U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMMY L. FLICKINGER and U.S. POSTAL SERVICE,
CHIMNEY HILLS POST OFFICE, Tulsa, OK

Docket No. 03-22; Submitted on the Record;
Issued April 9, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation benefits effective September 7, 2002 under section 8106(c) of the Federal Employees' Compensation Act, on the grounds that she refused an offer of suitable work.

The Office accepted that on or before January 25, 2000 appellant, then a 31-year-old letter carrier, sustained right wrist tendinitis and bilateral carpal tunnel syndrome.[1] The Office authorized a right carpal tunnel release on December 6, 2001 and a left carpal tunnel release on March 21, 2002.[2]

Appellant resigned from the employing establishment on June 15, 2001 due to her bilateral carpal tunnel syndrome. As of June 15, 2001, she was a full-time letter carrier at Level 5, with full benefits, including health insurance.[3]

[1] March 6, 2001 electromyography (EMG) studies showed a "profound right carpal tunnel syndrome and a mild left carpal tunnel syndrome."

[2] Appellant filed Claim No. 160352320 for bilateral carpal tunnel syndrome occurring on or before January 15, 2000. The Office approved this claim for bilateral carpal tunnel syndrome right wrist tendinitis and authorized bilateral carpal tunnel release. Appellant then filed an April 13, 2000 claim under No. 162014285 for left carpal tunnel syndrome due to repetitive motion in casing mail. This claim was initially denied. Appellant's two claims were doubled under Claim No. 160352320 as of December 20, 2001.

[3] In a May 14, 2002 statement of earnings and employment (Form EN1032), appellant stated that she worked for four hours on August 1, 2, 3 and 7, 2001 answering the telephones as an office temporary for $8.00 an hour. Other than this temporary position and her postal employment form which she resigned on June 15, 2001, there is no indication of record of appellant having another job.

On October 2, 2001 appellant filed a claim for lost wages for the period June 15, 2001 onward, during which she took leave without pay.[4] She received compensation from December 6, 2001 to January 9, 2002 on the daily rolls. Her case was placed on the periodic rolls beginning on January 10, 2002.

In a February 25, 2002 report, Dr. James F. Bischoff, an attending Board-certified orthopedic surgeon, stated that appellant had "severe carpal tunnel syndrome," bilateral forearm tendinitis and was recovering from right carpal tunnel release. Dr. Bischoff opined that appellant had reached maximum medical improvement. He referred to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and found a 10 percent permanent disability of the right hand and a 5 percent permanent impairment of the left hand resulting from the accepted bilateral carpal tunnel syndrome. Dr. Bischoff noted that these impairments would necessitate permanent restrictions against lifting more than five pounds with the right hand, "and avoiding overly repetitive use" of either hand.

Dr. Bischoff performed a left carpal tunnel release on March 21, 2002. He submitted periodic progress notes.

On April 23, 2002 the employing establishment offered appellant a limited-duty position as a part-time flexible distribution clerk for eight hours per day, with a schedule from 1:30 p.m. to 10:00 p.m., days off Wednesday and Thursday. The grade and step was noted as "PTF PS-5, Step L." The position was to begin on May 4, 2002, with a response deadline of April 29, 2002. The duties involved counting mail trays and logging the numbers on paper, answering the telephones, "limited computer use," speaking to a supervisor and "nixies/rewrap." The physical requirements of the position were listed as "intermittent sitting, walking and standing," "[o]ccasional intermittent handwriting," occasional lifting up to five pounds and frequent lifting of one pound or less. The employing establishment stated that "[u]se of left hand is not required," and "[r]epetitive use of right hand is not required. [Appellant] may work at [her] own pace." The employing establishment stated that the offered position was within the restrictions provided by Dr. Bischoff on February 25 and April 4, 2002, including no use of the left hand, limited handwriting, no lifting over five pounds and avoidance of repetitive motion with either hand.

In an April 25, 2002 letter to the Office received on May 2, 2002, appellant stated that she was refusing the April 23, 2002 job offer, which she received that day. She noted that she presented the offer to Dr. Bischoff and Ms. Rout, the rehabilitation nurse assigned to her case.[5]

[4] On the reverse of the form, the employing establishment controverted appellant's claim as it was "not filed until after resignation. [Appellant] was performing full duty when she resigned." In a February 25, 2002 letter, the Office advised appellant that she must submit medical evidence establishing her claimed disability for work from June 15 to December 5, 2001.

[5] In an April 30, 2002 report, Ms. Rout confirmed that on April 25, 2002 Dr. Bischoff reviewed the April 23, 2002 job offer and that he "did not have a problem with the job offer … and said that it looked alright to him. [Appellant] said that she did not have to accept the job offer from the employing establishment and only had to accept it from the claims examiner. [Ms. Rout] recommended that [appellant] keep the lines of communication open with the employing establishment and the claims examiner and contact them both." In a May 23, 2002 electronic mail message, Ms. Rout informed the Office that "[a]t the physician appointment today, [appellant] said that she was not going to sign the offer until she heard back from you about benefits. She said that the current job offer does n[o]t provide her with benefits. She said that, if there are no benefits offered to her, she would not sign it." Ms. Rout reiterated these remarks in a May 30, 2002 report.

Appellant explained that from June 15 to December 5, 2001, she exhausted her retirement savings to provide for her three children as a single parent with no child support. She noted that she lost her health insurance as the employing establishment would not assist her in maintaining her job benefits. Appellant asserted that the offered position as a part-time flexible at Level 5 carried no benefits, whereas her date-of injury position as a full-time Level 6 carried full benefits. She asked that she be reinstated as full-time Level 6 with full benefits. Appellant also stated that she could not accept the position as the hours were 1:30 p.m. to 10:00 p.m. and required working weekends, as she had no resources for child care and her youngest child was only 10 years old. She also declined the offer for medical reasons. Appellant explained that, although she was left-handed and the offered position allegedly required no use of the left hand, the job required writing and thus the use of her left hand. She also asserted that she had post-operative bursitis in the third finger of her left hand, requiring cortisone injections for pain. Appellant requested that the Office advise her as to whether she would receive wage-loss compensation from June 15 to December 5, 2001, a full-time position with career benefits and a work schedule so that she would not have to obtain evening and weekend daycare.

In an April 25, 2002 report, Dr. Bischoff stated that appellant would be returning to work, trying to avoid using her left hand. He provided work restrictions allowing repetitive motion of the wrists and elbows for up to 1 hour with 10- to 15-minute breaks as needed, "no stamping with left hand," and "may write up to one hour at a time." Dr. Bischoff renewed these restrictions in a May 23, 2002 report.

In a May 3, 2002 letter, the Office advised appellant that the part-time flexible distribution clerk position was found to be suitable work within her medical restrictions and remained currently available. The Office also advised appellant that under section 8106(c) of the Act (5 U.S.C. § 8106(c)), "a partially disabled employee who refuses to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation." Appellant was afforded 30 days in which to either accept the offer or provide "an explanation of the reasons for refusing it." The Office stated that, if appellant failed "to accepted the position any explanation or evidence which [she would] provide will be considered prior to determining whether or not [her] reasons for refusing the job are justified."

In a May 30, 2002 letter, the Office noted that a decision would be issued in her case on approximately June 3, 2002 "in reference to [her] claim for compensation for [the] period June 19 to August 2001 and also job suitability letter issued … on May 3, 2002." This letter did not mention appellant's April 25, 2002 letter or note any of her reasons for refusing the offered position.[6]

In a June 20, 2002 report, Dr. Bischoff stated that appellant's left hand had reached maximum medical improvement, with "good motion of the fingers and wrist." He opined that appellant had a "10 percent permanent impairment of the left hand as a result [of] the work-related injury." Dr. Bischoff noted permanent restrictions of "no lifting more than five pounds with the left hand," and released appellant from care.

By decision dated August 22, 2002, the Office terminated appellant's wage-loss compensation benefits effective September 7, 2002 on the grounds that she refused an offer of

[6] Nurse rehabilitation efforts were closed as of June 11, 2002, as appellant had reached maximum medical improvement and was released to return to light duty with permanent restrictions.

suitable work by failing to respond. The Office found that Dr. Bischoff's reports demonstrated that appellant was able to return to light-duty work. The Office further found that appellant was not entitled to further wage-loss compensation or a schedule award as she failed to respond to the offer of suitable work. The Office noted that appellant remained entitled to medical benefits for care related to the accepted bilateral carpal tunnel syndrome and right wrist tendinitis.

The Board finds that the Office improperly terminated appellant's wage-loss compensation benefits effective September 7, 2002 on the grounds that she refused an offer of suitable work.

Section 8106(c)(2) of the Act[7] provides in pertinent part, "A partially disabled employee who … refuses or neglects to work after suitable work is offered … is not entitled to compensation."[8] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[9]

In the present case, the record reflects that on April 23, 2002, the employing establishment offered appellant reemployment as a part-time flexible clerk, eight hours per day. Dr. Bischoff, appellant's attending Board-certified orthopedic surgeon, approved the offered position. Accordingly, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[10]

Given that the Office has shown that the limited-duty position offered to appellant was suitable based on her work restrictions at that time, the burden then shifted to appellant to show that her refusal to work in that position was justified.[11] The Office must first inform the claimant of the consequences of refusal to accept suitable work and allow the claimant an opportunity to provide reasons for refusing the offered position. If the claimant presents reasons for refusing the offered position, the Office must inform the claimant if it finds the reasons inadequate to justify the refusal of the offered position and afford the claimant a final opportunity to accept the position. If the Office fails to inform appellant of whether or not the reasons offered were sufficient to justify refusal of the suitable work position, the Office has failed to meet the procedural requirements of section 8106(c)(2).[12]

In this case, the Office advised appellant in a May 3, 2002 letter that the offered position was suitable work and afforded appellant the opportunity to either accept the position, or provide her reasons for declining the offer. The Office thus met this element of the procedural

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8106(c)(2).

[9] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

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

[11] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

[12] *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

requirement. However, the Office committed procedural error by failing to review appellant's reasons for refusing the offered position.

After appellant received the April 23, 2002 job offer from the employing establishment on April 25, 2002, she immediately responded to the Office by April 25, 2002 letter, setting forth her reasons for refusing the offered position. There is no doubt that the Office received this letter, as the record indicates that the Office received this letter on May 2, 2002. The Office's May 3, 2002 letter stated that any reason appellant offered for refusing the position would be considered. However, the May 3, 2002 letter did not mention appellant's April 25, 2002 letter or advise appellant if her refusal was justified. Similarly, in a May 30, 2002 letter to appellant advising her that a decision would be issued in her case on approximately June 3, 2002, the Office made no mention of appellant's April 25, 2002 letter or her reasons for refusing the offered position.

Moreover, the Office found in its August 22, 2002 decision that appellant had failed to respond to the light-duty job offer and thus terminated her wage-loss compensation effective September 7, 2002. Not only did the Office fail to carry out the procedural requirements of informing appellant if the reasons she offered for refusing the position were adequate, the Office did not even recognize that appellant had responded to the job offer. The Board notes that there is no requirement that an employee wait until after the Office's notice to respond to a light-duty job offer provided it is the same job offer and it is clear that the Office received the response contemporaneously. Therefore, the Board finds that the Office's termination of appellant's wage-loss compensation benefits was in error and must be reversed.

The decision of the Office of Workers' Compensation Programs dated August 22, 2002 is hereby reversed.

Dated, Washington, DC
April 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member