U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNA M. CONOM and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEATTLE DISTRICT OFFICE, Seattle, Wash.

Docket No. 96-1383; Submitted on the Record;
Issued June 24, 1998

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 terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) effective September 1, 1994, due to her refusal to accept suitable work.

On February 27, 1987 the Office accepted that appellant sustained aggravation of pre-existing allergic conditions and a depressive reaction due to this illness as a result of her federal employment. A temporary recurrence of disability was accepted on December 28, 1988. Rehabilitation efforts were undertaken beginning July 7, 1989 and continuing through February 3, 1994. On April 5, 1993 appellant suggested to her rehabilitation counselor that a computer based home business would be appropriate for her. Appellant's request for an Office of Personnel Management (OPM) disability retirement was approved effective December 30, 1989, but she later rescinded her request, reinstated her request, rescinded it again and reinstated it again and is currently receiving OPM benefits.

On May 5, 1993 a flexiplace position, in which a computer and modem installed in her home, home training and courier delivery of assignments, was proposed for appellant, in line with her April 5, 1993 request for a computer based home business.

By letter dated March 2, 1994,a formal position as an investigative support assistant/data entry clerk (workplace in home) with appellant's previous employer was offered to her. The offer noted that appellant would not be required to come into the office nor would it require her to conduct on-site visits. The job offer indicated that a personal computer, a modem, a telephone line, a printer and appropriate software were to be provided and installed in appellant's home. Training was to be provided at her home on the use of the equipment, her work was to be governed by the provisions of a flexible workplace agreement and her hours were to be governed by the collective bargaining agreement.

On March 15, 1994 appellant declined the job offer claiming that she had little aptitude and less skill in clerical tasks and that she recently had torn a ligament in her right hand and was presently able to use only her left hand on a keyboard. Appellant also claimed that prior to her receipt of the job offer she had requested removal from the Office compensation rolls and accepted OPM disability retirement. Appellant alleged that years of an adversarial relationship between herself and EEOC precluded a successful working relationship and claimed that she could not stand the reinstatement of previously endured stress.

On March 22, 1994 appellant's treating psychologist, Dr. Eileen R. McCarty, stated that appellant experienced significant fear with regard to returning to work with the employing establishment, even though the position offered was at her own home. Dr. McCarty noted that appellant was anxious and depressed, that she had difficulty with cognitive organization, that when she felt poorly she was less able to perform, that if appellant was expected to meet deadlines or to produce a certain amount of work, she would feel stressed and become hysterical, that this stress was counter-productive and that appellant would not be able to function in a productive way in any position offered by the employing establishment. Dr. McCarty had previously reported that appellant feared antidepressant drugs, that she had a negative attitude and feelings of despair, that changes were stressful and created more work, that appellant's self-esteem was undermined by changing employing establishment department directions and that appellant was always a moody person. She further noted that appellant was depressed about her medical problems, that she was terrified by the thought of unemployment, but that she did not like the idea of working at home due to limited social contact. Dr. McCarty indicated that appellant was terrified that she might not ever feel well and that she became angry with the ineffectiveness of counseling. Dr. McCarty stated that appellant had an hysterical emotional response to automobile exhaust, perfume, cigarette smoke, (even though she was a 20-year smoker who quit) new carpeting, new paint and recycled air. Dr. McCarty noted that appellant was frustrated that "no one can produce a verifiably safe environment, in which to work." A home program was recommended. On March 4, 1993 Dr. McCarty had noted that appellant's mental and emotional status had not improved, that she still had a troubled life, that she was depressed, that anti-depressants left her feeling out-of-control, that she was emotionally disorganized, that she reacted to a variety of smells with increased hysteria and decreased ability to function cognitively, that her inability to do work assignments increased her fear and that she felt she was not given adequate consideration. Dr. McCarty stated that appellant experienced significant fear with regard to returning to work with the employing establishment, even though work was at her home and that appellant felt that she was being targeted.

On May 18, 1994 the Office referred appellant to a panel consisting of a Board-certified orthopedist, a Board-certified psychiatrist and a Board-certified allergist, for a second opinion as to whether she could perform the job of data entry clerk at her home.

By report dated July 15, 1994, Drs. Chaplin, the orthopedist, Kennedy, the allergist and Hamm, the psychiatrist, responded to the Office's request. The panel of physicians reviewed appellant's factual history, her medical history and her present complaints and they performed a physical examination. Dr. David M. Chaplin addressed appellant's September 1992 hand injury, which occurred six years after her accepted employment conditions during a fall at her home and, which he diagnosed as a "strain and probable rupture of the radial collateral ligament of the

metacarpophalangeal joint of the right thumb," opined that appellant was able to resume employment on a reasonably continuous basis and opined that appellant should be able to perform the position of data entry clerk from her home. The panel specifically noted that appellant's "right thumb is able to participate and fully perform the duties mentioned." Dr. Michael S. Kennedy opined that her asthma and allergies were under control and that she could perform the job of data entry clerk in her home. Dr. John E. Hamm noted that the Office accepted the diagnosis of depressive reaction only due to reactions as residuals of her March 17, 1985 temporary aggravation of a pre-existing allergic condition. Dr. Hamm opined that appellant had no objective evidence that she experienced any permanent cognitive impairment resulting from an employing establishment toxic exposure, that she was chronically depressed, but that there was no objective evidence that her clinical depression resulted from her employing establishment employment. He offered no specific restrictions, opined that appellant was capable of resuming employment on a reasonably continuous basis and opined that there was no reason from a psychiatric standpoint that appellant could not perform the job of data entry clerk from her home. He also recommended psychopharmacologic treatment for her depression.

Effective September 1, 1994, as per her most recent request, appellant was restored to the OPM annuity rolls for receipt of disability retirement.

In a September 1, 1994 response to the medical panel's report, appellant claimed that the physicians misinterpreted her comments or provided deliberate fictions or had poor listening skills. She claimed that before leaving the employing establishment, her employer harassed her, that she was not offered work at home until she told them she was no longer emotionally equipped to deal with them, that computer work made her 1992 "fracture and torn ligament" feel worse, that her 1992 injury from a fall at home affected her thumb and wrist, that no one measured her degree of mobility in her right hand and that she takes quite a bit of narcotic-containing cough syrup and might end up at the Betty Ford Clinic. Appellant claimed that Dr. Kennedy knew she was taking antihistamines yet wanted her to take allergy skin tests, that no one listed all of her allergies, that as a clerk she could barely type, but that she would "love to resume the ability to type with two hands." She claimed that Dr. Chaplin's idea was obviously not realistic, but that she felt she could work if she could find a job that fit her restrictions and that she would love the proposed job if her hand was repaired, if she could just use her left hand and if the prospective employer were not the one that had consistently harassed her and lied to her for seven years. Appellant further alleged that her migraine headaches and obesity were aggravated by stresses on the job, that one of her "covered conditions" was "reactive depression to job stress," that a supervisor copied "OWCP confidential medical reports" and shared then at a supervisory meeting and that she was over-supervised. She claimed that she was deliberately denied medical accommodations, that her personal life was no concern of the government, that Dr. Hamm did not adequately test her and that her depression came as a result of her employment and dealing with the "system." Appellant did state, however, that her mother's family had trouble with depression. Appellant opined that she was physically and mentally incapable of performing the home workplace job offered her and she submitted an October 3, 1994 medical report from Dr. Alfred I. Blue, a Board-certified reconstructive hand surgeon, which diagnosed "an injury to the carpometacarpal joint volar or retaining ligament," but which indicated that surgery was not indicated. Dr. Blue opined that appellant would be better not

using the hand for repetitive motion as in using a computer or for word processing, but that occasional use should not be a problem.

On October 20, 1994 Dr. McCarty opined that appellant's depression was moderate to severe, that there was a negative quality to her depression, which was expressed in self-criticism and that this quality exacerbated her hysterical personality reaction so that she panicked. Dr. McCarty opined that psychotherapy had not helped appellant, that she did not believe appellant could be successfully employed and that appellant's own hysteroid reaction to a specific task was likely to sabotage her productivity.

On November 1, 1994 the rehabilitation counselor considered all of the medical evidence and opined that appellant was capable of performing the position of data entry clerk in her home.

By letter dated November 30, 1994, the Office advised appellant that the medical panel had found that the offered work-at-home job was appropriate to her condition, that the job was, therefore, considered by the Office to be suitable, that it remained available, that she could still accept it, that she had 30 days in which to make a decision or to explain why she was refusing the job and that she would not be entitled to further compensation if she failed to accept it. The Office explained that, were she receiving compensation, she would remain entitled for the period and that if she accepted the position and received less pay than her date of injury position, compensation would be paid for the difference.

By letter dated December 7, 1994, delivered in person to the Office appellant repeated her

objections to the job offer, criticized the Office's wording, stated that her physicians indicated that the job might worsen her conditions, stated that she was not in a position to be dropped from OPM disability retirement rolls, criticized the second opinion physicians and claimed that she wanted to spend the winter months in a warmer climate. The Office advised appellant that her reasons for refusal were not acceptable under the FECA and that she still had 30 days in which to accept the position. Appellant did not accept the offered position.

By decision dated March 29, 1995, the Office terminated appellant's entitlement to monetary compensation benefits finding that she refused an offer of suitable work. The Office found that the second opinion medical panel's report constituted the weight of the medical evidence as they were all Board-certified and as the report was well rationalized and it found that the offered position was indeed suitable.

The Board finds that this case must be reversed.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits and this includes cases in which the Office terminates compensation under section 8106(c) of the FECA for refusing to accept suitable work.[1]

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

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[2] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3] To justify termination, the Office must show that the work offered was suitable and must inform the appellant of the consequences of refusal to accept such employment.[4] In the instant case the Office properly and conclusively demonstrated by the weight of the medical evidence that the offered position was suitable for appellant's accepted temporary aggravation of pre-existing allergies condition and for her depressive reaction to the accepted allergies aggravation, but not for her subsequently sustained right thumb injury.

The medical evidence of record supports that appellant's allergies and asthma were under control after her removal from the employing establishment environment and she has not submitted any probative evidence supporting that working at home would reaggravate these conditions. Consequently, the second opinion evidence from the medical panel constitutes the weight of the medical opinion evidence on the allergies issue.

The psychiatric evidence of record also supports that her depressive reaction to aggravation of her allergic conditions was no longer a problem, since the temporary aggravation of these allergies was under control. The Board finds that the opinion of Dr. Hamm constitutes the weight of the psychiatric evidence as he is Board-certified in psychiatry and based his well-rationalized opinion on an accurate factual and medical history. The Board finds that the opinions of Dr. McCarty are of diminished probative value as she demonstrates a belief that appellant's claim had been accepted for a depressive reaction to all facets relating to her federal employment, rather than just for a depressive reaction to her temporary aggravation of her allergies. As Dr. McCarty discusses appellant's depression as being related to appellant's job performance and her fear of inability to perform, to having to meet deadlines, to having to produce a certain amount of work, to fear of anti-depressants, to dealing with program changes, to her anger at ineffective counseling, to her hysteria at smells and to her emotional disorganization, none of which were accepted by the Office as being compensable employment-related factors, her opinion is not based upon an accurate history and is, therefore, of diminished probative value. As Dr. Hamm found that appellant had no evidence of cognitive deficits as a result of a federal employment toxic exposure and that there was no evidence that her underlying clinical depression resulted from her federal employment, his opinion supported that appellant no longer suffered from a depressive reaction to her accepted employment-related temporary allergies aggravation. Dr. Hamm's opinion that appellant was capable of performing the offered work-at-home position, therefore, constitutes the weight of the psychiatric evidence of record and establishes that the offered position was psychiatrically suitable for appellant.

However, the Board finds that there exists a conflict in the Board-certified orthopedic medical opinion evidence between Dr. Chaplin, who found the offered work-at-home position

[2] 5 U.S.C. § 8106(C)(2) (1974).

[3] 20 C.F.R. § 10.124.

[4] *Michael I. Schaffer*, 46 ECAB 845 (1995).

suitable and Dr. Blue, who indicated that he felt that using a computer and/or performing word processing would be incompatible with appellant's orthopedic right thumb condition. As this conflict in medical evidence remains unresolved, the Office has failed to meet its burden to demonstrate that the offered position is completely suitable to appellant's condition and the termination decision must be reversed.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 29, 1995 is hereby reversed.

Dated, Washington, D.C.
June 24, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member