U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS C. WOMACK and U.S. POSTAL SERVICE,
POST OFFICE, Rolling Fork, MS

Docket No. 03-441; Submitted on the Record;
Issued June 12, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 2, 2001 on the basis that she refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

This case has previously been before the Board on appeal. In a decision dated October 26, 1999, the Board found that the Office improperly terminated appellant's compensation for refusal to accept suitable work, as the position offered by the employing establishment exceeded appellant's work limitations.[1] The facts of the case up to the time of the Office's January 22, 1998 decision, which was reversed by the Board, are contained in the Board's October 26, 1999 decision and are hereby incorporated by reference.

On December 22, 1999 the Office issued appellant a schedule award for a 20 percent permanent impairment of each arm. The period of the award was from January 23, 1998 to June 15, 2000.

On June 6, 2000 appellant elected to receive benefits under the Federal Employees' Compensation Act rather than retirement benefits.

By letter dated June 6, 2000, the Office requested that appellant submit a narrative medical report and a list of her work tolerance limitations from her attending physician.

On August 17, 2000 the Office referred appellant, prior medical reports and a statement of accepted facts to Dr. Neal Capel, a Board-certified orthopedic surgeon, for a second opinion evaluation of her carpal tunnel condition and her limitations for work. In a report dated September 7, 2000, Dr. Capel diagnosed: "Refractory long[-]term bilateral carpal tunnel

[1] Docket No. 98-1643 (issued October 26, 1999).

syndrome, operated two times left, one time right, in typical manner without improvement. Continued numbness, tingling and dysesthesias. Continued weakness of grip, slight. Intolerance for repetitive hand action." Dr. Capel stated that appellant's carpal tunnel syndrome had not resolved despite surgery and that appellant had pain and "some reduction of sensation from the normal." He concluded that "as far as the carpal tunnel syndrome I believe the patient could perform gainful employment. The additional impairment and complaint of chronic low back pain[2] adds to the difficulty but again with strong volition and motivation it could be carried out." Dr. Capel stated that appellant could not perform the duties of her former position of city letter carrier, but that she could perform work involving lifting and handling packages not in excess of 15 pounds and with considerable modification of the "period of repetitious performance." On an Office work tolerance limitations form, he indicated that appellant could work 4 hours per day, with 1 hour of reaching, 4 hours of sitting, walking or standing, and lifting, pushing or pulling up to 15 pounds.

In a report dated October 10, 2000, Dr. William C. Porter, Jr., appellant's attending orthopedic surgeon, diagnosed recurrent carpal tunnel syndrome bilaterally and stated: "Her prognosis is poor and I think as long as she can keep from working with hands, she will do fine. I think the risk of injury or hazard to herself and others by going back to work would be way too high. She needs to avoid working with her hands altogether." In a report dated October 14, 2000, appellant's attending physician for her low back condition, Dr. Rahul Vohra, a Board-certified physiatrist, stated that appellant "continues to have activity-related back pain which appears unchanged," and that she "continues to be limited to lifting 20 pounds on a frequent basis and 45 pounds occasionally."

On October 27, 2000 the employing establishment offered appellant a position as a modified distribution clerk for 20 hours per week on a split shift in the Greenville, Mississippi employing establishment, with duties of "Limited boxing of mail, limited casing of mail, writing second notices for customers, work automation, check in carriers, answer the telephone, deliver express mail, type correspondence and forms, and other duties as assigned within your medical restrictions." The limitations listed on the offer were those set forth by Dr. Capel on his September 7, 2000 work tolerance limitations form. Appellant rejected the offer on November 10, 2000 on the basis that she was unable to work because of her carpal tunnel syndrome and her chronic lumbar strain.

By letter dated November 13, 2000, the Office advised the employing establishment that the physical restrictions of its offer were appropriate, but that the offer was not suitable because it did not offer consecutive work hours.

By letter dated November 13, 2000, the Office sent Dr. Capel's report to Dr. Porter and requested that he comment on it, specifically with regard to appellant's work restrictions. Dr. Porter submitted a December 29, 2000 report of appellant's work tolerance limitations, indicating appellant could work 4 hours per day, with pushing, pulling and lifting of 15 pounds.

On April 5, 2001 the employing establishment offered appellant a modified distribution clerk position with consecutive work hours.

[2] Appellant sustained a low back injury in 1995 at work.

On April 12, 2001 the employing establishment offered appellant the same position of modified distribution clerk for 20 hours per week at the Rolling Fork, Mississippi Post Office where she had previously worked.

By letter dated April 16, 2001, the Office advised appellant that the offered position was suitable, that she had 30 days to accept the offer or provide reasons for refusing it and that 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses suitable work is not entitled to further compensation.

On May 8, 2001 appellant rejected the employing establishment's April 12, 2001 offer. She submitted an April 27, 2001 report of her work tolerance limitations from Dr. Porter, indicating that she could sit, stand or walk for 4 hours, lift 15 pounds, pull/push 15 pounds 1 hour, reach above her shoulder 1 hour and perform simple grasping 1 hour per day. In an April 27, 2001 note, Dr. Porter stated: "Patient has recurrent carpal tunnel syndrome; can[no]t work."

By letter dated May 22, 2001, the Office advised appellant that Dr. Porter's work tolerance limitations were within the employing establishment's April 12, 2001 offer, that her reasons for refusing the offer were unacceptable and that she had 15 days to accept the offer or have her compensation terminated.

By letter dated May 29, 2001, appellant contended that the Office was disregarding her back problem and that the medications she was taking caused drowsiness, dizziness and disorientation. She submitted a May 2, 2001 report from Dr. Salil Tiwari, a Board-certified neurologist, who stated that an electromyogram and nerve conduction study that day showed evidence of mild left S1 radiculopathy. Dr. Tiwari stated:

> "[Appellant] was to abstain from turning, twisting, stooping, bending or performing any task that may cause her pain to increase. Unfortunately I cannot raise her medicine because she is already becoming very sleepy and has slowness of thinking due to the medications which she takes at this time."

By decision dated July 2, 2001, the Office terminated appellant's compensation effective that date on the basis that she failed to accept an offer of suitable work.

Appellant requested a hearing, which was held on March 12, 2002. She submitted an August 28, 2001 report from Dr. Porter stating that she continued to have weakness and pain in her hands, that she had "chronic bilateral carpal tunnel syndrome that keeps her from being able to use her hands," and that he did not feel "that she is going to be able to handle a job working with her hands at all indefinitely."

By decision dated June 10, 2002, an Office hearing representative found that the Office properly terminated appellant's compensation on the basis that she refused an offer of suitable work.

By letter dated October 4, 2002, appellant requested reconsideration, stating that she received disability retirement due to two separate occupational injuries and that she still felt that both her injuries had not been considered. She submitted a September 24, 2002 report from

Dr. Porter stating that appellant had persistent bilateral hand pain in a median nerve distribution, that she was unable to pick up things that weighed more than a few pounds without a lot of pain, and that he would continue conservative management.

By decision dated October 22, 2002, the Office found that the additional evidence was not sufficient to warrant review of its prior decision.

The Board finds that the Office properly terminated appellant's compensation effective July 2, 2001 on the basis that she refused an offer of suitable work.

Under section 8106(c)(2) of the Act, 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.[3] To justify termination of compensation, the Office must establish that the work offered was suitable.[4] Section 10.516 of the Code of Federal Regulations[5] 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 showing before a determination is made with respect to termination of entitlement to compensation.[6]

The Office established that the position of part-time modified distribution clerk that the employing establishment offered to appellant on April 12, 2001 was suitable. The physical requirements of the offered position complied with the work tolerance limitations set forth by the Office's referral physician, Dr. Capel, in his September 7, 2000 report. Although appellant's attending physician, Dr. Porter, in an October 20, 2000 report, stated that appellant "needs to avoid working with her hands altogether" and in an April 27, 2001 report stated that appellant could not work, Dr. Porter also submitted reports of appellant's work tolerance limitations dated December 29, 2000 and April 27, 2001. The limitations set forth in these reports allowed appellant to perform the position offered by the employing establishment and the Board finds these physical limitation reports more persuasive than the general statements that she could not work with her hands.

The medical evidence shows that appellant's low back condition would not preclude her from performing the duties of the position offered by the employing establishment. Appellant's attending physician for her low back condition, Dr. Vohra, stated in an October 14, 2000 report that appellant could lift 20 pounds frequently and 45 pounds occasionally. The offered position required lifting of no more than 15 pounds. A May 2, 2001 report from Dr. Tiwari stated that appellant should "abstain from turning, twisting, stooping, bending or performing any task that may cause her pain to increase." The position offered by the employing establishment does not appear to require stooping or bending, but certainly some twisting or turning would be required

[3] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[4] *David P. Camacho*, 40 ECAB 267 (1988).

[5] 20 C.F.R. § 10.516.

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

in order to case or box mail. Dr. Tiwari provided no reason to completely preclude such activities and a proscription against "performing any task that may cause her pain to increase" is too vague and speculative to establish that an offered position is not suitable.

The Office properly advised appellant that the offered position was suitable, and that a refusal of suitable work would result in no further entitlement to compensation. The Office allotted appellant 30 days to provide an explanation for refusing the offer and considered her reasons, which related to suitability and properly found them unacceptable. The Office then allotted appellant 15 days to accept the offer or face termination of compensation for refusing suitable work. As the employing establishment's April 12, 2001 offer was suitable and the Office afforded proper notice and opportunity to be heard, the Office properly terminated appellant's compensation for refusing an offer of suitable work.

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[8]

With her October 4, 2002 request for reconsideration, the only new evidence appellant submitted was a September 24, 2002 report from Dr. Porter. This report was essentially repetitive of this doctor's prior reports, though it did not address the determinative question of whether appellant was able to perform the position offered by the employing establishment. This report is not relevant and is therefore insufficient to require that the Office reopen the case for further review of the merits of appellant's claim. Appellant's October 4, 2002 request for

[7] *Eugene F. Butler*, 36 ECAB 393 (1984).

[8] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office.

The October 22 and June 10, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member