U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON A. HANNON and DEPARTMENT OF THE TREASURY, OFFICE OF THE SECRETARY, Washington, DC

Docket No. 02-1680; Submitted on the Record;
Issued January 27, 2003

DECISION and ORDER

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

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

On April 21, 1998 appellant, then a 36-year-old senior program analyst, sustained an employment-related injury when she stepped off the curb into a hole, twisted her ankle and fell forward on her left knee. She sought immediate care from the emergency room and did not return to work the next day. Appellant received appropriate benefits and was placed on the periodic rolls. The Office accepted the condition of a saroiliac strain.

On May 13, 1998 Dr. Charles S. Lefton, a Board-certified orthopedic surgeon and appellant's attending physician, indicated that appellant was unable to work from April 23 to May 21, 1998. In a report dated May 18, 1998, Dr. Lefton indicated that appellant was under his orthopedic care for injuries to her back and knee. He related that appellant should not sit for any extended period of time. After a period of physical therapy, appellant continued to exhibit right SI pain and underwent a series of diagnostic testing. Dr. Michael P. Cassidy, a Board-certified orthopedic surgeon, diagnosed appellant with SI strain. In an October 5, 1998 Form CA-20a report, Dr. Cassidy diagnosed a lumbosacral contusion with lumbar radiculopathy and advised that appellant's present impairment was pain and inability to stay in one position. He additionally noted that appellant was referred to neurology and neuropsychiatry for her chronic pain. Dr. Cassidy continued to treat appellant.

In a September 21, 1998 report, Dr. Robert N. Kurtzke, a Board-certified neuro-psychiatrist, noted appellant's history of injury and that she was still experiencing radicular pain. He stated that the magnetic resonance imaging scan was unrevealing. The nerve conduction studies and electromyogram were normal with the exception of reduced recruitment in the right gastrocnemius. This finding was consistent with an electrically mild right S1 radiculopathy. Neurologic system review was pertinent only for tingling through the S1 dermatome. Findings

on examination were presented. Dr. Kurtzke opined that appellant had symptoms and signs of a right lumbosacral radiculopathy mainly involving the S1 root. He further opined that the electrical studies suggested a favorable outcome.

By letter dated October 7, 1998, the Office asked Dr. Cassidy to submit a detailed medical narrative stating appellant's current condition, the course of treatment and why appellant's current condition was the result of the work injury based on objective findings upon examination. Dr. Cassidy was also requested to indicate any factors which may have hampered appellant's recovery and/or encouraged the need for continuing medical treatment.

The Office referred appellant to Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her orthopedic condition. In a report dated October 22, 1998, Dr. Levitt noted the history of injury and appellant's medical treatment following the injury and provided the results of his physical examination. He stated that, at the outset, given appellant's history and her examination, there would be a suggestion that appellant has a chronic sciatica. Dr. Levitt further noted that there was little in the way of any objective pathology detected to support that diagnosis. He stated it was clear from a review of the medical records that appellant's lack of physical findings and the delayed recovery from her work injury was frustrating to both appellant and her physicians. Dr. Levitt opined that appellant needed a multimodality pain management program, which would include psychiatric treatment, behavioral treatment, rehabilitation and pharmacologic manipulation. He further stated that, after a review of the medical records, which included appellant's job description as an analyst, he opined that appellant should return to work and that there be made every accommodation to allow her to perform her usual sedentary work responsibilities. Dr. Levitt stated that appellant should have a desk which allowed her to get up frequently to stretch and, if necessary, to work in a standing position. He opined that the features of her job which require extended walking should be modified and, based on her examination, he opined that appellant had the capacity of working while receiving treatment. Dr. Levitt opined that a comprehensive pain management program in conjunction with appellant's return to work while participating in a functional restoration program was an essential ingredient to a successful outcome. He further stated that appellant had not reached maximum medical improvement and reiterated that there was a role for neuropsychiatric treatment in the form of a comprehensive pain management program.

In Form CA-20a and progress reports, Dr. Cassidy opined that appellant had S1 lumbar radiculopathy and was totally disabled for her usual work. In his progress report of December 11, 1998, Dr. Cassidy noted that appellant was unable to sit due to back pain. She was able to stand on tiptoe and heelstand and had a negative Trendelenburg's test. Lumbar spine flexion of 80 degrees and extension of 10 degrees caused mild pain in the right leg. Side bending and rotation caused pain into the right leg. Appellant was noted to be tender to palpation in the right sacroiliac joint. Knee and ankle reflexes were two plus bilaterally.

In a letter dated February 19, 1999, the employing establishment offered appellant the position of senior program analyst, which conformed to the modifications outlined in Dr. Levitt's medical report.

In a February 26, 1999 letter, appellant's attorney advised that Dr. Cassidy disproved of appellant's return to work. Provided with the letter was a February 25, 1999 report from

Dr. Cassidy which advised that appellant has been under his care for symptoms of a nerve injury and that she remained disabled from work.

On April 28, 1999 the Office notified appellant that the modified position as a senior program analyst constituted suitable work. She was informed that she had 30 days to either accept the offered job or to provide reasons for her refusal of the offer of suitable work or else she risked termination of her compensation.

In a May 13, 1999 medical report, Dr. Andrew A. Schiavone, a Board-certified neuro-psychiatrist, advised that the position of senior program analyst did not accommodate appellant's medical condition. He stated that appellant was suffering from depression due to the work-related injury of April 21, 1998 and chronic pain. Dr. Schiavone stated that appellant has difficulty concentrating, remembering and staying on track with even minor things. He opined that appellant could not perform the duties of the position offered. Dr. Schiavone further advised that he was unable to determine when or if appellant would be able to perform her work-related duties.

In Forms CA-20a, Dr. Schiavone advised that appellant had depression secondary to chronic pain and disability and chronic sacral pain as a result of her work-related injury. He additionally opined that appellant was totally disabled for usual work.

In a December 22, 2000 decision, the Office terminated appellant's compensation effective December 20, 2000 on the grounds that she failed to accept suitable employment in a modified position as a senior program analyst. The Office noted that its decision did not effect appellant's entitlement to continued payments on her schedule award which was to expire October 6, 2001.[1]

In a letter dated November 24, 2001, appellant requested reconsideration. New medical evidence submitted included a September 17, 2001 report from Dr. Allan H. Macht, a Board-certified surgeon, who stated that when he examined appellant on June 14, 2000 because of the injury to her right leg in the April 21, 1998 accident, appellant had signs and symptoms of nerve root irritation in the right lower extremity which was documented on electrodiagnostic studies. Appellant's gait was altered and she had difficulty putting any pressure on her right leg without the use of a cane. Atrophy was also noted in the right leg. Dr. Macht opined that appellant had a Class IV impairment or a 50 percent permanent impairment of the whole person under Table 13-15, page 335 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th Edition).

In a decision dated February 27, 2002, the Office denied modification of its December 22, 2000 termination decision finding that there was no new substantial and probative

[1] In a decision dated June 13, 2000, appellant was awarded a 25 percent permanent impairment to her right lower extremity. The period of the award ran from May 21, 2000 to October 6, 2001. Because more than one year has elapsed since the issuance of the Office's June 13, 2000 schedule award decision and May 24, 2002, the postmark date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 13, 2000 schedule award decision; *see* 20 C.F.R. § 501.3(d)(2).

evidence to support that the job offer from the employing establishment did not represent suitable employment.

The Board finds 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 proving that appellant's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5] The implementing regulation 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.[6] 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.[7] 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.[8] A review of the medical evidence in the present case indicates that there is insufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. In this regard, a conflict exists in the medical evidence between Dr. Levitt, the Office referral physician, and Drs. Cassidy and Schiavone, appellant's attending physicians, regarding whether appellant is capable of performing the modified job. Dr. Levitt opined, in his October 22, 1998 report, that appellant could return to her usual sedentary work responsibilities with modifications to her desk and extended walking responsibilities. He further opined that appellant had the capacity to work while receiving treatment, which should include a multimodality pain management program and a functional restoration program. Based on Dr. Levitt's report and the additional modifications on the physical demands of the position received from appellant's vocational rehabilitation specialist,

[2] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

[3] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

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

[5] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[6] 20 C.F.R. § 10.516 (1999).

[7] *See John E. Lemker*, 45 ECAB 258 (1993); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

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

the employing establishment modified appellant's senior program analyst position. 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 on the basis of Dr. Cassidy's advice that she was unable to work and further submitted the May 13, 1999 medical of Dr. Schiavone, which the Office received May 24, 1999 and was, thus, properly within the 30-day period provided by the Office in it's April 28, 1999 letter for responding to the suitability determination. In his December 11, 1998 progress report, Dr. Cassidy noted, in his objective assessment, that appellant was unable to sit due to pain and was totally disabled due to pain. Dr. Cassidy's opinion, therefore, conflicts with that of Dr. Levitt, who opined that appellant could return to her sedentary position and could work while receiving treatment, which included a pain management program. 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.[9]

Moreover, in his May 13, 1999 report, Dr. Schiavone opined that appellant was suffering from depression due to the work injury and its resultant chronic pain. He further advised that appellant had difficulty concentrating, remembering and staying on track with even minor things and opined that appellant could not perform the duties of the position offered. Dr. Schiavone's report constituted probative medical evidence that appellant had greater physical restrictions than those upon which the modified position was based. The Board notes that, in order to carry its burden of proof to show suitability of an offered job, the Office must consider whether a condition acquired by appellant subsequent to his or her work injury might prevent him from carrying out the duties or physical requirements of the offered position, even if that condition is not work related.[10] Thus, Dr. Schiavone's report provided an additional basis for finding that the offered position was not suitable.

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

[10] *See Edward J. Stabell*, 49 ECAB 566 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) which provides that "If medical reports in the file document a condition which has arisen since the compensable injury and this condition disables the claim from the offered job, the job will be considered unsuitable even if the subsequently-acquired condition is not work related."

The February 27, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
January 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member