U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDA J. LAWDINS and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 97-2611; Submitted on the Record;
Issued February 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work; (2) whether the Office properly terminated appellant's medical benefits related to her accepted emotional condition; and (3) whether the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On September 8, 1982 appellant, then a 46-year-old mail clerk, was injured at work when a box containing encyclopedias was dropped on her left foot. Appellant was put in a short leg cast for about six weeks. She returned to light duty on October 4, 1982. The Office accepted the claim for a left foot contusion, aggravation to an underlying foot condition, cervical and lumbar strain.[1] Appellant subsequently filed a claim alleging a recurrence of disability on August 25, 1994 and has not returned to work since that date.[2]

In order to facilitate her return to work, the Office authorized adjunct care for treatment of an emotional condition sustained by appellant during the same time she was receiving treatment for her foot condition. In a December 1, 1993 report, Dr. Dorothy C. Pettigrew, a Board-certified psychologist, opined that appellant was disabled from work by a chronic psychological disorder causally related to her work injury. Dr. Pettigrew explained in a January 5, 1994 report, that appellant had been under her care since 1984 for major depression, recurrent and post-traumatic stress disorder secondary to a work-related foot injury. She described appellant as having intrusive thoughts of her work accident and noted that appellant

[1] When appellant returned to work in a leg cast she complained of back and neck pain related to having to perform her duties with her leg elevated.

[2] Appellant has undergone six surgical procedures, including an exploration of the navicular joint and bone fragment removal on March 29, 1985, left naviculocuneiform fusion on October 29, 1986, tarsal tunnel release on May 13, 1988, left lateral nail and matrix excision on June 3, 1991, and autologous bone graft, redo staple fixation, exploration and repair of anterior and posterior tibial tendons on January 27, 1993.

believed that her supervisor interfered with her getting expeditious medical care. Dr. Pettigrew stated that appellant feared going back to work because she did not know if she could control her aggressive impulses.

The Office referred appellant to Dr. Karen S. Brown, a Board-certified psychiatrist, for a second opinion evaluation to determine the nature of the relationship between appellant's emotional condition and her work injury. In an April 14, 1994 report, Dr. Brown noted appellant's symptoms, medical and work histories, and reported physical findings. She opined that appellant suffered from chronic depression, which initially may have been work related. Dr. Brown noted, however, that it was "less clear that her continued depressive symptoms [were] unequivocally work related," as appellant had other nonwork-related health problems and personal difficulties. Dr. Brown concluded that it would be in appellant's best interest to return to work as a modified distribution clerk in order to reduce her preoccupation with her pain and to improve her overall level of functioning.

In a report dated June 24, 1994, Dr. John Bishop, a Board-certified orthopedist and appellant's attending physician, advised that appellant had reached maximum medical improvement on March 22, 1994. Dr. Bishop reported that appellant could return to sedentary work for eight hours a day as long as she did not walk or stand for more than one hour per day.

On February 8, 1996 the Office referred appellant for a second opinion evaluation with Dr. Gottfried R. Kaestner, a Board-certified orthopedic surgeon, to determine whether appellant had any work-related disability with respect to her left foot condition, cervical or lumbar conditions. In a February 27, 1996 report, Dr. Kaestner opined that appellant's ongoing symptoms of back pain were consistent with a preexisting, nonwork-related condition of spondylosis at C7-8. He also opined that appellant had no further aggravation of her preexisting back condition related to her work injury. According to Dr. Kaestner, while appellant might experience pain and swelling in her left foot after prolonged periods of walking and standing, she was capable of working an 8-hour shift with only 4 hours of intermittent walking, a 10-pound lifting restriction, and requirements of no lifting, bending, crawling, climbing, kneeling, twisting, pushing/pulling and no driving.

In order to resolve the conflict in the medical record concerning the nature of appellant's emotional condition, the Office referred appellant, along with a copy of the medical record and a statement of accepted facts, to Dr. Theodore Pearlman, a Board-certified psychiatrist, for an impartial examination. In a report dated March 3, 1996, Dr. Pearlman noted that appellant had no clinical evidence of depression, and that there was nothing in her psychological history to suggest that she suffered from post-traumatic stress disorder, particularly given that her work injury was a simple foot contusion within the ordinary human experience and not a catastrophic event. He discussed appellant's medical history and opined that she had Munchausen syndrome, a condition in which the patient contributes to and prolongs the length of disability for the purpose of maintaining the sick role and for secondary gain such as monetary benefits. According to Dr. Pearlman, any threatening behavior that appellant might manifest was the result of her own free will and not an Axis I mental illness. He concluded that if appellant was unable to work it was because of her own free choice and not a medical condition.

The employing establishment subsequently offered appellant a job as modified distribution clerk to be available on July 18, 1996. The job description stated the following duties: "Review passport applications seated in a lobby, receive customer complaints regarding change of address, hold mail, etc. Work record research [letter distribution] with scheme training, CFS mail and accountables."

By letter dated July 23, 1996, the Office advised appellant that the modified distribution clerk position offered by the employing establishment was within her work restrictions and was deemed suitable work. Appellant was advised that she had 30 days from the date of the letter to either accept the position or provide an explanation in writing for her reasons for refusing the job offer. She, however, did not timely respond to the Office's letter.[3]

In a decision dated August 22, 1996, the Office terminated appellant's compensation benefits for wage loss on the grounds that she refused an offer of suitable work.

By letter dated September 18, 1996, appellant requested a review of the written record. Appellant submitted the following items to support her rejection of the job offer: a February 16, 1990 prescription slip from Dr. Bishop recommending orthopedic shoes; a September 29, 1994 report from Dr. Bishop indicating that appellant suffered from a severe arthritic condition involving the mid-tarsal and trasometatarsal joints of her left foot; an August 23, 1996 report from Dr. Calhoun stating that appellant suffered from a herniated nucleus pulposus and was unable to work; and a letter from Jeff Necessary, a physician's assistant, dated October 1, 1996, which stated that appellant was disabled for work by cervical spondylosis at level C6-7, cervical strain and bilateral carpal tunnel syndrome.

Appellant also submitted a report from Dr. Debra Williams, an internist, which was dated October 25, 1996. Dr. Williams noted that appellant was unable to work as she was awaiting surgery for nerve entrapment, tarsal tunnel syndrome.[4]

On September 27, 1996 the Office issued a notice of proposed termination of medical benefits with respect to appellant's emotional condition.

In a decision dated February 13, 1997, an Office hearing representative affirmed the Office's August 22, 1996 decision terminating appellant's wage-loss compensation.

In an April 21, 1997 decision, the Office terminated appellant's medical benefits for her emotional condition.

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[3] On August 27, 1996 the Office received a letter from appellant dated August 21, 1996 which stated that she was physically and mentally unable to return to work, that she was under the care of two physicians for many different ailments and that she might require surgery. She indicated that additional medical evidence was being forwarded to the Office and stated that she was "not refusing anything at this time."

[4] In a February 27, 1997 unsigned outpatient note, a physician's assistant stated that appellant was under the care of Dr. Viegas for carpal tunnel syndrome and Dr. Hadjpavlov for a left cervical disc herniation at C6-7. The note indicated that the diagnosis of carpal tunnel syndrome was made because appellant's symptoms of pain and muscle spasms in her arms did not correlate with the herniated disc. The physician's assistant stated that appellant remained disabled due to neck pain and carpal tunnel syndrome.

The Board finds that the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act[5] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation 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 a showing before entitlement to compensation is terminated.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9]

In the instant case, the employing establishment offered appellant a job as a modified distribution clerk, a sedentary position consistent with the physical restrictions provided by both Drs. Bishop and Kaestner.[10] The Office determined that the position was suitable work and gave appellant 30 days to accept or reject the position. Because appellant did not timely respond to the Office's July 23, 1996 letter of suitability, the Office terminated appellant's compensation benefits by decision dated August 22, 1997 on the grounds that she refused an offer of suitable work.

Subsequent to the termination ruling, the Office received appellant's request for a review of the written record as well as additional medical evidence. Appellant submitted evidence indicating that she was disabled by conditions such as a herniated disc and tarsal tunnel syndrome. She specifically submitted an August 23, 1994 report from Dr. Calhoun which stated that appellant was unable to work as a modified distribution clerk because she suffered from a herniated nucleus pulposus. Likewise, Dr. Williams stated in an October 24, 1996 report that appellant was disabled from work due to nerve root entrapment, tarsal tunnel syndrome for which appellant was awaiting surgery.

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[5] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[6] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

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

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

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

[10] Although Dr. Bishop limited appellant to no more than one hour of walking and standing, while Dr. Kaestner stated that appellant could walk and stand for up to four hours per day, these two medical opinions were not contemporaneous such as to require an independent medical evaluation to resolve the conflict. Because Dr. Bishop's report predates Dr. Kaestner's report by more than one and a half years, Dr. Kaestner's opinion was properly given controlling weight by the Office in determining the suitability of the job position. The Board considers Dr. Kaestner's report to be the most relevant report as to appellant's physical capabilities at the time the job was offered.

Under the Office's procedures pertaining to suitable work, if the file documents a medical condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable, even if the subsequently acquired condition is not work related.[11] Because appellant submitted evidence indicating that she was disabled from accepting the position of a modified distribution clerk due to a herniated nucleus pulposus and tarsal tunnel syndrome, the Office was required to obtain reasoned medical evidence addressing whether or not appellant was disabled from work due to these subsequently acquired conditions. 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.

The Board, however, finds that the Office properly terminated appellant's medical benefits related to her emotional condition.

Section 8103(a) of the Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[12] The Office's obligation to pay for medical treatment under this section extends only to treatment of employment-related conditions and appellant has the burden of establishing that the treatment is for the effects of an employment injury.[13] Payment of medical expenses does not constitute acceptance of a claim.[14]

Because there was a conflict in the medical evidence between appellant's attending psychologist, Dr. Pettigrew, and the Office's second opinion physician, Dr. Brown, as to whether appellant had any continuing residual disability due to her emotional condition, the Office referred appellant for an impartial medical evaluation. Where opposing medical reports of virtually equal weight and rationale exist, and the case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently rationalized and based upon a proper factual background, must be given special weight.[15]

In the present case, the Office authorized treatment for appellant's emotional condition to facilitate a return to work, but the Office did not accept that appellant's emotional condition was causally related to her work injury. The medical evidence of record is also insufficient to establish that appellant's depressive symptoms were related to her work injury.

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[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) provides that "If medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related."

[12] 5 U.S.C. § 8103(a).

[13] *Delores May Pearson*, 343 ECAB 995 (1983); *Zane H. Cassell*, 32 ECAB 1537 (1981).

[14] *Carolyn F. Allen*, 47 ECAB 240 (1995); *Nicolea Bruso*, 33 ECAB 1138 (1982).

[15] *Brady L. Fowler*, 44 ECAB 343 (1992); *Nancy Lackner Elkins* (*Jack D. Lackner*), 44 ECAB 840 (1992).

Because the Office found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Pettigrew, and the Office referral physician, Dr. Brown, as to the etiology of appellant's emotional condition, the Office properly referred appellant for an evaluation with Dr. Pearlman, an impartial medical specialist.[16] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently reasoned upon a proper factual background, must be given special weight.[17]

Dr. Pearlman prepared a well-rationalized opinion, based on a complete review of appellant's medical and work histories, which found that appellant had no evidence of a current work-related psychiatric condition that would prevent him from returning to work or that would require further medical attention. She also stated that appellant's emotional state at the time of his examination was not causally related to the September 8, 1982 work injury or any other employment factors. Thus, inasmuch as Dr. Pearlman's opinion is entitled to special weight, the Board finds that the Office properly decided to terminate authorization for medical treatment of appellant's emotional condition.

The Board also concludes that the Office properly refused to reopen appellant's case for a merit review of the under section 8128(a).[18]

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[19] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[20] When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[21]

Although appellant filed a request for reconsideration on July 21, 1997, her application for review did not show that the Office erroneously applied or interpreted a point of law. Appellant also failed to either raise a substantive legal question or provide any new and relevant evidence. Consequently, as appellant failed to satisfy the requirements of 20 C.F.R. § 10.138(b), the Office properly exercised its discretion in denying appellant's reconsideration request under section 8128.

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[16] Where there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123 (a) of the Act, to resolve the conflict; *see* 5 U.S.C. § 8123(a); *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

[17] *Roger Dingess*, 47 ECAB 123 (1995); *Charles E. Burke*, 47 ECAB 185 (1995).

[18] Inasmuch as the Board has reversed the Office's February 13, 1997 decision, appellant's request for reconsideration is deemed to apply only to the Office's April 21, 1997 decision.

[19] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[20] 20 C.F.R. § 10.138(b)(1).

[21] 20 C.F.R. § 10.138(b)(2).

The decision of the Office of Workers' Compensation Programs dated April 21, 1997 regarding termination of medical benefits is hereby affirmed. The decisions dated February 13, 1997 and August 22, 1996 regarding failure to accept suitable work are hereby reversed.

Dated, Washington, D.C.
February 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member