U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. JONES and DEPARTMENT OF THE ARMY, Fort Campbell, KY

Docket No. 01-981; Submitted on the Record;
Issued September 23, 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 February 27, 2000, on the grounds that she refused an offer of suitable work.

On October 6, 1987 appellant, a 37-year-old warehouse worker, injured her lower back while lifting a case of cereal. She filed a claim for benefits on October 7, 1987 which the Office accepted for low back strain and herniated nucleus pulposus at L5-S1. The Office paid appellant compensation for temporary total disability and placed her on the periodic rolls.

Appellant underwent a functional capacity assessment on July 25 to 26, 1989, during which it was determined that she had limits on lifting more than 10 pounds, level lifting more than 17 pounds, pulling more than 51 and ½ pounds, pushing 43 and ½ pounds and carry more than 16 pounds.

In a work restriction evaluation dated January 26, 1999, Dr. J. Kenneth Burkus, a Board-certified orthopedic surgeon, stated that, according to the functional capacity evaluation appellant underwent in July 1989, she was able to return to work.

By letter dated April 26, 1999, the employing establishment offered appellant a job as a part-time sales store checker, for 20 hours per week, at the Fort Benning, Georgia Commissary. The job entailed operating an electronic check out terminal, along with other associated duties. The job description indicated that the job would not require her to lift more than 10 pounds, level lift more than 17 pounds, pull more than 51 and ½ pounds, push 43 and ½ pounds, or carry more than 16 pounds, in accordance with her functional capacity as determined in July 1989.

By letter dated May 12, 1999, the employing establishment offered appellant a full-time modified job as a sales store checker, for 40 hours per week, at the Fort Campbell, Kentucky Commissary. The position entailed operating an electronic check out terminal and involved the same job requirements contained in the April 26, 1999 job offer.

By letter dated May 19, 1999, appellant rejected the proposed job offer, contending that she was physically unable to perform the selected position.

In a report dated May 25, 1999, Dr. Burkus reiterated that appellant could return to work within the restrictions outlined in her functional capacity evaluation.

By letter dated July 19, 1999, the Office advised appellant that the full-time sales checker position was suitable and, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable explanation for refusing the offer.

By letter to the Office dated July 26, 1999, appellant stated that she was physically unable to perform the duties required by the sales checker job due to her work-related back condition. She specifically asserted that she was physically incapable of performing any job duties because of pain experienced during prolonged periods of sitting, standing and walking.

By letter dated August 24, 1999, the Office advised that she had 15 days in which to accept the position, or it would terminate her compensation.

In a work capacity evaluation and report dated November 15, 1999, Dr. Burkus indicated that appellant could return to a 40-hour-per-week job, with restrictions of lifting no more than 10 pounds, level lifting 17 pounds, pulling 51 pounds, pushing 43 and ½ pounds and carrying up to 16 pounds. He reiterated these findings in a work restriction report dated December 3, 1999.

In a report dated November 19, 1999, Dr. Melissa J. Tebrock, a Board-certified family practitioner, advised that appellant had suffered from chronic low back pain ever since her October 1987 employment injury. She stated:

> "[Appellant's] pain is chronic, severe and affects her ability to ambulate and perform activities of daily living.… [S]he is limited to the point that her family and friends must help her drive, shop and take care of her home. She often cannot even ambulate without assistance from a cane or walker. The medications that she takes currently are very sedating. Based on the above, I feel [appellant] cannot work at this time until her pain is better controlled and the patient demonstrates ability to care for herself and is not taking sedating medications."

By decision dated February 2, 2000, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated February 24 2000, appellant's representative requested an oral hearing, which was held on November 15, 2000.

Appellant submitted a November 3, 2000 from Dr. John B. Bieltz, an osteopath. He indicated that appellant had injured her neck when a box of Clorox fell and hit her in the head. Dr. Bieltz diagnosed status post anterior cervical fusion, cervical disc degeneration herniated nucleus pulposus at C5-6, cervical radiculopathy, status post microdiscectomy lumbar spine,

degenerative joint disease lumbar spine, mild radiculopathy lumbar spine and chronic pain syndrome. He stated:

> "[Appellant] has not worked since 1987 and, certainly with her neck and back problems, is certainly not employable at this time. She is probably going to require further surgical intervention on her neck at some time in the future. I do not think she will require any surgery on her back. At this time the patient has reached her maximum medical improvement from her two surgeries."

In a letter dated December 18, 2000, appellant reiterated that neither of the two modified jobs offered by the employing establishment was suitable because they exceeded her physical limitations.

By decision dated January 25, 2001, an Office hearing representative affirmed the February 2, 2000 decision.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[1] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2] Section 10.124(c) 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 the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[3] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.[5] A review of the medical evidence in the present case

---

[1] 5 U.S.C. § 8101 *et seq.*

[2] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[3] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[5] *Robert Dickinson*, 46 ECAB 1002 (1995).

indicates that there is insufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. In that regard, a conflict exists in the medical evidence in this case between Dr. Burkus, the Office referral physician, and Dr. Trebrock, appellant's attending physician, regarding whether appellant is capable of performing the modified job. Dr. Burkus stated in his January 26, 1999 work restriction evaluation and May 25, 1999 report that appellant was able to return to work based on the results of her July 1989 functional capacity evaluation. He indicated in a work capacity evaluation and report dated November 15, 1999 that appellant could return to a 40-hour-per-week job, with restrictions of lifting no more than 10 pounds, level lifting 17 pounds, pulling 51 pounds, pushing 43 and ½ pounds and carrying up to 16 pounds, and reiterated these findings in a December 3, 1999 work restriction report. Based on Dr. Burkus' reports, the employing establishment offered appellant a full-time modified job as a sales store checker, for 40 hours per week, at the Fort Campbell, Kentucky Commissary. The Office found that this job offer was suitable, and gave appellant 30 days to accept the position.

Appellant refused to accept the modified job, however, and submitted the opinion of Dr. Trebrock, who stated that appellant had severe, chronic back pain which affected her ability to ambulate and perform activities of daily living. She advised that appellant was so limited in functional ability that she required assistance from her family and friends in driving, shopping and housekeeping, and noted that she was often unable to walk without the aid of a cane or walker. Dr. Trebrock further noted that appellant was required to take medication which had a sedative affect. She concluded that appellant would not be able to work until her pain was better controlled, until she showed an ability to care for herself and until she was no longer taking sedating medications. Therefore, Dr. Trebrock's opinion created a conflict in the medical evidence with that of Dr. Burkus. It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[6] The Board, therefore, reverses the Office's January 25, 2001 decision, affirming the Office's February 2, 2000 termination decision.[7]

[6] *Barbara R. Bryant*, 47 ECAB 715 (1996).

[7] Following the Office's February 2, 2000 termination decision, appellant submitted Dr. Bieltz's November 3, 2000 report. Dr. Bieltz stated that appellant also had a neck condition and diagnosed status post anterior cervical fusion, cervical disc degeneration herniated nucleus pulposus at C5-6, cervical radiculopathy, status post microdiscectomy lumbar spine, degenerative joint disease lumbar spine, mild radiculopathy lumbar spine and chronic pain syndrome. He advised that appellant was definitely not employable due to her neck and back problems and was probably going to require further surgical intervention on her neck at some future time. Dr. Bieltz's report constituted probative medical evidence that appellant had greater physical restrictions than those upon which the sales checker job was based. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer. *See* 20 C.F.R. § 10.124(c). Thus, Dr. Bieltz's report provided an additional basis for finding that the offered position was unsuitable.

The January 25, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
September 23, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member