U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board`

In the Matter of SONYA G. BUSTAMANTE and U.S. POSTAL SERVICE, POST OFFICE, Vallejo, CA

Docket No. 02-1055; Submitted on the Record;
Issued April 16, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2), on the grounds that she refused an offer of suitable work; and if so (2) whether the Office abused its discretion in denying her request for reconsideration of her claim under 5 U.S.C. § 8128.

On October 6, 1983 appellant, then a 45-year-old clerk, was lifting sacks and hurt her neck and shoulder while in the performance of her federal duties. The Office accepted her claim for a cervical strain, aggravation of cervical degenerative disease and herniated disc and paid appropriate benefits. Appellant underwent a cervical laminectomy and fusion at the C5-6 level in January 1991. On May 11, 1993 she underwent a cervical laminectomy and decompression at the C4-7 1evel.

The Office referred appellant to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 3, 1999, he noted appellant's history of injury and treatment and concluded that she could work as a distribution clerk for four hours a day. Dr. Ferretti noted that the position requirements were essentially sedentary requiring sitting at a desk performing primarily paper work tasks.

By letter dated July 22, 1999, the Office requested additional information from appellant's physician regarding the second opinion.

In a report dated July 26, 1999, appellant's attending physician, Dr. A. Giovannini, a Board-certified orthopedic surgeon, explained that appellant had consistently demonstrated clinically evident spasm, shoulder girdle atrophy and restricted cervical spine motion. He noted that Dr. Ferretti's findings on his examination, differed markedly from those found on repeated examinations at his office. Dr. Giovannini opined that Dr. Ferretti's report was conclusory, internally inconsistent and not consistent with appellant's testimony. He stated that he did not agree that appellant could work four hours a day.

On August 5, 1999 appellant was offered a job as a modified distribution clerk, by the employing establishment.

On August 5, 1999 a copy of the job offer was sent to appellant's physician, Dr. Giovannini for review and comments.

By response dated August 9, 1999, Dr. Giovannini advised that the proposed job was not in compliance with appellant's restrictions due to frequent recurrences of severe neck and back spasm that confined her to her home for at least two or three days out of the week.

On August 13, 1999 appellant rejected the job offer, based on her physician's advice.

By letter dated November 10, 1999, the Office referred appellant for an impartial evaluation with Dr. James Schneider, a Board-certified orthopedic surgeon.

In a November 30, 1999 report, Dr. Schneider found that appellant was not totally disabled. He wrote that she was capable of carrying out modified work requirements. Dr. Schneider also noted that he reviewed a new job description of modified distribution clerk and that appellant was capable of this work activity. He completed a work restriction form stating that she could work four hours a day with restrictions.

By letter dated December 14, 1999, the Office advised appellant that the offered position was suitable to her work capabilities and advised her of her obligation to refuse or accept the offer within 30 days. Appellant did not respond.

In a December 21, 1999 report, addressed to the Office, Dr. Giovannini advised the Office that appellant was going through a spontaneous increase in back pain and spasm of the exact type incurred after the specific traumatic incident of October 6, 1983, without intervening cause other than the recent cold and rain. He indicated that the cold and moist weather as well as the increasing level of depression most likely explained the increased level of pain and spasm over lumbar spine paravertebral musculature. Dr. Giovannini advised that appellant was scheduled to begin working again part time in the near future in the capacity of "[m]odified [d]istribution [c]lerk." He noted that she was actually looking forward to trying and seemed ready to apply maximum effort to the task. Dr. Giovannini opined that in his opinion, which was not voiced to appellant, she would not be successful in staying at her work. He explained that she had tried in the past, with equally good intentions and was not successful.

The Office also received an Ergos evaluation summary report or functional capacities evaluation of appellant on December 20, 1999.

By decision dated January 14, 2000, the Office terminated appellant's benefits for the reason that she refused an offer of suitable employment.

By letter dated January 19, 2000, appellant wrote that she did not receive a job description, where or when to report to work or anything to take to the medical unit to be released for work.

By letter dated February 19, 2000, appellant wrote that when she received the letter from the Office dated December 14, 1999, it was not clear as to whether the position offered was the same one that was offered on August 5, 1999. Therefore, she was under the impression that she would be receiving another job offer from the employing establishment. Appellant also indicated that her doctor informed the Office in his December 21, 1999 report, that she was accepting the modified position.

On May 31, 2000 appellant, through her representative, disagreed with the January 14, 2000 decision and requested a hearing, which was held on June 21, 2000.

By letter dated June 27, 2000, appellant's representative noted that the medical reports from Dr. Giovannini continued to find that appellant was totally disabled. He enclosed additional evidence.

By decision dated October 30, 2000, an Office hearing representative affirmed the termination of appellant's compensation benefits.

By letter dated May 31, 2001, appellant requested reconsideration.

By decision dated June 6, 2001, the Office denied reconsideration of appellant's claim on the grounds that the evidence submitted was immaterial to the issues.

By letter dated September 12, 2001, appellant again requested reconsideration.

In a merit decision dated September 14, 2001, the Office denied modification of its decision to terminate benefits.

On October 10, 2001 appellant again requested reconsideration and enclosed additional information with her request.

By decision dated January 7, 2002, the Office denied reconsideration.

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[1] the Office may terminate 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[3] and shall be provided with the opportunity to make such a showing

[1] 5 U.S.C. § 8123(a).

[2] 5 U.S.C. §§ 8101-8193.

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

before a determination is made with respect to termination of entitlement to compensation.[4] 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.[5]

In this case, Dr. Giovannini, appellant's treating physician, stated that she could not return to modified-duty work while Dr. Ferretti, the second opinion physician, found that she could work as a modified distribution clerk for four hours a day. The record reflects that the Office properly found a conflict of medical opinion and referred appellant to Dr. Schneider for an impartial evaluation to resolve the conflict.

Dr. Schneider, a Board-certified orthopedic surgeon and the impartial medical specialist, found that appellant could carry out the job requirements for the modified distribution clerk position for four hours a day with physical restrictions. The Office properly found that the limited-duty position offered by the employing establishment conformed to these restrictions. The Board finds that the weight of the medical evidence is represented by the report of Dr. Schneider and supports that the offered modified distribution clerk position was within appellant's physical limitations. The weight of the medical evidence, as represented by Dr. Schneider's referee medical opinion, establishes that the position offered was within appellant's physical limitations.

The Board has held that when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.[6] The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[7] The weight of the medical evidence in this case establishes that appellant was capable of performing the position offered to her on August 5, 1999.[8] The Board finds that Dr. Schneider's referee opinion was sufficiently probative, rationalized and based upon a proper factual background and that it, therefore, supports the Office's decision terminating appellant's compensation.

Further the record reflects that appellant did not respond to the Office's December 14, 1999 notice within 30 days. The record reflects that appellant sent the Office a letter dated January 19, 2000 indicating she did not receive a job description or any information regarding where or when to report to work. She subsequently sent a second letter to the Office, dated February 19, 2000, indicating that it was unclear if the position offered was the same as that offered in August and she thought she would be receiving a subsequent job offer. However, appellant did not respond with relevant evidence in the 30 days she was allotted from

[4] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[6] *James P. Robert*, 31 ECAB 1010 (1980).

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

[8] The position was again offered to appellant on December 14, 1999.

December 14, 1999. She alleges that her physician, Dr. Giovanni, responded on her behalf. However, the Office requested that appellant respond within 30 days and no response was received from her with reasons pertaining to why she was refusing the job offer. The Board finds that the weight of the medical evidence, as represented by Dr. Schneider's November 30, 1999 report, established that the position offered was consistent with appellant's physical limitations. Further, she did not provide any reasons during the 30-day time frame to support her refusal to return to work. At the time of Dr. Giovannini's December 21, 1999 report, he indicated that appellant was looking forward to begining work part time and although he was of the opinion that she would not be successful, he did not indicate that she could not perform the position. Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation.

The Board also finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review of her claim under 5 U.S.C. § 8128.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[10] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[11]

In this case, appellant has not raised any new arguments that the Office erroneously applied or interpreted a point of law, nor has appellant submitted any new and relevant evidence not previously submitted. With her May 31, 2001 request for reconsideration, appellant submitted a letter indicating her request was based on evidence available to the Office prior to the hearing that was not submitted for consideration nor utilized during her hearing. This evidence had previously been submitted and considered by the Office when it issued its June 6, 2001 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[12]

With her October 10, 2001 request for reconsideration, appellant enclosed a brief from her representative. She contended that the December 21, 1999 report from Dr. Giovannini was clear that she was returning to work. Additionally, appellant alleged that it was excluded from

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.607(a).

[11] 20 C.F.R. § 10.608(b).

[12] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 25 ECAB 309 (1983).

the record. However, these arguments and Dr. Giovannini's report were previously considered.[13] Appellant also alleged that she continued to be in pain. Finally, she alleged that a conflict existed. The record reflects that an impartial medical specialist was selected and appellant was advised to return to work based on his medical opinion. These arguments are not new or relevant and again were previously considered.[14]

In its January 7, 2002 and June 6, 2001 decisions, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's requests for reconsideration.

The January 7, 2002, September 14 and June 6, 2001 decisions of the Office of Workers Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 16, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[13] *Id.*

[14] *Id.*