

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH CHURCHWELL and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Palo Alto, CA

*Docket No. 02-792; Submitted on the Record;
Issued October 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

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

On December 3, 1992 appellant, then a 59-year-old licensed vocational nurse, was injured in the performance of duty when she tripped and fell over a bed while escorting a patient. The claim was accepted for a contusion of the left middle finger, right shoulder contusion and strain and back and left hip contusions. The Office subsequently expanded the claim to include bilateral hip strain, right shoulder impingement with adhesive capsulitis and disc protrusions at L2-3 and L5-S1. Appellant's treating physician for her orthopedic injuries is Dr. Joseph R. Myers, an orthopedic surgeon.

Appellant also filed a claim for an emotional condition on March 23, 1993 when appellant was preparing to perform a needle prick on a patient and placed her right hand in an equipment box where she was stuck by an uncapped syringe. The needle had been previously used on an intravenous drug user who had hepatitis and appellant feared contraction of the disease. It took over one month for her tests to come back negative, during which time appellant described herself as "crazy with worry" that she had auto-immune deficiency syndrome. The Office accepted the claim for an adjustment disorder with mixed emotional features. Appellant stopped work effective September 14, 1995 and began receiving compensation for total disability on the periodic rolls.

Appellant received treatment for her adjustment disorder with Dr. Lester S. Campbell, a psychologist. A progress report dated January 5, 1996 indicates that appellant experienced ongoing depression, anxiety, severe memory loss and a loss of self-worth. Dr. Campbell stated that appellant was temporarily totally disabled and estimated a date of maximum medical improvement of "January 1997, if ever." In another report dated March 29, 1996, he reiterated appellant's continuing disability for work due to severe stress.

The Office referred appellant to Dr. Ronald J. Lowell, a Board-certified psychiatrist, for a second opinion evaluation, who disagreed that appellant was disabled from work.

On May 14, 1997 the Office issued a notice of proposed termination of compensation, citing the reports of Dr. Lowell and Dr. Nell Riley, a neuropsychologist.

In a decision dated June 18, 1997, the Office terminated appellant's compensation on the grounds that she had no further disability or residuals due to her work-related injuries.

In a decision dated January 20, 1998, an Office hearing representative vacated the Office's June 18, 1997 decision, finding that a conflict existed in the record as to whether appellant was disabled from work due to her psychological condition. The Office hearing representative further noted that contrary to the Office finding, Dr. Lowell had not indicated that appellant had recovered from her depressive disorder so she continued to be entitled to medical benefits.

In order to resolve the conflict in the medical evidence regarding appellant's continuing disability due to her work-related emotional condition, the Office referred appellant for an impartial medical evaluation with Dr. Stephen M. Raffe, a Board-certified psychiatrist. In a June 9, 1998 report, Dr. Raffe indicated that appellant was totally disabled by her perceived pain, but felt that the pain was generated from a nonwork-related psychiatric condition known as conversion disorder.¹ He opined that appellant could not be gainfully employed due to her preoccupation with pain.

In order to resolve the conflict in medical evidence regarding the extent of appellant's continuing disability from an orthopedic standpoint, the Office referred appellant for an impartial medical evaluation with Dr. Eugene A. Baciocco, a Board-certified orthopedic surgeon. In a July 17, 1998 report, Dr. Baciocco discussed the medical record and recorded physical findings. He discussed appellant's history of injury and symptoms. Dr. Baciocco opined that appellant continued to suffer residuals of her work injury but he found that she was capable of working with restrictions of no over-the-shoulder activities on the right, no forceful pulling or pushing, no repetitive bending, stooping or lifting. Dr. Baciocco advised that appellant was not to lift or carry over 20 pounds.

In a February 1, 1999 letter, the employing establishment offered appellant the position of medical clerk in the Extended Care Unit. Appellant rejected the job offer by letters dated February 15, 1999 and May 4, 2000, primarily because she felt she would have to exceed her work restrictions to perform her duties. The job offer stated:

“Major duties and responsibilities include receptionist/secretary duties, telephones, scheduling appointments, receiving patients, initiating admitting process, maintaining an accurate bed census, providing administrative support for

¹ Dr. Raffe explained that conversion disorders place people in a helpless and dependent state such that the individuals receive unconscious and unintentional secondary gain in the form attention and support from others, who would not otherwise provide that attention and support. He opined that appellant's conversion disorder occurred as a result of her marriage separation and that the work injury was only coincidental to the diagnosis.

the clinical staff and relief assistance for other clerks within the unit. A clerk initiates the admitting process, responds to problems and patient requests, assembles medical records and transcribes orders.”

The Office next referred appellant for a second opinion evaluation with Dr. Robert Hepps, a Board-certified psychiatrist. In a report dated November 12, 1999, Dr. Hepps discussed appellant’s medical history and diagnosed that she suffered from depression and anxiety disorder due to her work injury. He opined that appellant was capable of returning to work for four hours per day increasing her hours to eight per day after one month. Dr. Hepps stated that appellant’s work restrictions were primarily physical and did not concern her emotional state.

In report dated January 27, 2000, Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon and Office referral physician, diagnosed: (1) chronic tendinitis, right shoulder; (2) diffuse moderate degenerative arthritis and disc disease of the dorsal and lumbar spine; (3) mild diffuse degenerative arthritis in both knees; (4) possible mild trochanteric bursitis of the left hip; and (5) mild degenerative arthritis of the left hand. Dr. Ferretti opined that appellant continued to have residuals of her work injury due to pain in the back, right shoulder and left hip. He indicated that appellant’s work injuries caused a permanent aggravation of her preexisting arthritic conditions. Dr. Ferretti reviewed a copy of the job offer and concluded that appellant could perform the duties of the job from an orthopedic standpoint.

In an April 25, 2000 report, Dr. Meyers advised that appellant would be unable to perform the duties of the position of medical clerk. He noted that lifting charts, answering the telephone and recording messages involved repetitive use of the upper extremities, which was not within the physical capabilities of appellant. Dr. Meyers was also concerned with appellant having to carry heavy charts and having to walk room to ascertain the bed census.

On January 4, 2001 the Office held a telephone conference to clarify appellant’s exact job duties. The record contains a memorandum of conference dated January 9, 2001, outlining a description of the position which is paraphrased below.

The employing establishment indicated during the telephone conference that appellant could begin working four hours a day increasing to eight hours after one month. She was told that she would not be required to lift a chart weighing over 20 pounds and that her job was basically sedentary. On rare occasions appellant might be required to walk to another clerk station but otherwise she was assigned to one desk. Little to no bending, stooping or kneeling was required and she would be permitted to stand or sit at will. Appellant was not required to assist patients. She was required to assemble charts but not continuously since most of the information was now being stored in a computer. Appellant would be required to do some keyboard work for admissions, usually less than one page. Telephone work was required one to two days but a headset would be provided. If on a rare occasion appellant had to retrieve something above shoulder level, she was told to ask someone for help. No transcribing would be required.

On June 25, 2001 the employing establishment withdrew the transcribing duties and informed appellant that headsets would be made available to her. Appellant was also told that the job would start at four hours per day increasing to eight hours per day.

The record indicates that the Office contacted the employing establishment on September 9, 2001 and verified that the previously offered job was still available with the modifications agreed upon per the January telephone conference.

By letter dated September 26, 2001, the Office notified appellant that the offered position of a medical clerk with modified duties was found to be suitable work. She was advised that she had 30 days to either accept the position or provide an explanation of her reasons for refusing it or else she risked termination of her compensation.

Appellant declined the job offer on October 16, 2001, stating that Dr. Myers had advised her that she was unable to return to work due to extreme pain in the right arm, back and hip. She noted that due to her pain her blood pressure stays elevated and she is required to be on medication that makes her too dizzy to work.²

On November 9, 2001 the Office informed appellant that her reasons for refusing the offered position were deemed unacceptable. She was given an additional 15 days to accept the job or her benefits would be terminated.

In a decision dated November 28, 2001, the Office terminated appellant's compensation.

Appellant requested reconsideration on December 17, 2001. In her letter she stated that she would be submitting an additional medical report from Dr. Meyers outlining why she is disabled from returning to work. That report, however, was never provided.

In a January 2, 2002 decision, the Office denied appellant's request for reconsideration, finding that the evidence on reconsideration was insufficient to warrant a merit review.

The Board finds that the Office improperly terminated appellant's compensation.

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.³ Section 8106(c)(2) of the Federal Employees' Compensation Act⁴ provides that the Office may terminate 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.⁵ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁶

² Appellant provided a September 11, 2001 report from Dr. Meyers stating that she remained totally disabled due to back, right hip and shoulder pain. He noted the same physical findings as in prior reports. Dr. Meyers reiterated that appellant had signs and symptoms of right shoulder impingement and that a magnetic resonance imaging scan should be obtained.

³ *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

⁴ 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

⁵ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁶ *Stephen R. Lubin*, 43 ECAB 564 (1992).

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.⁷ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁸

In this case, the employing establishment offered appellant a job based on the physical restrictions prepared by Drs. Baciocco and Raffe, both impartial medical specialists who examined appellant regarding her orthopedic injuries on June 9 and July 1, 1998 respectively.

These reports, however, are stale with regard to the modified job offer extended to appellant on June 25, 2001. The Board has recognized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work.⁹ The reports from Drs. Baciocco and Raffe predate the job offer on June 25, 2001 by three years. Although Drs. Hepps and Ferretti performed Office referral examinations in 1999 and 2000, respectively, they examined appellant at some 18 months prior to the job offer and their reports do not accurately reflect appellant's work capability as of June 25, 2001.¹⁰

Furthermore, the Board notes that appellant's treating physician found on September 11, 2000, before the job offer, that appellant was totally disabled for work. Dr. Meyers saw appellant on April 25, 2000 and said that she could not perform the stated job duties of the modified position.

The Board finds that the Office erred in finding that the job constituted suitable work. Because there was no suitable job offer, the Board also finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

⁷ 20 C.F.R. § 10.516 (1999).

⁸ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

⁹ *See generally Eileen R. Kates*, 46 ECAB 573 (1995).

¹⁰ Drs. Hepps and Ferretti acknowledged that appellant's work residuals affected her ability to work.

The January 2, 2002 and November 28, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
October 17, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member