U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON Y. SWAIM and DEPARTMENT OF VETERANS AFFAIRS, LONG BEACH VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA

Docket No. 03-1324; Submitted on the Record;
Issued May 18, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 5, 2002 for refusal to accept suitable employment.

The Office accepted appellant's claim for low back strain and herniated disc at L5-S1. Appellant stopped working on November 23, 1988 and did not return to work. After the injury, appellant moved from California to Texas.

In a report dated May 4, 1998, a second opinion physician, Dr. B. Peyton Delaney, a Board-certified psychiatrist and neurologist, stated that it was "impossible" to state physical restrictions for appellant to be a registered nurse (RN). He stated that it was "improbable" to describe a scenario in which appellant would be able to perform light duty for eight hours a day. Dr. Delaney stated that "one would state" that appellant should not sit or stand for hours, and not twist, bend, lift objects and pull as in maneuvering patients. He stated that, because "of this," it was "not plausible" that appellant could function as an RN as he understood it.

On June 1, 2001 appellant underwent a functional capacity evaluation which concluded that she could perform light-duty work. Appellant also underwent periodic lumbar epidural steroid injections.

In a report dated July 27, 1998, a second opinion physician, Dr. Stephen Hoffman, a Board-certified psychiatrist and neurologist, stated that appellant could not work as an RN due to her herniated disc at L5-S1, and that appellant was unable to perform any heavy lifting, bending, stooping, kneeling, twisting or remain in any one position for a period of time.

In a report dated August 28, 2001, a second opinion physician, Dr. Govindasamy Durairaj, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, and reviewed a magnetic resonance imaging (MRI) scan

performed on September 11, 1998, x-rays and the June 1, 2001 functional capacity evaluation. He opined that there was no need for another MRI scan since the protrusion of the disc along the right posteriolateral disc margin and mild foraminal stenosis at L5 were the objective findings to substantiate the ongoing disability and need for treatment.

Dr. Durairaj opined that appellant could perform a sedentary-duty job full time with restrictions of no sitting, walking or standing for more than 2 hours, pushing 1 to 2 hours up to 30 pounds, and pulling and lifting for 1 to 2 hours not more than 20 pounds. He stated that appellant should take five-minute breaks every hour.

By letter dated May 9, 2002, the employing establishment stated that based on Dr. Durairaj's August 28, 2001 physical restrictions, it was offering appellant the position of registered nurse effective June 2, 2002. The employing establishment requested that appellant respond by May 24, 2002.

On an undated form received by the Office on May 15, 2002, the employing establishment stated that it sent appellant a written job offer on May 9, 2002 for the position of a nurse, and the available date of the job was June 2, 2002. The employing establishment indicated that the position would continue to remain available. The employing establishment attached a description of the job's physical requirements and a copy of Dr. Durairaj's August 28, 2001 physical restrictions.

On May 10, 2002 the Office informed appellant that the employing establishment had the position of staff nurse available with restrictions of no sitting, walking, standing for more than 2 hours at a time, pushing 1 to 2 hours but not more than 30 pounds, pulling and lifting 1 to 2 hours but not more than 20 pounds. The job description stated that routine breaks were 15 minutes twice during the shift but appellant could take a 5-minute break every hour. The Office gave appellant 30 days to respond.

By letter dated May 16, 2002, appellant requested an extension of 90 days to respond. She stated that her condition had changed in that her herniated disc now extended to include the L4 disc, and she believed that Dr. Durairaj's opinion meant that she could work only six hours a day consisting of two hours each of sitting, walking and standing. She stated that her treating physician, Dr. Paul T. Geibel, a Board-certified orthopedic surgeon, had not released her to full-time employment. Further, she was currently in a rehabilitation status which would not be completed until June 2002 at which time she would be reevaluated per a functional capacity test. Appellant stated that she needed time to sell her house in San Antonio, Texas, in order to be able to move to California.

By letter dated May 21, 2002, the Office informed appellant that her reasons for refusing the job were unacceptable and she had 15 days to accept the job.

By letter dated May 30, 2002, appellant stated that she was "tentatively" accepting the job offer, but she requested a date to report to work after July 10, 2002 in order to have her treating physician review the job offer, sell her home and arrange for medical treatment in California.

By decision dated June 5, 2002, the Office terminated appellant's compensation benefits based on her refusal to accept an offer of suitable employment. The Office relied on Dr. Durairaj's August 28, 2001 opinion in determining that appellant could perform the work of a staff nurse.

Appellant requested an oral hearing before an Office hearing representative which was held on November 21, 2002. Appellant stated that she wanted to return to work but in a way that would not reinjure her back. She stated that she wrote a letter to the Office requesting assistance in establishing her work restrictions but the Office "consistently neglected" to respond to her letters. Appellant stated that one of her doctors recommended an exercise program which the Office denied and she felt that the Office was not concerned about her care. She stated that the position of a staff nurse would require her to be in charge of 2 pods of 40 patients each, and with the nursing shortage, she felt that some time in the future, she would need to violate her work restrictions. Appellant expressed concern that she would have difficulty maintaining her license to practice nursing if her physical condition prevented her from performing her job competently. Appellant denied that she refused a job offer but was merely waiting for a doctor's opinion.

Appellant's husband who was representing appellant explained that he was submitting additional medical evidence to support appellant's contention that she was unable to perform the work of a staff nurse. Appellant's husband noted that the second opinion physician, Dr. Delaney, opined that appellant could not perform the work of a staff nurse and Dr. Hoffman opined that appellant was unable to work at all. He also stated that multiple doctors' opinions and multiple hospital staffing offices said that they could not hire appellant "on the floor" with her injuries. Appellant's husband stated that appellant accepted the job offer but needed until July 10, 2002 "to get some things in order," and was waiting for a new date to report to work.

Subsequent to the hearing, appellant submitted a functional capacity evaluation dated September 18, 2002 which recommended that appellant undergo six weeks of work hardening to prepare for the specific job requirements and an MRI scan dated October 24, 2002 which noted increased degenerative disc disease at L4-5 and L5-S1. Appellant also submitted two medical reports dated December 2, 2002 from Dr. Geibel.

In one of the reports, Dr. Geibel performed a physical examination and prescribed treatment. In the other report, he stated that, based on his physical examination, the most recent functional capacity evaluation and MRI scan, appellant could not work as a nurse but would require an administrative position. He stated that appellant was unable to sit more than 30 to 45 minutes, stand more than 45 minutes, push, pull or carry more than 10 pounds frequently, and could occasionally lift up to 15 or 20 pounds at most.

By decision dated January 22, 2003, the Office hearing representative affirmed the Office's June 5, 2002 decision. He found, however, that Dr. Geibel's opinion, which appellant submitted subsequent to the hearing, created a conflict of medical opinion. The Office hearing representative therefore remanded the case for the Office to refer appellant to an impartial medical specialist to resolve the conflict in the medical evidence. He stated that on remand the impartial medical specialist should provide "findings on examination" and a "rationalized medical opinion as to the nature and extent of work-related disability, and also whether the claimant is capable of working the offered job." The Office hearing representative noted that

because the Office met its burden of proof in terminating compensation, the burden for reinstating benefits shifted to appellant to establish continuing employment-related disability. He stated that compensation and medical benefits were not to be reinstated pending the report of the medical examiner.

The Board finds that the Office properly terminated appellant's compensation benefits effective June 5, 2002 for refusal to accept suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[1] Under section 8106(2) of the Federal Employees' Compensation Act,[2] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3]

Section 8106(c)(2) provides in pertinent part, "A partially disabled employee who … refuses or neglects to work after suitable work is offered … is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[5] 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.[6] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[7] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[8]

The determination of whether an employee has the physical ability to perform a modified position offered by the employing establishment is a medical question that must be resolved by the medical evidence.[9] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[10] Furthermore, if medical reports document a condition which has arisen since the

---

[1] *H. Adrian Osborne*, 48 ECAB 556 (1997).

[2] 5 U.S.C. § 8106(2).

[3] *Henry W. Sheperd, III*, 48 ECAB 382 (1997); *Patrick A. Santucci*, 40 ECAB 151 (1988).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Les Rich*, 54 ECAB ____ (Docket No. 01-1995, issued January 2, 2003).

[6] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[7] *Les Rich*, *supra note* 5.

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

[9] *See John E. Lemker*, 45 ECAB 258 (1995); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[10] *Gloria J. Godfrey*, *supra* note 6.

compensable injury and the condition disabled the employee, the job will be considered unsuitable.[11] Lastly, if the employee is required to move to a certain area, isolated or otherwise, because of health conditions which were caused by the injury or which predated it, the issue of availability must be considered with respect to the new area of residence.[12] 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.[13]

The Office's Federal (FECA) Procedure Manual provides that, among other requirements, the job offer from the employing establishment to appellant must be in writing and must indicate the date that the job is available.[14] The Office must then advise appellant of the job offer in writing. If the Office does not provide the start date for the job in its letter to appellant, the start date is the date the employing establishment indicated that the job would be available.[15] The Office, however, must indicate in its letter to appellant that the job is still available.[16]

In its May 9, 2002 letter in which it offered appellant the job of registered nurse, the employing establishment stated that the job was available as of June 2, 2002. In the undated letter received by the Office on May 15, 2002, the employing establishment reiterated that the job was available on June 2, 2002 and would continue to be available. In its letter dated May 10, 2002 advising appellant of the job offer, the Office stated that the job was still available and gave appellant 30 days to respond to the job offer. The employing establishment and the Office therefore complied with the procedural requirements of providing appellant the date the job became available which was June 2, 2002. Appellant responded to the job offer on May 16, 2002. On May 21, the Office found appellant's reasons for objecting to the job offer were not acceptable and gave appellant 15 days to respond. On May 30 appellant responded and asked for a start date on July 10. Appellant did not report to work on June 2, 2002.

In terminating benefits on June 5, 2002, the Office found that none of the reasons appellant gave for refusing the offer of suitable work, *i.e.*, that her physical condition had worsened, she needed time to complete the rehabilitation program and to sell her house, and Dr. Geibel had not released her to full-time employment, were valid. Further, the Office found that the job of a staff nurse was suitable because it was within Dr. Durairaj's August 28, 2001 restrictions which included not lifting more than 20 pounds. The Office stated that Dr. Geibel

[11] *Id*.

[12] *Id*.; *see Edward J. Stabell*, 49 ECAB 566 (1998).

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

[14] Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment*, Offer of Employment, Chapter 2.814.4.a(1)(d)(December 1993).

[15] *See Les Rich*, *supra* note 5.

[16] Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment*, Offer of Employment, Chapter 2.814.4.c(2)(December 1993).

did not respond to its September 5, 2001 letter requesting his opinion on whether appellant could perform the offered job of staff nurse.

The Board finds that appellant's reasons for refusing suitable work met none of the criteria in the regulations. Appellant did not present medical evidence showing that her physical condition had changed, that the move would be harmful to her health, or the new location would be unhealthy for her. Appellant's rehabilitation program was not relevant if appellant had the current capacity to perform the job. The time appellant needed to sell her home was not a valid reason for refusing the job offer.[17] The recent medical evidence in the record at the time of the job offer consisted of Dr. Durairaj's opinion which established that appellant could perform the staff nurse position. His opinion justifies the Office's termination of benefits. Moreover, by providing appellant the opportunity to respond to the job offer within 30 days on May 9, and within 15 days on May 21, the Office complied with the procedural requirements of *Maggie L. Moore*[18] to provide appellant with a reasonable amount of time to either accept or reject the offer of suitable employment.

The decision of the Office of Workers' Compensation dated June 5, 2002 terminating compensation benefits is hereby affirmed.[19]

Dated, Washington, DC
May 18, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*, Chapter 2.814.5(a) and (c) (July 1997).

[18] 42 ECAB 484 (1991).

[19] The hearing representative's decision also remanded the case for further development. That aspect of the case is in an interlocutory posture and the Board therefore does not address it in this decision.