U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCIA L. DOBLE and U.S. POSTAL SERVICE,
POST OFFICE, Chicopee, MA

Docket No. 97-1204; Submitted on the Record;
Issued December 17, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective November 21, 1995, on the grounds that she refused an offer of suitable work.

On June 18, 1991 appellant, a 41-year-old letter carrier, was injured when she slipped and fell from a flight of steps. Appellant stopped work on June 20, 1991 and returned to work on June 27, 1991. She stopped work again on October 19, 1991 and has not returned to work since that date. Appellant filed a claim for benefits on December 2, 1991, which the Office denied by decision dated January 24, 1992. She requested an oral hearing, which was held on August 25, 1992. In support of her request, appellant submitted a June 24, 1992 report from Dr. Michael R. Sorrell, a Board-certified neurosurgeon and appellant's treating physician. He diagnosed reflex sympathetic dystrophy (RSD) and stated:

> "[Appellant] has difficulty carrying more than a few pounds in either arm and also has pain on walking. She has so much discomfort that she cannot sit in one place for more than a few minutes without having to get up to walk around. [Appellant's] medical condition has neither stabilized or is slowly progressive. She has had vigorous treatment to no avail. Her condition may worsen. I have seen not any sign that this condition will improve in the near future. I do not think that she can return to any work. Lifting light objects may provoke discomfort almost immediately. She has pain with walking. [Appellant] might be able to sit at [a] typewriter but a few minutes at a time but I could not guarantee any reliability to her services.... We have encouraged her to be as active as possible. Certainly returning to a work situation would be good for her psyche but the environment would have to be so nonstructured, that she could take many hours at a time away from her work if she had a recurrence of her discomfort."

Appellant also submitted an October 2, 1992 report from Dr. Robert L. Knobler, a Board-certified neurosurgeon, who corroborated Dr. Sorrell's diagnosis of RSD and also diagnosed thoracic outlet syndrome on the left, which appellant sustained as a direct result of the June 18, 1991 employment injury.

By decision dated December 5, 1992, the Office accepted appellant's RSD and thoracic outlet syndrome claims. Appellant was placed on the periodic roll and received compensation for the appropriate periods.

In a work restriction evaluation dated October 29, 1993, Dr. Sorrell indicated that appellant could perform limited duty from one to three hours and specifically restricted appellant to no more than three hours of continuous sitting, standing for up to one hour, intermittent walking for one hour, intermittent lifting of up to ten pounds for one hour, intermittent bending for one hour, with no squatting, climbing, kneeling or twisting. Dr. Sorrell also restricted appellant from simple grasping, pulling and pushing and fine manipulation with her hands.

In order to determine appellant's current ability to perform a limited-duty job, the Office scheduled a second opinion examination for appellant with Dr. Richard L. Levy, a Board-certified orthopedic surgeon, for June 23, 1994. In a report issued the date of the examination, Dr. Levy stated:

> "Based on [appellant's] history and thermographic analysis the diagnosis of RSD appears reasonable. She does have coldness of the hands even on a hot day and a tremor of the outstretched hands, again compatible with the diagnosis of RSD. This problem does appear to be causally related to her injury of June 18, 1991. It curtailed her ability to work as of [October 19, 1991]. It is not possible to say how a relatively mild injury evolves to such a debilitating problem. RSD is indeed a very mysterious illness and criteria for diagnosis are always changing. In the end RSD often remains a clinical diagnosis based on observation and history.… The residual of her injury is the chronic pain condition and mild movement disorder. From an objective standpoint and certainly by her history, [appellant] does have a work capacity. She is functioning at home at least at a sedentary or light capacity is in that range."

In work restriction evaluation forms dated June 23 and July 12, 1994, Dr. Levy indicated that appellant was currently capable of working an eight-hour day, with intermittent sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting and standing. He also advised that appellant should be restricted from lifting no more than 10 pounds. Dr. Levy stated that appellant could perform repetitive motions of the wrist, but recommended that she avoid repetitive activity.

The Office determined that a conflict existed in the medical evidence between the opinion of Dr. Sorrell and the opinion of Dr. Levy as to the nature and extent of appellant's

disability, and referred appellant for a medical examination with Dr. Bruce R. Myers, Board-certified in physical medicine and rehabilitation, pursuant to section 8123(a).[1]

Dr. Myers' examination of appellant took place on September 28, 1994 and he issued a report on the date of the examination. Dr. Myers, after reviewing the statement of accepted facts and appellant's medical records, concluded that appellant had mild chronic pain syndrome secondary to RSD with persistent sympathetically mediated. He stated:

> "Regarding her work capacity. In general, I am in agreement with Dr. Levy's report that she indeed has a work capacity, although her physical condition seems to vary from day to day and week to week thus varying her work capacity. The most optimal situation for her to be in would be self-employed so that she could change positions as frequently as possible and as necessary, work full days on good days and partial days on her more symptomatic days. Obviously, this is not necessarily always an option. For defining physical capacity for this case, it would appear that she will be able to work full days at times, part-time other days, and therefore an average six[-]hour workday is likely to be her average work capacity. This would involve primarily sedentary to light activities involving varied positions such as sitting, walking, and dynamic standing with minimal lifting, squatting, kneeling and twisting. I do not feel that she should be climbing or working above shoulder height considering the above findings. She can operate a motor vehicle up to two hours a day but [I] would not recommend two hours to be concurrent."

In a work capacity evaluation form dated September 29, 1994, Dr. Myers stated that appellant should avoid repetitive, fine motor activities such as simple grasping and pinching/gripping activities. He indicated that appellant could work short-term at repetitive motion activities for the wrist and elbow; he cautioned, however, that these activities should be limited to short-term periods, should not be done on a regular schedule, only occasionally and for no longer than 15 to 20 minutes at a time. Dr. Myers advised that appellant could work an eight-hour day provided she was restricted from prolonged sitting. He indicated appellant should vary work tasks, avoid climbing and lifting at shoulder height and advised that she could kneel, squat, bend, twist and lift occasionally. Dr. Myers also indicated that appellant could drive 2 hours per day, but not concurrently, for only 1 hour at a time and could lift up to 10 pounds on occasions. Dr. Myers recommended that appellant stand in a static position for no longer than 20 minutes, in a dynamic position for no longer than 30 to 40 minutes, engage in walking for no longer than 30 minutes and engage in sitting for no longer than 60 minutes, with breaks. He concluded that appellant would reach maximum medical improvement in June 1994.

By letter dated August 1, 1995, the employing establishment offered appellant a limited-duty job as a photocopier based on the restrictions outlined by Dr. Myers. The Office indicated that the job remained open and that she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would

[1] 5 U.S.C. § 8123(a).

terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).[2] Attached to the letter was a description of the limited job. It stated:

> "Hours of duty: 11:00AM to 5:00PM.
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> "Duties: This operation consists of first class and third class letters and flats that have endorsements, 'address correction requested' and 'forwarding and address correction requested.'
>
> "The CFS clerk shall make copies of the mail piece and forward copies to the mailer, giving the mailee's old address and new address so the mailer can update their mailing lists. A charge of 35 cents per copy will be collected at delivery. After copying, all first class mail pieces are put back into the mail-stream and delivered to the mailee's new address.
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> "Third class pieces with endorsement 'address correction requested' are copied and the mail piece is then thrown away. Third class pieces with endorsement 'forwarding and address correction' are copied and mail piece is forwarded.
>
> "Physical requirements of the [p]osition:
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> "You will not be required to lift any mail or objects that weigh more than 10 pounds, no more than three or four times per hour. You will be limited to bending and twisting. You can walk two hours per day, sit two hours per day and stand two hours per day, these physical requirements are intermittent."

In an August 23, 1995 letter to the Office and to the employing establishment, appellant's attorney rejected the Office's limited-duty job offer. Counsel asserted that he had investigated the proposed job and discerned that it involved repetitive tasks which contraindicated the restrictions imposed by Dr. Myers. Counsel asserted that the job merely involved standing at a copy machine, picking up individual pieces to be copied, placing them on the copier and then repeating this process with the next item. Thus, he concluded, the job consisted entirely of repetitive fine motor tasks, gripping, grasping and pinching with the hand and fingers and repetitive motions of the wrist and elbow, all of which were specifically contraindicated by Dr. Myers. Appellant's attorney therefore contended that the job offer was unsuitable because it was incompatible with her current physical capabilities and did not comply with Dr. Myers' restrictions.

By letter dated October 6, 1995, the Office advised appellant that, after reviewing the issues raised by her attorney in his August 23, 1995 letter, it had concluded that the job was still suitable. The Office gave appellant 15 days from the date of the letter to accept the position and stated that her failure to accept the position would result in her compensation benefits being terminated. Appellant did not report to work within 15 days.

[2] 5 U.S.C. § 8106(c)(2).

Appellant subsequently submitted an October 13, 1995 report from Dr. Alyssa A. LeBel, Board-certified in psychiatry and appellant's new treating physician, who stated:

> "[Appellant] had severe nerve damage in her upper extremities, bilaterally and symptoms of burning pain, swelling, erythma and coolness, which is markedly exacerbated by repetitive movement, even with the use of light-weight material. A photocopying job is, by description, a repetitive movement using the upper extremities and will clearly exacerbate [appellant's] pain and disability.... I would strongly request that [appellant] not be asked to take this current job offer."

By decision dated November 21, 1995, the Office found that appellant was not entitled to compensation for wage loss claimed after that date on the grounds that she had refused to accept a suitable job offer pursuant to 5 U.S.C. § 8106(c)(2).

By letter dated November 29, 1995, appellant's attorney requested a hearing, which was held on August 22, 1996.

At the hearing, appellant testified that she did not accept the employing establishment's offer of a limited-duty photocopying position because Dr. LeBel advised her to reject it based on her impression that the job was repetitive. She stated that the job description did not indicate or explain whether any kind of modifications or flexibility would be allowed. Appellant further testified that neither Dr. LeBel nor Dr. Myers had reviewed the job and rendered a specific opinion as to whether it was suitable and within her restrictions. With regard to performing the task of photocopying, appellant stated that, after making a few copies, she would immediately experience burning pain in her arms and then lose feeling in her fingers. Appellant asserted that she would be unable to move her fingers and grasp the papers and that she would experience numbness and tingling in her hands, arms, shoulders and neck, moving into her face and causing her to black out, at which time she would have to discontinue the job entirely.

Daniel Ringuette, the employing establishment's human resources specialist, also testified at the hearing. He stated that, with regard to the limited-duty job offered to appellant, that "there [i]s copying involved and I think we determined at the time that you did n[o]t have to close the cover of the copying machine. You could sit or stand or lean. You would put the copy down … but … [w]hen you were tired or something bothered you, you would just stop." Mr. Ringuette stated that there was a chair placed in the area because there was a choice of standing, leaning with the lean bar or sitting. He also stated that appellant would be allowed to take a break and sit down in the event she began to experience pain in her hands and would not be required to perform tasks exceeding her physical capabilities, unlike the regular employees without limitations. When queried by appellant's attorney as to how the employing establishment would respond in the event appellant was rendered unable to perform the photocopying job because it involved repetitive activity, Mr. Ringuette replied: "... there [i]s answering the phone, or engaging in other light tasks to accommodate her, with no pressure applied to any of our limited-duty or rehabilitational employees.… Again, if somebody came in, made a few photos and there was a problem, maybe they had a bad day or a bad night – there [i]s no problem with the employee sitting there, or standing or walking, whatever -- whatever she feels -- whatever the employee feels better about."

Subsequent to the hearing, appellant's attorney submitted an August 25, 1996 deposition and an April 16, 1996 report from Dr. LeBel. In her report, Dr. LeBel stated that "at the present time, her pain involves all extremities, but still most prominently involves the left upper extremity. Her symptoms are those consistent with severe nerve damage in her upper extremities bilaterally, with burning pain, swelling, erythma and coolness, all markedly exacerbated by repetitive movements and carrying even light-weight material." Dr. LeBel further stated:

> "On her most recent examination in February 1996, [appellant] had muscle weakness in all extremities, most prominent in the left upper extremity, with allodynia and hyperesthesia present in a patchy distribution in the right upper extremity and bilateral lower extremities and throughout the left upper extremity. She has mild atrophy of the left upper extremity with dusky discoloration and coolness. Her pain was easily elicited with movement of her fingers, wrist and elbows.
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> "At present, [appellant] is being considered for work at the [employing establishment], which is defined as a photocopying job. Specifically, this work involves standing or sitting at the copier, handling envelopes, brochures, fliers and magazines and operating all aspects of the photocopier. More specifically, the job requires that [appellant] perform copying functions with her hands and arms, including removing the item to be copied from a bin or pile, placing the item down in the copier, opening and closing the lid of the copier, removing the copied item and the photocopy from the machine and returning the copied item and the photocopy from the machine and returning the copied item and the photocopy to the appropriate receptacles. Clearly, this work involves repetitive fine and gross motor movements of the upper extremities and would exacerbate [appellant's] symptoms. The patient's prognosis for recovery is poor.
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> "As well, the job that is currently offered would require a move on [appellant's] part back to the western Massachusetts area, away from very important physical therapy and from her regular medical follow-up in the Boston area. At this time, it is medically contraindicated for [appellant] to participate in such a job and to compromise her medical therapy."

By decision dated November 14, 1996, an Office hearing representative affirmed the Office's November 21, 1995 termination decision. The hearing representative stated that, in finding the position suitable, the Office had relied on two Board-certified specialists, Drs. Levy and Myers, both of whom opined appellant could work at least six hours a day in a job that would be sedentary in nature and would not require repetitive motion of the hands and arms. The hearing representative found that the job selected for appellant met the criteria described by these physicians because it required very little in the ways of lifting or carrying and, according to Mr. Ringuette's testimony, would allow her to rest as needed and perform only as much work as she was able to do. The hearing representative further stated that he did not consider credible her complaints of constant pain. He noted appellant's testimony that she was able to take care of her personal needs and prepare her own meals and stated that the work involved in the job she was being offered was no more strenuous than her daily activities. The hearing representative

therefore affirmed the Office's previous finding that appellant had refused an offer of suitable employment.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before a determination is made with respect to termination of entitlement to compensation.[5] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. In this regard, the Office reviewed the employing establishment's offer to appellant of a part-time photocopier, reviewed the medical evidence of record which indicated that appellant should avoid repetitive work and found the position suitable to appellant's restrictions. Dr. Myers, indicated that appellant could apparently work full days at times and part time other days and with a likely average work capacity of six hours per day. He advised that appellant could work at primarily sedentary to light activities involving varied positions such as sitting, walking, and dynamic standing with minimal lifting, squatting, kneeling and twisting. In his work capacity evaluation, Dr. Myers specifically prohibited appellant from repetitive, fine motor activities such as simple grasping and pinching/gripping activities. He indicated that appellant could work short-term at repetitive motion activities for the wrist and elbow, but stated that these activities should be limited to short-term periods and should not be done on a regular schedule -- only on occasion -- and for no longer than 15 to 20 minutes at a time. Dr. Myers advised that appellant should vary work tasks, avoid climbing and lifting at shoulder height and advised that she could kneel, squat, bend, twist and lift occasionally. He, however, did not specifically approve the employing establishment's photocopying position, which, according to the job description, involves only one type of work, photocopying, which is repetitive by its very nature and requires appellant to engage in the fine motor activities from

[3] 5 U.S.C. §§ 8101-8193.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[5] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

which she was restricted, such as simple grasping and pinching/gripping activities. Dr. Myers had permitted appellant to engage in repetitive tasks for the wrist and elbow, but only for occasional, irregular or short-term periods. Further, although Mr. Ringuette testified at the hearing that the position was compatible with Dr. Myers' restrictions and that appellant would not be forced to perform activities beyond her capacities and Dr. Myers' restrictions, 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 the medical evidence.[7] Mr. Ringuette is not a physician and he failed to ascertain whether any alternate tasks would be made available to appellant in the event she became physically unable to perform her photocopying duties.

Finally, subsequent to the November 21, 1995 termination decision, appellant submitted Dr. LeBel's April 16, 1996 report, which contains probative, rationalized medical evidence that the symptoms from appellant's RSD condition would be exacerbated by the repetitive movements involved in the photocopying position. Dr. LeBel stated that the job required that appellant "perform copying functions with her hands and arms, including removing the item to be copied from a bin or pile, placing the item down in the copier, opening and closing the lid of the copier, removing the copied item and the photocopy from the machine and returning the copied item and the photocopy from the machine and returning the copied item and the photocopy to the appropriate receptacles. Clearly, this work involves repetitive fine and gross motor movements of the upper extremities and would exacerbate [appellant's] symptoms."[8]

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[9] A review of the above evidence indicates that there is not substantial medical evidence to support a finding that the offered position was within appellant's physical limitations. Although Dr. Myers advised in his report that appellant should avoid repetitive work, the employing establishment selected a position whose duties apparently were comprised entirely of repeatedly taking items and placing them on the photocopier, an activity which is repetitive by nature. Once appellant raised the issue of whether the photocopying job was too repetitive, thereby conflicting with the restrictions imposed by Dr. Myers, the Office did not submit any medical opinion or factual evidence indicating that the

[7] *Robert Dickinson*, 46 ECAB 1002 (1995).

[8] This opinion, contrary to the hearing representative's finding in the Office's November 14, 1996 decision, does not constitute an idle fear of exacerbating a work-related condition. The Board has held that an employee's fear that a proposed job would aggravate her physical condition is of no probative value and in the absence of supporting medical evidence, will not be deemed a reasonable or justifiable grounds for refusing suitable work where the medical evidence of record indicates that the position offered is consistent with appellant's physical limitations; *see Edward P. Carroll*, 44 ECAB 331 (1992). In this case, however, appellant submitted a probative, rationalized medical opinion from Dr. LeBel which specifically indicated that the activities outlined in the job description would exacerbate her RSD condition because they exceeded her physical abilities and restrictions, as stated and accepted by the Office.

[9] The Board notes that appellant's counsel contended below and in his appeal to the Board that appellant would be additionally unable to accept the limited-duty job offer because she had moved to Massachusetts. The Board rejects this contention, as relocation does not constitute a valid reason for refusing a position; *see Arthur C. Reck*, 47 ECAB 339 (1996).

position involved alternate tasks which would diversify appellant's duties and prevent appellant from engaging in activities contrary to Dr. Myers' restrictions. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case.[10]

The decision of the Office of Workers' Compensation Programs dated November 14, 1996 is hereby reversed.

Date, Washington, D.C.

Dated, Washington, D.C.
December 17, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[10] *Barbara R. Bryant*, 47 ECAB 715 (1996).