

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNICE S. CEASAR and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX

*Docket No. 02-443; Submitted on the Record;
Issued October 9, 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 for refusing an offer of suitable work.

On September 25, 1977 appellant, then a 42-year-old mess attendant, filed a notice of traumatic injury alleging that she slipped on a wet floor while picking up some trays. The Office accepted the claim for contusions of the right knee and hip, torn right medial meniscus and aggravation of osteoarthritis of the right knee.¹ Appellant underwent arthroscopic surgery of the right knee on January 12, 1981. From the date of injury through December 1987, appellant received compensation for intermittent periods of total disability. Thereafter she was placed on the periodic roll.

Appellant has been under the care of Dr. Don E. Cheatum, a Board-certified specialist in rheumatology and Dr. Robert G. Vierre, a Board-certified orthopedist. X-rays of the right hip, right hand and wrist, right shoulder, right elbow, left foot, left ankle, right and left knees have confirmed a diagnosis of osteoarthritis, while lumbar x-rays demonstrated moderately severe osteoarthritic changes with degenerative disc disease at L2-3 and L5-S1.

In a July 6, 1987 treatment note, Dr. Cheatum noted that he had been treating appellant for rheumatoid arthritis since 1978 and that the condition was especially worse in the right knee. Dr. Cheatum recommended that appellant be placed on permanent disability as he believed that her condition would not improve.

In a work restriction (OWCP-5 form) dated September 10, 1992, Dr. Vierre advised that appellant had permanent restrictions with the amount of time she spent walking, standing, lifting, bending, stooping and that appellant had to change positions multiple times throughout the day.

¹ Appellant was previously injured at work on June 18, 1976 and her claim was accepted by the Office for chondromalacia.

He stated that she should not be involved in driving any specific distance and required multiple rest periods such that she would be unable to return to work in any capacity.

In a July 24, 1994 report, Dr. Cheatum reiterated that appellant was permanently disabled due to the effects of her work injury, which included permanent aggravation of her rheumatoid arthritis.

In a September 10, 1997 report, Dr. Vierre indicated that appellant was totally disabled for work due to osteoarthritis of the neck, back and both knees.

The Office referred appellant for a second opinion evaluation with Dr. Tom Mayer, a Board-certified orthopedic surgeon. In a report dated October 8, 1997, Dr. Mayer opined that appellant had residual osteoarthritis as a result of her work injury that precluded her from returning to her date-of-injury job. He nonetheless opined that appellant could return to a sedentary position for eight hours per day.

The Office determined that a conflict existed in the record and referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. Bernie McCaskill, a Board-certified orthopedic surgeon, for an impartial medical evaluation on April 22, 1998.

In a report dated April 22, 1998, Dr. McCaskill discussed appellant's work injury, symptoms and medical history. He recorded physical findings and neurological findings. The physician indicated that, while appellant clearly had advanced degenerative changes in her right knee, her physical presentation was functional. Dr. McCaskill opined that appellant exaggerated her symptoms and was capable of working in a sedentary job so long as she was not required to stand or work for more than a limited period of time. In an OWCP-5 form attached to his report, Dr. McCaskill noted that appellant was restricted and very limited in the amount of time she could spend walking or operating a motor vehicle. He also noted that she could not push, pull, or lift over five pounds and that she had restrictions with regard to squatting, kneeling and climbing.

On May 15, 1998 the employing establishment offered appellant a job as a full-time program clerk described with restrictions as follows: "restricted to sedentary work; avoid walking and standing; can sit with change of position/posture once per hour; lifting/pulling/pushing not to exceed [five] [pounds]; no squatting, kneeling, or climbing." Appellant's job was described as requiring her to receive sort and distribute mail, answer the telephone and operate a computer in scheduling and looking up appointments.

In a June 9, 1998 letter, the Office advised appellant that the offered position was deemed suitable work. She was informed that she had 30 days to either accept the job or provide her reasons for refusing the position or else she risked termination of her compensation.

Appellant rejected the job offer on June 15, 1998. She alleged that she was unable to drive to work due to constant knee pain and that she required help at home to clean and bathe herself such that she could not be expected to return to work.

The Office subsequently received from appellant numerous treatment notes and medical reports from Dr. Cheatum dated from June 3, 1997 through June 19, 1998, in which the

physician maintained that appellant was unable to work. In the most recent report dated June 19, 1998, Dr. Cheatum noted that appellant had a history of severe rheumatoid arthritis with consistent inflammatory arthritis occurring after an original right knee injury at work in 1976. He stated that the effects of appellant's work injury have definitely not ceased with her movements being restricted with severe pain such that she cannot sit, walk or stand for more than a few minutes at a time. Dr. Cheatum noted that appellant could not perform any repetitive activities with her hands and that she needed assistance with her personal daily activities. He concluded that appellant was permanently and totally disabled for all work.

On July 9, 1998 the Office advised appellant that her reasons for refusing the job offer were not acceptable. She was given 15 days to accept the position.

In a decision dated July 27, 1998, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Appellant requested a hearing but later opted for a review of the written record.

In a March 24, 1999 decision, an Office hearing representative affirmed the Office's July 27, 1998 decision.

On March 23, 2000 appellant by counsel requested reconsideration. She submitted progress notes from Dr. Cheatum dated March 29, April 4 and 26, May 24 and 30, June 7 and 22 and July 20, 2000. Dr. Cheatum indicated that appellant suffered from severe seronegative rheumatoid arthritis and severe secondary osteoarthritis in her knees. He noted additional arthritic findings in the left and right shoulders. Appellant was in consideration for left knee surgery. Dr. Cheatum stated that appellant's arthritis and knee problems were work related.

In a March 2, 1998 report, Dr. Richard L. Vera, advised that appellant was receiving epidural steroid injections for treatment of the conditions of lumbar degenerative disc disease, spondylosis and arthritis.²

In a decision dated September 7, 2000, the Office denied appellant a reconsideration request under 5 U.S.C. § 8128.

In a September 5, 2001 letter, appellant once again requested reconsideration and submitted new medical reports, from Dr. Cheatum dated September 25 and October 16 and 23, 2000 and September 5, 2001. These reports describe that appellant has osteoarthritis of the knees and lists current medications. In his September 5, 2001 report, Dr. Cheatum stated that appellant had severe rheumatoid arthritis concomitant with osteoarthritis. He listed physical findings but did not address the issue of disability for work.

In a decision dated October 4, 2001, the Office denied modification of its prior decisions.

² A January 7, 1998 myelogram of the cervical spine confirmed diffuse spondylosis with mild to moderate spinal stenosis at C4-5 and C6-7.

The Board finds that the Office properly terminated appellant's compensation because she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.³ Section 8106(c)(2) of the Federal Employees' Compensation Act provides that the Office may terminate the 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. The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.

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.⁴ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.⁵

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.⁶ In assessing medical evidence, the number of physicians supporting one position over 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.⁷

In this case, the Office accepted that appellant sustained a right knee condition as the result of a work injury on September 25, 1977. The Office properly found that a conflict existed in the record between appellant's treating physician and the Office referral physician as to whether appellant was capable of performing sedentary work. Drs. Cheatum and Vierre considered appellant to be totally and permanently disabled for all work while Dr. Mayer opined that appellant could perform sedentary work despite her residual osteoarthritis.

Section 8123(a) of the Act⁸ provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the

³ *Roberto Rodriquez*, 50 ECAB 124 (1998).

⁴ *John E. Lemker*, 45 ECAB 258 (1993).

⁵ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁶ *Maurissa Mack*, 50 ECAB 498 (1999); *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁷ *Maurissa Mack*, *supra* note 6; *Connie Johns*, 44 ECAB 560 (1993).

⁸ 5 U.S.C. § 8123(a).

Secretary shall appoint a third physician who shall make an examination.⁹ Because there was a conflict as to appellant's capacity to work between Drs. Cheatum and Mayer, the Office correctly referred appellant to Dr. McCaskill for an impartial medical evaluation. In his report dated April 22, 1998, Dr. McCaskill opined that appellant suffered from osteoarthritis but that she was capable of performing sedentary work for eight hours a day with restrictions.

In situations where there exist 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.¹⁰ The Board has carefully reviewed Dr. McCaskill's opinion and finds that he based his opinion on a proper factual background. He likewise offered a well-rationalized report addressing appellant's capacity for work. Because Dr. McCaskill's opinion is well rationalized and based on a proper factual background, it is entitled to special weight. Accordingly, the Board concludes that the Office was correct in finding that appellant could perform sedentary work.

The job offered by the employing establishment was based on the work restriction form prepared by Dr. McCaskill and properly adopts the work restrictions outlined by the impartial medical specialist. The Board, therefore, finds that the Office correctly deemed the job offer to be suitable work.

Finally, because the Office followed its procedures in notifying appellant of the suitability of the offered job and she was given the requisite 15 days to accept the job after her reasons for refusing it were deemed unreasonable, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

⁹ See *Robert D. Reynolds*, 49 ECAB 561 (1998); *Lawrence C. Parr*, 48 ECAB 445 (1997).

¹⁰ *Rosie E. Garner*, 48 ECAB 220 (1996).

The October 4, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 9, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member