U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNN A. EANNONE and U.S. POSTAL SERVICE,
BOUND BROOK POST OFFICE, Bound Brook, NJ

Docket No. 02-333; Submitted on the Record;
Issued July 3, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused to work after suitable work was procured for her.

Appellant, a 49-year-old letter carrier, filed a notice of traumatic injury on January 18, 1989 alleging that she injured her low back and right leg in the performance of duty. The Office accepted her claim for intervertebral disc syndrome and entered her on the periodic rolls. Appellant returned to work on October 25, 1989 in a light-duty position working four hours a day. She filed a notice of recurrence of disability on November 14, 1989 alleging that on that date she sustained a recurrence of disability causally related to her January 1989 employment injury. The Office accepted this claim. Appellant returned to light-duty work on May 22, 1991. She filed a claim for recurrence of disability on November 27, 1991. Appellant did not return to work.

In a letter dated July 19, 2000, the Office informed appellant that the employing establishment had offered a suitable work position and allowed her 30 days to accept the position or offer her reasons for refusal. Appellant rejected the position on August 16, 2000. On August 22, 2000 the Office informed her that her reasons for refusing the position were not acceptable and allowed additional time to accept the position. Appellant accepted the light-duty position on August 31, 2000. She returned to work on September 23, 2000. Appellant stopped work on September 25, 2000. By letter dated October 10, 2000, the Office proposed to terminate her compensation benefits as she refused to work after suitable employment was provided. The Office terminated appellant's compensation benefits effective September 25, 2000. She requested an oral hearing. By decision dated August 7, 2001, the hearing representative affirmed the Office's November 14, 2000 decision.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective September 25, 2000.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant neglected to work after suitable work was secured for her. Section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulations[3] 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

In this case, appellant's attending physician, Dr. Norman Glassner, a Board-certified orthopedic surgeon, found that appellant was totally disabled due to degenerative disc disease with right sciatica and a probable herniated disc at L4-5. The Office referred appellant for a second opinion evaluation with Dr. Phillip K. Keats, a Board-certified orthopedic surgeon. In a report dated October 29, 1999, he noted appellant's history of injury and performed a physical examination. Dr. Keats diagnosed a herniated disc based on magnetic resonance imaging (MRI) scan and stated that appellant could not return to her date-of-injury position. He recommended light duty with no lifting pushing or pulling over 15 pounds. Dr. Keats also restricted appellant's repetitive walking, standing, stooping, climbing, pushing and pulling.

Following the October 29, 1999 report, the Office provided Dr. Keats with a surveillance videotape from postal inspectors which demonstrated appellant's golf swing. On November 4, 1999 he noted reviewing the videotape and stated, "[t]he activities which I have seen on the videotape are inconsistent with the purported herniated disc in the lumbar spine and with limitations of daily living which [appellant] had expressed at the time of my examination. The visualized activities on the videotape are inconsistent with the findings on physical examination as well." He recommended a repeat MRI scan on January 5, 2000. In a June 2, 2000 report, Dr. Keats reviewed the MRI scan which demonstrated a small to moderate left posterolateral herniated disc at L4-5 which appears to be contacting the left L5 nerve root. He repeated his earlier restrictions and stated that appellant had a mild disability from an orthopedic standpoint. Dr. Keats found that she did not require any further treatment or medical equipment.

The employing establishment provided appellant with a light-duty job offer for eight hours a day within the restrictions offered by Dr. Keats.

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.517(a).

[4] *Arthur C. Reck*, 47 ECAB 339, 341-342 (1995).

Dr. Glassner submitted a report dated August 1, 2000 and stated that appellant was required to drive 150 miles round trip to the employing establishment which in concert with the pushing, pulling and standing type of activities would cause her a severe increase in her symptoms and would not be possible for her. He stated, "[i]t would be worth an attempt at getting her back to work if she was limited to between 5 [to] 10 miles one way driving, no pushing more than a few minutes a day for very extreme circumstances, mostly a sitting job that did not require prolonged standing or walking; certainly if this was, it would be a very short period of time."

Under the Office's procedures, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[5] Dr. Glassner indicated that appellant would encounter difficulty in driving 150 miles roundtrip due to her employment-related back condition. He offered the opinion that appellant could return to work with additional restrictions on driving and pushing. This report supports appellant's inability to perform the offered position due to her driving restriction. The Office did not undertake further development of the medical evidence by asking Dr. Keats to address the issue of appellant's ability to drive 150 miles round trip in addition to her eight-hour workday. The Office, therefore, did not have an appropriate basis on which to terminate appellant's compensation benefits for refusing to continue to work.[6]

As the Office has not established that appellant could perform the duties of the offered position in addition to the 150 mile commute to the position, the Office failed to meet its burden of proof in establishing that the position was suitable such that appellant refused to work in a suitable work position.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996).

[6] *Donna M. Stroud*, 51 ECAB ___ (Docket No. 98-476, issued January 5, 2000).

The August 7, 2001 and November 14, 2000 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
July 3, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member