U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHY E. MURRAY and U.S. POSTAL SERVICE,
POST OFFICE, Roanoke, VA

*Docket No. 03-1889; Submitted on the Record;*
*Issued January 26, 2004*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied modification of its decision terminating appellant's compensation based on her refusal of suitable work.

The Office accepted that appellant sustained a right shoulder strain, thoracic disc displacement, thoracic sprain, back sprain and cervical sprain, due to employment injuries on August 6, 1984, February 27, 1986, May 22, 1995, August 16, 1996 and August 26, 1999. The Office authorized a July 2, 1992 left T8-9 costotransversection and discectomy. Subsequent to her surgery, appellant returned to part-time limited-duty employment on July 30, 1993 and to full-time employment on September 4, 1993. Following her August 26, 1999 injury, appellant, at the time a 47-year-old clerk, stopped work and did not return. On February 29, 2000 the Office authorized a lateral interbody fusion at T7-8 and T8-9. Dr. Raymond V. Harron, an osteopath and appellant's attending physician, performed the fusion on December 1, 1999. On August 14, 2000 Dr. Harron opined that appellant had reached maximum medical improvement following surgery and released her back to Dr. Michael J. Basile, a Board-certified internist, for a determination of her work restrictions.

In a work restriction evaluation (OWCP-5c) dated September 1, 2000, Dr. Basile opined that appellant could work for four hours per day with restrictions on lifting three pounds for one-quarter hour, squatting one-half hour, sitting four hours, walking, standing and reaching for one hour, operating a motor vehicle for one hour and performing repetitive wrist movements for one hour. He further indicated that appellant could not reach above her shoulder, twist, perform repetitive movements of the elbow, push, pull, kneel or climb. Dr. Basile also noted that appellant should wear a head receiver to answer the telephone. In an accompanying note, Dr. Basile indicated that appellant was "released back to work as per restrictions" on the OWCP-5c. He also reviewed the position duties provided by the employing establishment and changed the maximum weight carried from five to three pounds.

On September 7, 2000 the employing establishment offered appellant the position of greeter in accordance with Dr. Basile's restrictions. By letter dated September 12, 2000, the Office notified appellant that the position of greeter was found to be suitable work within her medical restrictions and remained currently available. The Office also advised appellant that under section 8106(c) of the Federal Employees' Compensation Act[1] "a partially disabled employee who refuses to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation." The Office provided appellant 30 days in which either to accept the position or provide reasons for refusal. Appellant did not respond.

By decision dated October 12, 2000, the Office terminated appellant's wage-loss compensation, effective that date, on the grounds that she refused an offer of suitable work.[2]

In a decision dated August 2, 2001, the Office denied modification of its October 12, 2000 decision on the grounds that appellant had failed to submit rationalized evidence sufficient to show that she could not perform the limited-duty position offered by the employing establishment.[3]

On October 9, 2001 appellant, through her attorney, requested reconsideration and submitted additional medical evidence. In a decision dated February 2, 2002, the Office denied modification of its October 12, 2000 decision. On January 29, 2003 appellant's attorney again requested reconsideration and submitted additional medical evidence. In an April 11, 2003 decision, the Office denied modification of its October 12, 2000 decision terminating appellant's compensation on the grounds that she refused an offer of suitable work.

The Board finds that the Office improperly denied modification of its decision terminating appellant's compensation based on her refusal 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.[4] To justify termination of compensation, the Office must establish that the work offered was suitable.[5]

The implementing regulation[6] 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

[1] 5 U.C.S. § 8106(c).

[2] By decision dated May 8, 2001, the Office denied appellant's claim for an emotional condition.

[3] In an internal memorandum dated July 13, 2001, the Office noted that appellant had requested a review of the written record on October 25, 2000. The Office found that as the request for a review of the written record was untimely, it would treat it as a request for reconsideration.

[4] 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."

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

[6] 20 C.F.R. § 10.517(a).

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.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[8]

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.[9] In this case, the Office relied upon Dr. Basile's September 1, 2000 work restriction evaluation in finding that the position of greeter offered by the employing establishment on September 7, 2000 was within appellant's work limitations. The record shows that the physical capacity required for the part-time position of greeter was within appellant's work restrictions as identified by Dr. Basile. The Office, therefore, properly found that the offered position was suitable.[10] Upon advising appellant that the offered position was suitable, the Office provided appellant 30 days to accept the position or provide reasons for refusal. Appellant did not respond within the time allotted and, therefore, the Office properly terminated her compensation.

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.[11] Subsequent to the Office's termination of compensation, appellant submitted medical evidence in support of her claim that she was unable to perform the offered position. In a report dated October 6, 2000, received by the Office subsequent to its October 12, 2000 decision, Dr. Basile stated that appellant had radicular pain in the left lower extremity such that she "was now unable to return to any form of work" pending further evaluation. Dr. Basile also completed a duty status report form, dated October 6, 2000, in which he found that appellant could perform no work duties.

In a report dated October 23, 2000, Dr. Basile indicated that he had reviewed the Office's October 12, 2000 decision and apologized for the delay in the transmission of his October 6, 2000 report. He stated that appellant did not accept the offered position due to "an unexpected relapse in her medical condition. She developed pain in her left lower extremity of a radicular nature that would require further investigation…." Dr. Basile stated that he had advised appellant not to return to work pending further evaluation.[12]

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

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

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *See John E. Lemker*, *supra* note 7.

[11] *Deborah Hancock*, 49 ECAB 606 (1998).

[12] In an office visit note dated October 30, 2000, Dr. Harron noted appellant's complaints of left leg pain in the L5 distribution and recommended a magnetic resonance imaging (MRI) scan.

In a form report dated March 20, 2001, Dr. Basile checked "yes" that appellant's condition had worsened since September 1, 2000. He stated:

> "After undergoing physical therapy and increasing physical activity in anticipation of returning to work, [appellant] experienced a reoccurrence of nerve pain in [the] left lower extremity [and] foot. She has T8 radicular pain in her chest bilaterally [and left] scapular pain."

Dr. Basile opined that appellant was not able to work under the restrictions provided on September 1, 2000 due to "[o]ngoing debilitating pain."

In a form report dated April 4, 2001, Dr. Harron noted that an MRI scan showed no disc protrusion but degenerative thoracic changes. He opined that appellant had "permanent underlying nerve root damage" and could not perform any employment due to pain. In a report dated September 24, 2001, Dr. Harron discussed his treatment of appellant beginning October 29, 1999 and his performance of a lateral thoracic interbody fusion at T7-8 and T8-9 on December 1, 1999. Dr. Harron noted appellant's history of employment injuries and his prior finding that she had permanent nerve root damage. He stated:

> "In my professional opinion, the nerve root damage and pain onsets and offsets show beyond any reasonable professional medical question that the root damage results from that injury and the 1984 work injury. You will recall from your file … that [appellant] first experienced left leg pain in 1984, as a result of her first T8-9 disc and nerve injury and what, seven years later, resulted in her first thoracic back surgery. The time that it took to localize [appellant's] 1984 injury had extreme consequences. By 2000 the nerve root impingement had become permanent and, I believe, irreversible. The short time in which it was displaced following [the] 1999 surgery only confirms this. The pain returned, however, with weight-bearing and palpation, as well as with activities such as light bending and lifting.
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> "In my further opinion, [appellant] was not able to accept the greeter job and is not currently capable of returning to work, either in the former technician job or in the greeter position offered to her last September. That became apparent to me last fall after I had released her to do so, when her blood pressure reached dangerous levels, her pain increased significantly as a result of her curtailment of medication and her increase in physical exertion (however modest) and the results of the November 13, 2000 MRI [scan] were reported. The experience with all these shows that, at least at the present time, as well as last fall, [appellant] cannot and could not tolerate the combination of exertion, work and the level of pain medication she requires."

In a report dated October 1, 2001, Dr. Basile reiterated that appellant's condition deteriorated following his release of her for employment such that she was not able to work as a greeter. Dr. Basile noted that appellant had previously documented left lower extremity pain following her initial thoracic disc surgery. He stated that appellant expressed a desire to return to

work and, therefore, began to increase her level of physical activity, which had been effectively bed rest. Dr. Basile stated:

> "In my opinion, [appellant] was, in September of 2000 and continues to be, temporarily totally disabled due to the effects of her thoracic back injury and its secondary implications for her permanent thoracic nerve root damage and left lower extremity pain. Given her pain level and medication level, I do not believe [appellant] could perform either her old job or the job of a greeter, however, sedentary and, however, much [appellant] wishes to return to work."

In a report dated January 23, 2003, Dr. Harron described in detail his treatment of appellant and the reasons why her current condition was medically related to her accepted employment injuries. He stated that on October 30, 2000, his first treatment of appellant since August 2000, she "was in no physical (regardless of emotional) condition to return to work at that moment because her physical condition had deteriorated because of increased activity, which resulted in extreme pain in the left lower extremity."

The Board finds that the medical evidence is sufficient to establish that the Office erred in denying modification of its finding that appellant was able to perform the position of greeter offered to her in September 2000. While Dr. Basile released appellant to resume part-time limited-duty employment in a work restriction evaluation dated September 1, 2000, he subsequently found that, in a report dated October 6, 2000, her condition had since deteriorated such that she was unable to perform the duties of the offered position. In a report dated October 1, 2001, Dr. Basile opined that appellant was totally disabled from September 2000 to the present from work, including the job of greeter, due to her thoracic nerve root damage and pain in the left lower extremity. He opined that regardless of the sedentary nature of the job of greeter, appellant was unable to perform the position due to her pain and resulting level of medication.

Moreover, Dr. Harron, who performed appellant's thoracic fusion, found in a report dated April 4, 2001, that she was unable to work due to permanent nerve damage. In a report dated September 24, 2001, Dr. Harron opined that appellant could not perform the position of greeter offered to her in September 2000. He explained that appellant increased her physical exertion and decreased her medication in preparation to return to employment but was unable to "tolerate the combination of exertion, work and the level of pain medication she requires." Both Drs. Basile and Harron found that appellant was unable to perform the position of greeter in September 2000. The physicians supplied detailed rationale for their opinions by explaining that appellant's attempt to increase her level of activity and decrease her pain medication in preparation for employment caused an increase in left lower extremity pain such that she was unable to perform even sedentary employment in September 2000. Drs. Basile and Harron based their opinions on an accurate factual and medical history and provided detailed findings on

examination. Consequently, the medical evidence supports a finding that the Office's termination of appellant's compensation based on her refusal of suitable work should be modified.[13]

The decision of the Office of Workers' Compensation Programs dated April 11, 2003 is reversed.

Dated, Washington, DC
January 26, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[13] Appellant has also submitted evidence showing that she may have a psychological impairment. While the Office denied appellant's claim for an emotional condition due to her employment injury, even if a condition preventing an employee from performing an offered position is not employment related and acquired subsequent to the employment injury, an offered job will be considered unsuitable. *Robert Dickerson*, 46 ECAB 1002 (1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (December 1993).