

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN F. BURKE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Brockton, MA

*Docket No. 01-39; Submitted on the Record;
Issued February 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

On July 28, 1986 appellant, then a 40-year-old nursing assistant, sustained employment-related costochondritis and a chest wall strain while assisting a patient. She stopped work that day and was placed on the periodic rolls. In 1992 appellant moved to Georgia and was terminated by the employing establishment in 1993.

On September 16, 1994 appellant was referred together along with the medical record, a statement of accepted facts and a set of questions, to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 17, 1994, Dr. Doman advised that appellant could work eight hours per day with lifting restrictions. Appellant was referred for vocational rehabilitation on December 14, 1994.

Appellant submitted a June 22, 1995 report from Dr. Leslie Kelman, Board-certified in psychiatry and neurology, who found no evidence of neurological dysfunction and advised that appellant could perform light-duty work with no lifting, pushing or pulling of more than 20 pounds and no lifting the left upper extremity beyond the horizontal. In a September 22, 1995 report, Dr. Charles R. Harper, II, who is Board-certified in preventive medicine, advised that appellant had fallen that summer and struck her head and that cervical spine x-rays demonstrated mild degenerative joint disease at C4-5. In a report dated October 6, 1995, Dr. Bennett J. Bruckner, a Board-certified internist, diagnosed irritable bowel syndrome. Dr. Arthur D. Schiff, who is Board-certified in psychiatry and neurology, provided an October 24, 1995 report in which he stated that a magnetic resonance imaging (MRI) scan of the lumbar spine did not reveal any significant disc herniation or nerve compression. Left upper extremity electrophysiologic studies revealed no evidence of neuropathy, plexopathy, radiculopathy or thoracic outlet syndrome. He recommended physical therapy, no lifting over 50 pounds and no frequent neck hyperflexion or hyperextension.

On February 16, 1996 the employing establishment offered appellant a limited-duty position for eight hours per day as a telephone operator,¹ which she refused on February 26, 1996. Appellant stated that she had moved to Georgia and was unwilling to accept a job in Massachusetts and doubted her capacity at performing the offered position. In a March 13, 1996 letter, the Office advised appellant that the position offered was suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond. By decision dated April 17, 1996, the Office terminated appellant's wage-loss compensation, effective April 28, 1996, on the grounds that she refused an offer of suitable work.

On June 4, 1996 appellant, through counsel, requested reconsideration. In an August 14, 1996 decision, the Office denied modification of its prior decision. On January 6, 1997 appellant again requested reconsideration and submitted evidence previously of record. By decision dated April 8, 1997, the Office vacated the April 17, 1996 decision, finding the job offer void because appellant had not received notification regarding reimbursement of relocation expenses. She was returned to the periodic rolls.²

By letter dated May 8, 1997, the Office informed appellant that the telephone operator position was still available. She was advised that the employing establishment would pay relocation expenses. Appellant was again notified of the penalty provisions of section 8106, and given 30 days to respond. In a June 6, 1997 letter, appellant's attorney disagreed with the suitability of the offered position, stating the cost of relocation would be financially prohibitive and that appellant's hypersensitivity to cold prevented her from returning to Massachusetts. By letter dated July 15, 1997, the Office advised appellant that her reasons for refusing the offered position were not acceptable and she was given an additional 15 days to respond. By decision dated September 15, 1997, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

On July 13, 1998 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

By decision dated August 27, 1998, the Office denied modification of its prior decision. On March 8, 1999 appellant's attorney again requested reconsideration and alleged that the employment injury caused an emotional condition. In an April 8, 1999 decision, the Office denied modification of its prior decision. On April 6, 2000 appellant's attorney again requested reconsideration. In a May 1, 2000 decision, the Office denied modification of its prior decision.

¹ The job description indicated that the position was "mostly sedentary" with no overhead lifting or reaching with her left arm. She was to provide switchboard operations, maintain rosters and a telephone directory and provide administrative support during periods of reduced telephone traffic.

² The Board notes that, contrary to the Office finding that appellant was terminated by the employing establishment before her relocation, the record establishes that she relocated to Georgia prior to being terminated by the employing establishment. The implementing regulation in effect at the time the Office issued its April 8, 1997 decision vacating the April 17, 1996 decision in which the Office found that appellant refused an offer of suitable work, provided that reasonable relocation expenses may be paid by the Office. 20 C.F.R. § 10.123(f) (1996). There is nothing in the regulations requiring payment for relocation expenses if an employee relocates while on the rolls of the employing establishment. *Paul Kovash*, 49 ECAB 350 (1998).

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

Section 8106(c)(2) of the Federal Employees' Compensation Act³ provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁴ 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.⁵ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁶

The implementing regulation⁷ 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.⁸ 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.⁹

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 medical evidence.¹⁰ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹¹

The record reflects that, in its decision dated September 15, 1997 terminating appellant's wage-loss compensation, the Office relied upon a report dated October 17, 1994 in which

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

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

⁷ 20 C.F.R. § 10.124(c). The Board notes that this regulation was changed in 1999, but the language is essentially the same. 20 C.F.R. § 10.517(a) (1999).

⁸ See *John E. Lemker*, 45 ECAB 258 (1993).

⁹ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

¹¹ See *Connie Johns*, 44 ECAB 560 (1993).

Dr. Alexander Doman, a Board-certified orthopedic surgeon who performed a second opinion evaluation for the Office, advised that appellant could work eight hours per day with restrictions. The Board finds that, while appellant submitted a number of medical reports relevant to the termination of compensation benefits, none of the physicians advised that she could not work at the offered sedentary position of telephone operator.¹² Dr. Kelman found no evidence of neurological dysfunction and advised that appellant could perform light-duty work. Similarly, Dr. Schiff found no evidence of neuropathy or thoracic outlet syndrome and provided restrictions to appellant's physical activity that were within those of the offered position. Drs. Harper and Bruckner provided no opinion regarding appellant's ability to work. The medical record, therefore, does not establish that appellant was unable to perform the offered position.

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.¹³ The record in this case indicates that the Office properly followed the procedural requirements. By letter dated April 21, 1997, the Office advised appellant that a partially disabled employee who refuses suitable work is not entitled to compensation, that the offered position had been found suitable, and allotted her 30 days to either accept or provide reasons for refusing the position. Appellant, through counsel, responded that the cost of relocation would be financially prohibitive and that her hypersensitivity to cold prevented her from returning to Massachusetts. By letter dated July 15, 1997, the Office advised appellant that the reasons given for not accepting the offered position were unacceptable. She was provided an additional 15 days in which to accept the position. Appellant did not respond. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under 5 U.S.C. § 8106 her compensation was properly terminated on September 15, 1997.

Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.¹⁴ The medical evidence submitted subsequent to the September 15, 1997 decision includes a report dated August 20, 1997 that was faxed to the Office on December 4, 1997, in which Dr. Arun Lakhaupal, who is Board-certified in psychiatry and neurology, diagnosed chronic post-traumatic pain, mostly myofascial type of left cervical brachial pain, without evidence of major neurologic compromise and osteoarthritis-related discomfort. He recommended physical therapy.

In a psychological evaluation dated October 18, 1997, Steve Sanders, Ph.D., a clinical psychologist, diagnosed chronic neck and shoulder pain with probable myofascial component, pain disorder and major depression. Dr. Lakhaupal provided treatment notes dated February 11 and September 11, 1998 in which he reiterated his diagnoses. In reports dated November 30 and December 18, 1998, Dr. Sanders advised that appellant's pain disorder and depression were due

¹² *Supra* note 1.

¹³ *See Maggie L. Moore, supra* note 9.

¹⁴ *Deborah Hancock*, 49 ECAB 606 (1998).

to the work injury. He concluded that her psychological diagnosis would not preclude her from performing the offered position but that a relocation move would be detrimental to her mental health. Dr. Maurice Jove, a Board-certified orthopedic surgeon, provided treatment notes dated February 23 and April 27, 1999 in which he advised that appellant had “chronic problems related to her shoulders” and recommended MRI scan testing.

The Board finds that the medical evidence submitted by appellant does not sufficiently explain why she could not perform the duties of the offered telephone operator position. The Board notes that appellant’s counsel cites to a medical report by “Dr. Stein.” The record before the Board, however, does not contain any reports from the said physician. Dr. Sanders advised that appellant could perform the position from a psychological standpoint and only the move would be detrimental to her mental health. Dr. Sanders did not provide a full discussion to explain his conclusion pertaining to the relocation issue. Drs. Lakhaupal and Jove noted appellant’s pain complaints but provided no opinion regarding her ability to work. The medical evidence submitted by appellant does not sufficiently explain why she could not perform the duties offered by the employing establishment and, thus, the termination of compensation effective September 15, 1997 was justified.¹⁵

¹⁵ On October 27, 1999 appellant filed both a recurrence claim and a Form CA-7, claim for compensation, for the period November 1998 and continuing. The Board notes that, because appellant refused suitable employment, section 8106 serves as a bar to her receipt of further compensation arising from the accepted employment injury. 5 U.S.C. § 8106; *see Merlind K. Cannon*, 46 ECAB 581 (1995). By letter dated November 22, 1999, the Office informed appellant that she was not entitled to further wage-loss compensation but accepted the recurrence claim to reflect an update for medical treatment only.

The decision of the Office of Workers' Compensation Programs dated May 1, 2000 is hereby affirmed.

Dated, Washington, DC
February 14, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member