

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY SALAZAR and DEPARTMENT OF VETERANS AFFAIRS,
ANN ARBOR VETERANS HOSPITAL, Ann Arbor, MI

*Docket No. 02-408; Submitted on the Record;
Issued March 5, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant refused an offer of suitable work effective June 28, 2001.

On June 23, 1994 appellant, then a 33-year-old medical clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that she injured her left arm when a cart flipped and struck her left forearm. On August 31, 1994 the Office accepted the claim for contusion of the left forearm, mild left neuropathy and left reflex sympathetic dystrophy. Appellant received total temporary disability through May 21, 1995 when she returned to restricted duty. On February 15, 1996 her limited-duty position was eliminated. Appellant has not worked since.

In an April 21, 2000 report, Dr. Donald Austin, a Board-certified neurosurgeon, prescribed work restrictions that included no use of the left upper extremity and included the option of appellant standing or sitting while working.

On January 9, 2001 appellant was offered a full-time restricted position as an information receptionist that the Office found suitable and in compliance with her medical restrictions. In a January 17, 2001 telephone conversation with the Office, appellant indicated that she was interested in the job, she noted that she only lived two miles from the job site, but she could not accept the job as she was recently diagnosed with neurocardiogenic syncope. In a January 19, 2001 letter, appellant refused the job offer. In a February 12, 2001 letter, the Office notified appellant that she had 15 days to accept the position or her compensation would be terminated.

In a February 20, 2001 report, Dr. Charles S. Sheldon, an osteopath, wrote that appellant was admitted for treatment and evaluation after experiencing increasingly frequent episodes of dizziness, confusion and falls. Appellant indicated that she experienced these symptoms throughout the day. Among his findings, Dr. Sheldon included episodic dizziness and confusion, falls, status post closed-head trauma and reflex sympathetic dystrophy left arm, seven years.

In a February 20, 2001 report, Dr. Du Thinh conducted a tilt table test and diagnosed neurocardiogenic syncope with a primary heart rate component. He stated:

“At the present time, because of profound fatigue and recurrent syncope, which is exacerbated by her chronic left arm pain, [appellant] cannot medically and safely perform any work, and should be excused from work until the underlying mechanism of her symptoms are delineated and treatment is more effective.”

In a February 21, 2001 report, Dr. Blain Keigley, a radiologist, wrote that appellant had a nonremarkable magnetic resonance imaging (MRI) scan of the brain. In an April 6, 2001 report, cardiologist, Dr. Daniel Kosinski, wrote that appellant’s electroencephalogram was normal, as were the MRI scan of the brain and the tilt table study. He concluded that appellant’s “symptoms were very atypical to be explained by autonomic dysfunction.”

In an April 3, 2001 letter, the Office referred appellant to Dr. William J. Rowe, a Board-certified cardiologist for a second opinion examination. In an April 12, 2001 report, Dr. Rowe diagnosed sympathetic dystrophy of the left arm, bizarre neurological findings of unexplained etiology, history of rectal bleeding and tarry stools, unexplained etiology, status post cholecstectomy but no evidence of heart disease. He further wrote that he had never seen a case resembling this in 45 years of practice and in the act of touching the left arm even slightly with no more pressure than the application of a feather, she cried out in pain and obvious tears. He found that there was no evidence of any cardiac problem, and that she could return to work.

In a May 4, 2001 letter, the Office informed appellant that the restricted job offer as an information receptionist remained open and consistent with her medical restrictions. Appellant was given 30 days to accept the position or provide an explanation of why she could not. The letter also explained to appellant under 5 U.S.C. § 8106(c)(2) that: “a partially disabled employee who refuses or neglects suitable work, after it is offered to, procured by, or secured for him is not entitled to compensation. Therefore any claimant who refuses an offer of suitable work or fails to report for work when scheduled, is not entitled to any further compensation for wage loss or schedule award.

In a June 12, 2001 letter, the Office found that appellant’s medical evidence did not establish that she could not perform the restricted-duty position she was offered. Appellant was given 15 days from the date of that letter to accept the position without penalty of compensation loss.

In a June 27, 2001 letter, the employing establishment informed the Office that appellant did not appear for work or otherwise respond to the June 12, 2001 notice.

In a June 28, 2001 decision, the Office terminated appellant’s compensation for refusing an offer of suitable work.

On June 28, 2001 the Office received a letter dated June 26, 2001 from appellant’s representative indicating that appellant accepted the position and listed six accommodations that the Office must provide.¹ In a July 12, 2001 letter, appellant, through her representative,

¹ The Board notes that the record contains no postmarked envelope as to when the acceptance letter was mailed.

requested reconsideration arguing that appellant accepted the position within the prescribed time limit but did not report to work because she was not informed of where or when she was to report.

In an October 4, 2001 decision, the Office denied reconsideration finding that appellant had been provided the information when and where to report, in the January 9, 2001 letter, and she and her representative had the telephone numbers of the Office and the employing establishment if there was further confusion.

The Board finds that the Office improperly terminated appellant's compensation effective June 28, 2001 on the grounds that she refused an offer of suitable work.

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."² When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.³

The Board finds that there is a conflict in the medical evidence between Dr. Rowe, who served as an Office referral physician, and Dr. Thinh, appellant's attending physician, regarding whether she had sufficiently recovered from her accepted condition to perform the offered job. Dr. Thinh indicated in his February 20, 2001 report that appellant could not perform any work. Dr. Rowe, in his April 3, 2001 report, could find no indication appellant had any residuals related to her accepted condition. Because there was a conflict of medical opinion on appellant's capacity for employment in the selected position, the Office failed to meet its burden of proof to establish that the selected position was suitable.

² 5 U.S.C. § 8123(a).

³ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

The June 28, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
March 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member