

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSTANCE RANALDSON and U.S. POSTAL SERVICE,
POST OFFICE, Columbus, OH

*Docket No. 02-1191; Submitted on the Record;
Issued October 2, 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 refusal to accept suitable work.

On December 1, 1989 appellant, then a 37-year-old distribution clerk, sat down to use a telephone at the employing establishment when the seat of the chair collapsed. She grabbed the telephone stall to keep from falling to the floor. Appellant filed a claim for iliolumbar sprain and a femoral hernia of the left leg. She underwent a femoral herniorrhaphy on December 14, 1989. Appellant returned to limited duty on January 29, 1990. She received continuation of pay and authorization for leave buy back for the period she did not work. Appellant stopped working again on April 27, 1990 and filed a claim for recurrence of disability. The Office accepted appellant's claim for lumbosacral strain, left femoral hernia and left femoral nerve neuropathy and began payment of temporary total disability compensation. The Office subsequently reduced appellant's compensation to reflect her actual earnings of subsequent jobs, particularly her last position as a reservation agent, from which she was discharged on August 30, 1999.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Scott G. Kleiman, a Board-certified orthopedic surgeon, for an examination and second opinion on appellant's ability to work.¹ In a February 14, 2000 report, Dr. Kleiman indicated that appellant complained of pain and weakness in the right arm,² pain in the lower back, radiating down the left leg and pain in the left groin region. He reported that appellant had diminished sensation in the medial and lateral aspects of the right forearm but motor examination and deep tendon reflexes were within normal limits. Dr. Kleiman indicated that appellant was

¹ Prior to Dr. Kleiman's examination, the employing establishment offered appellant a position as a modified clerk. Appellant refused the position. The employing establishment subsequently informed the Office that the position was no longer available but other positions would become available.

² Appellant had filed a claim for a carpal tunnel syndrome of the right arm due to repetitive motion in her job, which had been accepted by the Office as employment related.

tender to palpation in the lower lumbar area with no appreciable muscle spasm noted. He found diminished sensation in the medial and lateral aspects of the left lower leg and diminished sensation over the anterior aspect of the left thigh. Dr. Kleiman diagnosed chronic lumbosacral strain, femoral hernia and femoral neuropathy secondary to femoral nerve encroachment. He commented that there were no objective findings to substantiate the diagnosis but noted that the subjective complaints were compatible with irritation of the femoral nerve with diminished sensation and described pain in the anterior aspect of the left thigh. Dr. Kleiman stated that appellant's subjective complaints outweighed her objective findings. He indicated that the only residual of appellant's lumbar spine condition was described persistent pain with no neurological residual findings noted. Dr. Kleiman reported that he had reviewed the job description of the modified distribution clerk position and concluded that appellant could perform the duties of that position. In an accompanying work restriction evaluation form, he indicated that appellant could work four hours a day. Dr. Kleiman stated that appellant could do intermittent sitting or walking 3 hour a day, intermittent standing or reaching 2 hours a day, reaching above the shoulder for 1 hours a day and could push, pull or lift up to 20 pounds. He reported that appellant could not squat or kneel but could climb two hours a day.

The Office requested clarification from Dr. Kleiman on whether appellant could work four or eight hours a day at the modified distribution clerk position. In an April 26, 2000 response, he stated that it had been his understanding that the modified distribution clerk position required a four-hour workday so he had concluded appellant could work four hours a day. Dr. Kleiman stated that after reviewing the job description, appellant could work a full eight-hour day in the capacity of a modified clerk with the physical activity and restrictions indicated. He stated that the work limitations he had submitted previously would remain the same.

In a May 5, 2000 letter, the employing establishment offered appellant a modified clerk position. The Office indicated that the job duties included answering the telephone, research delivery records for accountable items, help at the lobby window and perform other duties related to claims work. The employing establishment indicated that the physical requirements of the job were standing two hours intermittently, walking three hours intermittently, sitting three hours intermittently, lifting up to 15 pounds, pushing or pulling 20 pounds and one hour a day of overhead reaching. In a May 15, 2000 response, appellant refused the position because of a conflict between Dr. Kleiman and Dr. Paul J. Matrka, a Board-certified orthopedic surgeon, her ability to work and her restrictions.

In a June 1, 2000 letter, the Office stated that it found the position offered to appellant was suitable. The Office indicated that appellant had 30 days to accept the position or present a justifiable reason for refusing the position. The Office stated that if appellant refused to accept the position, any reason she presented for her refusal would be considered prior to a determination of whether her reasons for refusing the job are justified. The Office warned appellant that if she refused the position without a justifiable reason, her compensation would be terminated.

Appellant submitted a June 27, 2000 report from Dr. Matrka, who indicated that appellant had persistent problems with femoral nerve complaints involving her left leg. He noted that appellant's complaints were subjective but had been constant since he first examined her in 1989 and were consistent with her femoral hernia and subsequent surgery with residual femoral nerve

hypesthesia and paresthesia. Dr. Matrka stated that he concurred with Dr. Kleiman's report except that he would restrict appellant to working four hours a day.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Robert A. Nelson, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Drs. Matrka and Kleiman. In a September 8, 2000 report, Dr. Nelson indicated that appellant currently complained of bilateral hand pain and residual pain in the left leg due to scar tissue from the hernia repair. He reported appellant had a positive Tinel's sign at the right elbow with decreased grip strength. Dr. Nelson also noted a positive Tinel's sign in the left arm with decreased grip strength. He stated that appellant's current diagnosis was bilateral carpal tunnel syndrome, status-post carpal tunnel release and femoral hernia status-post repair. Dr. Nelson indicated that appellant had objective positive findings for bilateral carpal tunnel syndrome and slight decreased strength. He stated that the lumbar spine, femoral hernia and femoral neuropathy conditions had resolved with the exception of slight pain due to scar tissue from the hernia repair and mild weakness of the left leg. Dr. Nelson stated that he had reviewed the job description for modified clerk and concluded that appellant could perform the duties of the position full time.

In a November 9, 2000 letter, the Office informed appellant that, as a result of Dr. Nelson's report, it found her reasons for refusing the position of modified clerk to be unacceptable. The Office, therefore, gave appellant 15 days to accept the position. The Office informed appellant that if she did not submit a written response within 15 days or responded by continuing to refuse the offered position, the Office would issue a final decision.³

In a November 27, 2000 decision, the Office terminated appellant's compensation, effective December 3, 2000, for refusal to accept suitable employment.

Appellant requested a hearing before an Office hearing representative, which she subsequently amended to a request for a review of the written record by an Office hearing representative. In a May 21, 2001 decision, the Office hearing representative affirmed the Office's November 27, 2000 decision.

In a July 28, 2001 letter, appellant requested reconsideration. She stated that the bilateral carpal tunnel syndrome prevented her from performing repetitive motions. Appellant indicated that the job offer of her former position would require her to perform repetitive motion. She contended that the Office did not take into consideration her bilateral carpal tunnel syndrome in making the job offer. Appellant submitted a July 17, 2001 report from Dr. Matrka, who indicated that he would have no difficulty in appellant performing the job description that was submitted to Dr. Nelson. He noted that he had seen other job descriptions that would be unrealistic for appellant to perform. Dr. Matrka stated that appellant could not do repetitive motions, such as sorting mail and could not be on her feet for any length of time performing these motions. He reported that appellant continued to have symptoms of carpal tunnel and of

³ In a November 9, 2000 decision, the Office denied appellant's claim for recurrence of disability after August 31, 2000 on the grounds that the medical evidence of record did not establish that she had a recurrence of disability due to the effects of her accepted employment-related conditions. There is no indication in the record that appellant appealed from this decision.

tardy nerve palsy involving her right elbow. Dr. Matrka indicated that appellant had an ongoing problem from a femoral nerve entrapment as a result of the femoral herniorrhaphy which precluded her from standing for any length of time. He suggested that appellant sit for two hours a day and stand for two hours a day. Dr. Matrka stated that it was unrealistic to perform these activities within an eight-hour day.

In a December 14, 2001 merit decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "[A] disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."⁴ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁵

In this case, Dr. Matrka and Dr. Kleiman had conflicting opinions on whether appellant could work four hours a day or eight hours a day at the modified clerk position offered by the employing establishment. The Office, therefore, referred appellant to Dr. Nelson for an impartial medical examination to resolve the conflict in the medical evidence. He diagnosed bilateral carpal tunnel syndrome and noted that appellant had undergone a femoral herniorrhaphy. Dr. Nelson stated that appellant's lumbar condition and femoral neuropathy condition had resolved except for left leg weakness at pain at the site of the surgery. However, he did not provide any findings from his examinations in support of his conclusions that the femoral neuropathy condition had resolved. Dr. Kleiman had noted that appellant had diminished sensation and weakness in the left leg due to the femoral neuropathy. Dr. Matrka indicated that appellant still had pain and weakness in the left leg, which would limit her ability to stand. Dr. Nelson, therefore, did not adequately explain his conclusion that the femoral neuropathy had resolved with slight weakness in the leg. Also, he stated that appellant could perform the duties of the modified clerk position. However, Dr. Nelson did not give any rationale in support of his conclusion, such as a discussion of appellant's work restrictions as compared to the physical requirements of the offered position. In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.⁶ While Dr. Nelson's report was based on a proper factual background, it lacked any rationale in support of his conclusion that appellant could perform the duties of the offered position. The Office, therefore, has not established that the position offered to appellant was suitable.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ 20 C.F.R. § 10.124.

⁶ *James P. Roberts*, 31 ECAB 1010 (1980).

The decisions of the Office of Workers' Compensation Programs dated December 14 and May 21, 2001 are hereby reversed.

Dated, Washington, DC
October 2, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member