appellant was capable of only sedentary or light-duty work, should not lift over 20 pounds, should not do overhead work and should not do repetitive tests. Dr. Swink opined that with these restrictions, appellant would be unable to return to her preinjury position as distribution clerk. He opined, however, that appellant was capable of sedentary or light-duty work with no more than 4 hours of reaching, pushing, pulling and lifting with a weight restriction of 20 pounds and with no reaching above the shoulder. The employing establishment had offered appellant a modified position of flat sorter machine operator consistent with Dr. Shade's restrictions of August 28, 1998. Physical restrictions indicated lifting no more than 15 pounds and no prolonged repetitious use of left arm. As the modified position was based upon Dr. Shade's more conservative restrictions regarding lifting (15 pounds versus 20 pounds as indicated by Dr. Swink and the March 1998 FEC) and his opinion regarding the amount of time appellant is capable of working in a limited-duty position is entitled to special weight as the independent medical examiner, the Office could properly find that the modified position of flat sorter machine operator is medically suitable for appellant. The Office further followed its procedures in offering the suitable position to appellant. Accordingly, the Office properly terminated appellant's compensation for refusing suitable work.

Following the termination of her compensation for refusing suitable work, appellant submitted an October 1, 1999 medical opinion from Dr. Shade, who opined that appellant was totally disabled from October 27 through December 21, 1998. The record reflects that appellant was paid total disability compensation for the period in question. As there is no medical rationale in the report to support that appellant's condition has worsened to reflect a change in her accepted condition, this report has no probative value in establishing that appellant is unable to perform her light-duty work at eight hours a day after December 21, 1998.[12] Likewise,

[10] 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan*), 45 ECAB 207 (1993).

[11] *See Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[12] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996) (medical conclusions unsupported by medical rationale are of diminished probative value).

Dr. Shade provides no medical rationale for his subsequent opinion indicating lifting restrictions of no more than five pounds after December 21, 1998.[13] Accordingly, the Board finds that Dr. Shade's reports are insufficient to create a new conflict in the medical evidence or to overcome the weight of Dr. Swink's report. Consequently, the Office properly terminated compensation as it found that appellant's reasons for refusing suitable work were not justified.

The January 14, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 8, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[13] *Id.*