U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRACY L. FERGUSON and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

Docket No. 03-737; Submitted on the Record;
Issued June 11, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for reconsideration.

On September 29, 1999 appellant, then a 32-year-old letter carrier, filed a notice of occupational disease alleging that beginning May 12, 1999 she injured her legs, feet, ankles and back as a result of carrying mail weighing up to 60 pounds for 10 to 12 hours per day. The Office informed appellant that there was insufficient factual and medical evidence to support her claim. By decision dated January 29, 2000, the Office denied appellant's claim for compensation as the evidence was insufficient to establish fact of injury. Appellant requested reconsideration and submitted a November 5, 1999 report from her treating Board-certified orthopedic surgeon, Dr. Franklin C. Garmon. The Office denied appellant's request on February 9, 2000 on the grounds that the evidence was insufficient to warrant modification of the previous decision. Appellant disagreed with the Office's decision and requested an oral hearing. The Office informed appellant that she could not request an oral hearing after reconsideration had been denied. Appellant requested reconsideration on October 4, 2000 and submitted reports from Dr. Garmon dated May 25, August 30 and September 7, 2000.

Appellant also submitted reports from Dr. Garmon dated October 17, November 16 and December 14, 2000 outlining her work restrictions. Dr. Garmon diagnosed appellant with chronic lumbosacral strain and left L5 radiculopathy and noted the following work restrictions: no lifting greater than 15 pounds; no long periods of bending, pushing, pulling, squatting or lifting; no standing more than 15 minutes at a time; no working more than 8 hours per day; no walking to carry mail on routes and sitting as tolerated. He recommended that appellant be given Saturdays and Sundays off.[1]

[1] On February 1, 2001 Dr. Garmon indicated that appellant's work restrictions remained the same.

By decision dated December 22, 2000, the Office determined that the evidence submitted warranted modification of the prior decision and accepted that appellant sustained a work-related lumbosacral strain with S1 radiculitis for the period May 12, 1999 to August 17, 2000.

By letter dated February 13, 2001, appellant's employing establishment offered appellant a limited-duty job assignment for eight hours per day with Sunday/rotating days off. The job offer was within the following medical limitations: "employee is able to intermittently lift up to 15 pounds, walk 2 hours, push and pull 1 hour. She can continuously perform fine manipulation 3 hours and stand 15 minutes. She should not bend, stoop or squat more than 15 minutes at a time. She cannot work more than eight hours a day."

By letter dated March 13, 2001, Dr. Garmon stated:

> "[Appellant] was seen in the office today still complaining of severe low back and left leg pain that has been aggravated by the failure of her employment facility to replace her stool while she is working and to provide two consecutive days off from employment as requested in the previous employment restrictions. As these restrictions have not been followed she is, therefore, unable to continue working and it is requested that she be placed on a disability status from March 7, 2001 for an undetermined period."

Appellant stopped work on March 7, 2001. A disability certificate from Dr. Garmon dated March 8, 2001 indicated that appellant was totally disabled from March 7, 2001 because her symptoms were aggravated due to her pregnancy. In a report dated April 30, 2001, Dr. Garmon indicated that appellant's condition was deteriorating with an increase in leg discomfort during her last visit. He stated:

> "This appeared to be resulting from a failure of the employer to comply with the work restrictions previously requested. Her leg and back pains were noted to have increased on each subsequent visit (monthly) and when seen on March 15, 2001 (letter included) it was requested that she be considered disabled from March 7, 2001 for an undetermined period of time."

Dr. Garmon opined that appellant was currently totally disabled and incapable of working in any capacity.

On April 20, 2001 the employing establishment modified the February 13, 2001 limited-duty job offer to include two consecutive days off on Sunday and Monday and provided a special chair for appellant with back and arm support. This modified offer included all the other physical restrictions from the February 13, 2001 offer. Appellant rejected the employing establishment's limited-duty job offer on May 9, 2001.

By letter dated May 17, 2001, the Office notified appellant of its determination that the position offered by the employing establishment was suitable and that she had 30 days to either accept the offered position or provide reasons for refusing. The Office indicated that, under 5 U.S.C. § 8106(c)(2), a claimant who refused an offer of suitable employment is not entitled to any further compensation for wage loss. By decision dated July 5, 2001, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated July 9, 2001, appellant requested reconsideration and submitted a copy of a magnetic resonance imaging report performed on July 31, 1999, which indicated "Disc-osteophyte complex with mild annulus bulge at L5-S1. Mild impression on the anterior thecal sac and mild impression on both nerve root sleeves at this level." By decision dated August 9, 2001, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of the previous decision.

By letter dated February 4, 2002, appellant requested reconsideration and submitted reports from Dr. Garmon dated November 26, 2001 and January 23, 2002. Dr. Garmon indicated that appellant's chronic low back condition had not resolved and that she was still disabled. He also explained that appellant's pregnancy only temporarily aggravated her back condition.

By decision dated May 23, 2002, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of the previous decision.

By letter dated June 14, 2002, appellant requested reconsideration. She alleged that, at the time of the job offer on February 13, 2001, Dr. Garmon had stated that she was totally disabled. Appellant claimed that the job offer was based on her previous restrictions and that her disability status had been overlooked. She also submitted copies of medical reports already in the record.

By decision dated September 10, 2002, the Office denied appellant's request for reconsideration on the grounds that appellant neither raised substantive legal questions nor included new and relevant evidence to warrant a review of the prior decision. The Office noted that appellant's contention regarding her disability status at the time of the offer had already been considered by the Office in its previous decision.[2]

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. Section 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered … is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[3] To justify such a termination, the Office must show that the work offered was suitable.[4] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[5]

[2] Appellant submitted evidence after the Office's final decision. The Board may not review this evidence, as the review of a case shall be limited to the evidence in the case record, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

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

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

[5] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[6] The Board finds that the medical evidence was insufficient to establish that appellant could perform the limited-duty job.

The Office terminated appellant's compensation benefits on the basis of Dr. Garmon's February 1, 2001 report indicating that she could work eight hours per day with restrictions. He stated that appellant's work restrictions were as follows: no lifting greater than 15 pounds; no long periods of bending, pushing, pulling, squatting or lifting; no standing more than 15 minutes at a time; no working more than 8 hours per day; no walking to carry mail on routes and sitting as tolerated. He also recommended that she be given Saturdays and Sundays off. He did not mention a special stool.

On April 20, 2001 the employing establishment offered appellant a light-duty position which included: intermittent lifting up to 15 pounds; walking 2 hours, pushing and pulling 1 hour; performing fine manipulation 3 hours and standing 15 minutes. The position also included no bending, stooping or squatting more than 15 minutes at a time and no working more than 8 hours per day with rotating Sundays off. The Office also modified the light-duty position to include the use of a special chair with back and arm support and two consecutive days off on Sunday and Monday.

The Board finds that the record contains no rationalized medical opinion evidence indicating that appellant could perform the limited-duty job. The Office appears to have based its finding that the April 20, 2001 job offer was suitable on the opinion of Dr. Garmon, appellant's attending orthopedic surgeon. However, there are several reports of record in which Dr. Garmon indicated that appellant was totally disabled. For example, in a report dated March 13, 2001, a disability certificate dated March 8, 2001 and a report dated April 30, 2001, Dr. Garmon indicated that appellant was totally disabled beginning March 7, 2001 for an undetermined period. It is the Office's burden to present medical evidence showing that the April 20, 2001 job offer was suitable and that appellant could perform the limited-duty job.[7] The record does not contain rationalized medical opinion evidence from a physician stating that appellant could perform the duties of the April 20, 2001 job offer. The Board also notes that it is unclear whether the offered position was within Dr. Garmon's medical restrictions. Dr. Garmon stated in his February 1, 2001 report, in addition to other restrictions, that appellant could do "no walking to carry mail on routes"; however, the employing establishment's job offer on April 20, 2001 included "walking two hours." Therefore, it is unclear whether appellant could have performed the walking duties of the limited-duty position. As the Office did not present rationalized medical opinion evidence indicating that the limited-duty job offer was suitable, the Office did not meet its burden to terminate appellant's compensation benefits.[8]

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

[7] *John E. Lemker*, *supra* note 4.

[8] The issue of whether the Office properly denied appellant's request for reconsideration is moot since the Office's decision terminating appellant's compensation benefits is being reversed.

The September 10 and May 23, 2002 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
June 11, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member