U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH L. BUSH and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 01-349; Submitted on the Record;
Issued March 18, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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

On February 17, 1995 appellant, then a 41-year-old distribution clerk, filed a claim, alleging that she developed tendinitis of her right arm as a result of her employment duties. Appellant stopped work on May 3, 1994 and returned to work intermittently, she stopped work on March 26, 1996. The Office accepted the claim for right arm tendinitis; carpal tunnel syndrome and extended this to include depression. The Office authorized a carpal tunnel release, which was performed on October 27, 1995. Appellant was paid appropriate compensation for all periods of disability.

In an operative report dated October 27, 1995, Dr. B.T. Wright, a Board-certified orthopedic surgeon, noted performing carpal tunnel release on appellant's right wrist. He noted a diagnosis of carpal tunnel syndrome and chronic epicondylitis of the right elbow.

On April 27, 1996 appellant filed a claim, alleging that she developed a depressive disorder on March 26, 1996 as a result of chronic pain she experienced from her accepted February 17, 1995 injury. Appellant submitted reports from Dr. Wright dated April 30 and May 30 and a May 28, 1996 report from Dr. Priscilla Ray, a specialist in psychiatry. Dr. Wright noted that appellant was being treated for depression. He noted that appellant's depression was at least in part entirely related to her February 17, 1995 injury, treatment of this injury and conditions at her job. Dr. Wright indicated that appellant could perform light-duty work from an orthopedic perspective but was taken off work by Dr. Ray for psychological reasons. He noted that appellant was under her care for depression. She diagnosed appellant with major depression; dependent traits; carpal tunnel release; chronic pain; and occupational problems. She noted that the primary stressors for appellant were related to her work injury and the conditions of her employment where she felt underutilized. Dr. Ray noted that appellant was hospitalized for approximately two weeks for a depressive disorder. She recommended that appellant work in a position which did not require night work or undue stress.

In a July 12, 1996 decision, the Office denied appellant's claim on the grounds that the evidence failed to demonstrate that the claimed condition of depression on or about March 26, 1996 was causally related to her accepted injury.

In a decision dated January 21, 1997, the Office hearing representative vacated the decision dated July 12, 1996 and remanded the case to the Office for further development of the medical evidence. The hearing representative directed that the Office refer appellant to a psychiatrist to determine the causal relationship of the accepted employment-related injury and appellant's psychiatric condition.

On February 28, 1997 the Office referred appellant for a second opinion to Dr. Theodore Pearlman, Board-certified in psychiatry.

In a medical report dated March 24, 1997, Dr. Pearlman indicated that appellant's depression was not a depressive illness but depression related to dissatisfaction with her limited-duty job assignment. He noted that appellant could return to her preinjury work position. Dr. Pearlman diagnosed appellant with conversion disorder or factitious disorder with psychological and physical symptoms; and pain disorder with psychological symptoms.

The Office determined that a conflict in medical evidence was present between Dr. Ray, appellant's treating physician and the second opinion physician, Dr. Pearlman and referred the case to a referee physician, Dr. Stanton Moldovan, a Board-certified psychiatrist, to resolve the conflict.

In a medical report dated June 20, 1997, Dr. Moldovan noted that appellant showed some anxiety and depression and was crying intermittently throughout the examination; insight and judgment were intact; there was no evidence of forgetfulness; and good strength in both arms and legs. He diagnosed appellant with major depression improved; status post carpal tunnel release; status post right wrist flexor tendon tenosynovectomy; and status post right elbow release of extensor aponeurosis. Dr. Moldovan determined that appellant did have a major depressive episode in 1996 which has since significantly improved. He indicated that he did not believe appellant's depression disabled her from all work. Dr. Moldovan further noted that he did not believe appellant was capable of doing the repetitive work that she previously performed as a manual distribution clerk. He recommended that appellant return to a position where there would be no repetitive movements.

The Office on July 16, 1997 accepted appellant's occupational disease claim for the additional condition of major depression based on Dr. Moldovan's independent medical evaluation of June 20, 1997.

The Office referred appellant for a second opinion orthopedic evaluation to Dr. Richard DeYoung, Board-certified in orthopedics. The Office provided Dr. DeYoung with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a medical report dated July 3, 1997, Dr. DeYoung indicated that he reviewed the records provided to him; however, was unable to perform a physical examination because appellant's arm was in a cast. Appellant sustained a broken right arm when her horse

kicked her in February 1997. Dr. DeYoung recommended that appellant be reexamined when she no longer had a cast.

On October 30, 1997 the employing establishment offered appellant a position as a modified distribution clerk. The restrictions included no repetitive hand movements. The duties of appellant included working modified cases; sitting at a desk; removing mail from a tray to code; loading mail into a cardboard trays; and carrying trays which weighed less than 10 pounds into a designated workstation. The hours of employment were eight hours a day, from 7:00 a.m. to 3:00 p.m., Monday through Friday. The employing establishment indicated that appellant's annual salary was $37,290.00 based on an eight-hour workday.

Thereafter, appellant submitted a magnetic resonance imaging (MRI) scan dated September 18, 1997; a report from Dr. Ray dated November 6, 1997; and a statement dated November 13, 1997 refusing the limited-duty position. The MRI revealed a minimal posterocentral disc bulge at C2-3 and C4-5. The report from Dr. Ray dated November 6, 1997 noted that appellant could return to employment in January 1998, which was a less stressful time, initially for two hours to see if she exacerbated her depression and, thereafter, she could increase to four hours in one week and then to full time. She noted that appellant should not drive long distances. Appellant's statement dated November 13, 1997 indicated that she refused the limited-duty position because the position offered did not meet the work restrictions established by Dr. Ray.

Dr. Wright submitted a note dated November 19, 1997 indicating that he reviewed the job offer of October 1997 and determined that the job description would allow safe performance and function of appellant's operated arm and wrist. He noted that appellant's return to work within the limits of the description was permitted.

By letter dated November 25, 1997, the Office notified appellant that the position as modified distribution clerk was found to be suitable to her work capabilities. The Office indicated that appellant had 30 days to accept the position or provide further explanation for refusing it. The Office advised appellant that, if she did not accept the offered position or did not demonstrate that her refusal to accept was justified, her compensation would be terminated under 5 U.S.C. § 8106(c).

In a letter dated December 31, 1997, appellant indicated that she would not be able to accept the job offer and submitted reports from Dr. Ray dated December 22, 1997 and Dr. Daniel Franklin, an etiologist, dated December 23, 1997. Dr. Ray's letter indicated that appellant was readmitted to the hospital on December 16, 1997 for exacerbation of depression and anxiety and remained hospitalized. Dr. Franklin's report noted that appellant suffered from chronic imbalance from an inner ear weakness.

On January 16, 1998 the Office informed appellant that her refusal of the offered position was found to be unjustified and provided 15 days for her to accept the job.

Thereafter, appellant submitted a report from Dr. Wright dated January 20, 1998. He indicated that appellant's upper extremity was unchanged and noted that she had permanent impairment. He noted that appellant was recently hospitalized for major depression. Dr. Wright

indicated that he did not believe appellant was capable of gainful work activities at this time. He noted that the reason for her inability to work is solely and entirely related to her depression.

In a letter dated January 27, 1998, appellant indicated that she was accepting the position offered as a limited-duty clerk. She did not report for work.[1]

On February 6, 1998 the Office terminated disability compensation on the grounds that appellant refused an offer of suitable work, which the medical evidence established she was capable of doing.

In a letter dated February 23, 1998, appellant requested a hearing before an Office hearing representative. She submitted a report from Dr. Ray dated February 12, 1998; two notes from the employing establishment dated February 27 and March 11, 1998; a personal statement dated March 11, 1998; and a note from Dr. Franklin dated October 21, 1998. Dr. Ray noted that appellant was able to return to work on a part-time basis but be allowed to continue treatment in the day hospital program during her transition back to work. She indicated that appellant could work three hours in the morning so that she could attend the day hospital program. Dr. Ray noted that appellant remained depressed. She indicated that appellant was willing to return to work but was waiting for the employing establishment to determine when she could start. The notes from the employing establishment indicate that appellant failed to report for work and notified her that if she did not report she would be terminated. The March 11, 1998 note indicated that appellant's light-duty request for three hours a day was denied on the basis that this work was unavailable. Appellant's note requested light-duty work three hours a day. Dr. Franklin's report indicated that appellant had a chronic imbalance condition. At the hearing, appellant testified that she accepted the job offer but was waiting to hear from the employing establishment as to a start date. Appellant indicated that the job offer did not consider her emotional condition and did not try to accommodate Dr. Ray's recommendation for part-time hours.

On January 7, 1999 the hearing representative found that the Office was justified in terminating appellant's compensation because she refused an offer of suitable employment. The hearing representative determined that appellant failed to supply sufficient documentation to support her refusal of the suitable job and her failure to return to work.

Appellant requested reconsideration of the Office's decision dated January 7, 1999 and submitted additional medical evidence. The medical evidence included an October 27, 1998 report from Dr. Ray and a January 21, 1999 report from Dr. Wright. The report from Dr. Ray indicated that appellant was anxious about returning to work and that she recommended appellant return after the stressful holiday season. Dr. Ray noted that, after receipt of the Office's November 25, 1997 letter, appellant was treated for suicidal thoughts. She noted that appellant was admitted to the hospital from December 15 through December 29, 1997. Thereafter appellant was admitted to the day hospital and when her condition stabilized the frequency of attending the day hospital decreased until she was released on May 12, 1998.

[1] In a nurse closure report dated January 31, 1998, the nurse noted that appellant was released from the hospital on January 5, 1998. She noted that appellant had no intentions of returning to work at the employing establishment but planned to file for Social Security benefits.

Dr. Ray noted that the exacerbation of her major depression, anxiety and irritability was due to her frustration in dealing with the return to work on a suitable schedule. She noted that appellant could not work because of her inpatient status in December 1997 and then her full-time day status after that time. Dr. Wright noted that appellant could return to work on restricted duty. He noted that appellant had been off work for a long period of time.

By decision dated October 12, 1999, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was immaterial and not sufficient to warrant review of the prior decision.

In a letter dated January 5, 2000, appellant requested reconsideration of the Office's decision and submitted additional medical evidence. Appellant submitted a report from Dr. Ray dated January 3, 2000. Dr. Ray noted that, in January 1998, she recommended against appellant returning to work to a full-time position. She noted appellant exhibited limited energy due to exacerbation of her depression; an inability to perform her job up to her expectations; fear that she would reinjure her arm; and need for considerable emotional support on a daily basis as was provided in the day hospital program. Dr. Ray noted appellant accepted the position due to fear of losing her job. She noted that, in letters dated February 6 and February 12, 1998, she recommended that appellant work three hours a day while in the day hospital which would allow her time to make the transition back to work.

By merit decision dated January 24, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was immaterial and not sufficient to warrant review of the prior decision.

In a letter dated June 12, 2000, appellant requested reconsideration of the Office's decision and submitted additional medical evidence. She submitted a copy of the October 30, 1997 job offer and a duplicate report from Dr. Wright dated November 19, 1997. Appellant also provided several arguments in support of her request for reconsideration including: the modified job offered in October 1997 was the same limited position she tried unsuccessfully to perform in March 1996; when her compensation was terminated in February 1998, her treating physician Dr. Ray had not released her to work; the modified job offer November 1997 was not presented to Dr. Ray for review as to suitability; the referee physician, Dr. Moldovan did not review the November 1997 job offer for suitability; the Office relied on Dr. Moldovan's June 1997 report when making their determination to return appellant to work but he was not informed that appellant's condition worsened in December 1997; the Office's 15-day letter failed to designate a start date for the offered position; the field nurse misquoted Dr. Ray to Dr. Wright indicating that appellant had reached maximum medical improvement when she had not; and the field nurse misquoted appellant when she noted that appellant refused the position because it was demeaning.

By merit decision dated August 14, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was immaterial and not sufficient to warrant review of the prior decision.

The Board finds that the Office did not meet the burden of proof in terminating appellant's disability compensation for refusal of suitable employment.

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.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision, which must be narrowly construed.[5]

The implementing regulation[6] 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 a 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.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[8]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[10]

The Board finds that the medical evidence does not establish that appellant was capable of performing the listed requirements of the offered position. On October 30, 1997 the employing establishment offered appellant a position as a modified distribution clerk. The restrictions included no repetitive hand movements. The duties of appellant included working modified cases; sitting at a desk; removing mail from a tray to code; loading mail into a cardboard tray; and carrying trays which weighed less than 10 pounds into a designated work station. The hours of employment were eight hours a day, from 7:00 a.m. to 3:00 p.m., Monday through Friday and the employing establishment indicated that appellant's annual salary was $37,290.00 based on an eight-hour workday. In a note dated November 19, 1997, Dr. Wright indicated that he reviewed the job offer October 1997 and determined that the job description

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[6] 20 C.F.R. § 10.124(c).

[7] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[8] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *affirmed on recon.*, 43 ECAB 818 (1992).

[9] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[10] *Arthur C. Reck*, 47 ECAB 339 (1996).

would allow safe performance and function of appellant's operated arm and wrist. He noted that return to work within the limits of the description was permitted. The referee psychiatrist, Dr. Moldovan, in a report dated June 20, 1997, noted that he did not believe appellant's depression disabled her from all work. He noted that he did not believe appellant was capable of doing the repetitive work that she had been doing before as a manual distribution clerk. However, it is not clear whether the hours of work listed on the job offer were consistent with Dr. Moldovan's recommendation regarding appellant's return to work as it does not appear from the record that he reviewed the limited-duty job offer for suitability. Further, the record does not reflect that Dr. Moldovan had knowledge of appellant's hospitalization in December 1997 and the effect if any, this would have on appellant's return to work. Additionally, it does not appear that Dr. Ray, appellant's treating psychiatrist reviewed the job offer nor does the record indicate that the Office or the employing establishment took into consideration Dr. Ray's recommendation, in her report dated November 6, 1997, that appellant return to work in January 1998 initially for two hours to see if she exacerbated her depression and then increase her hours in a week to four hours and then to full time duty. There is no indication in the record that the Office sought clarification of these matters, specifically with regard to appellant's psychiatric restrictions, prior to terminating compensation for a refusal of suitable work.[11]

In this case, appellant's treating psychiatrist, Dr. Ray, in a report dated December 22, 1997, indicated that appellant was readmitted to the hospital on December 16, 1997 for exacerbation of depression and anxiety and remained hospitalized but could return to work after the stressful holiday season. Dr. Ray further noted that appellant's emotional condition affected her ability to work. She noted that appellant could not work because of her inpatient status in December 1997 and then her full-time day status for medical treatment after that time. Reports from Dr. Ray continued to document appellant's disability status in 1998 due to exacerbation of the depression. She noted appellant accepted the position due to fear of losing her job. The record does not reflect that the Office provided Dr. Ray with a copy of the job offer or that they considered her recommendation for less than full-time status upon return to work. In this instance, although appellant was able to return to work without restrictions from an orthopedic standpoint, her ability to return to work from a psychiatric standpoint was questioned by Dr. Ray as noted above and required further clarification as to the suitability of the job offer. Thus, the medical evidence fails to establish that the job offered was suitable and the Office improperly terminated appellant's compensation on the grounds that she refused an offer of suitable work.[12]

The Board finds that the Office did not meet its burden of proof in establishing that the offered position was suitable. Therefore, the Office improperly applied the penalty provision of section 8106(c)(2).

[11] *See Maggie Moore*, 43 ECAB 818 (1992).

[12] *See Patrick A. Santucci*, 40 ECAB 151 (1988).

The August 14 and January 24, 2000 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
March 18, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member