U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTIE D. FORTE and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Little Rock, AR

Docket No. 99-1728; Submitted on the Record;
Issued October 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

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

On November 23, 1990 appellant, then a 58-year-old food service worker, filed a traumatic injury claim alleging that she was injured when she bumped against a box and fell hard on her left side. The Office accepted the claim on November 18, 1993 for an L4-5 disc protrusion and permanent aggravation of lumbar degenerative disc disease. Appellant stopped work on January 3, 1991 and retired effective February 1991.

In an April 22, 1991 report, Dr. Carol Sue Caruthers, a general practitioner, noted that appellant fell at work and subsequently developed severe low back and left leg pain. Dr. Caruthers reported physical findings, reviewed lumbar spine x-rays, and diagnosed that appellant suffered from degenerative arthritis of the lumbar spine with chronic, post-traumatic low back pain. She stated that appellant's condition was "static due to several factors including underlying arthritis, age and obesity. She recommended that appellant only work on a sedentary basis to avoid further injury.

A magnetic resonance imaging (MRI) scan of the lumbar spine performed on September 23, 1991 revealed a moderate diffuse central disc herniation at L4-5 and mild disc bulge at L3-4 with mild canal stenosis.

Appellant came under the care of Dr. David L. Reding, a Board-certified neurosurgeon, on September 20, 1991. In monthly reports dating from September 1991 through January 1992, Dr. Reding opined that appellant suffered from lumbar disc disease and a left-sided rupture at L4-5 with canal compromise, which he attributed to appellant's work injury.

An MRI of the lumbar spine dated November 8, 1993 showed mild narrowing and disc degenerative at L4-5. A minimal disc bulge without focal herniation was noted at L2-3 and L3-

4. Nerve conduction studies dated November 8, 1993 were also performed and were interpreted as normal.

In a report dated November 10, 1993, Dr. Harold H. Chakales, a Board-certified orthopedic surgeon and Office referral physician, diagnosed that appellant sustained a lumbar disc protrusion at L4-5 that was superimposed on preexisting lumbar degenerative disc disease. He attributed the disc protrusion to appellant's November 23, 1990 work injury. Dr. Chakales opined that appellant was totally disabled due to her back condition. He stated, "From a therapeutic standpoint, I do n[o]t recommend any surgical intervention. I feel her course is stabilized and she basically has reached maximum healing." Dr. Chakales went on to state that appellant's work injury caused a permanent aggravation of her preexisting degenerative back condition.

In a January 19, 1994 report, Dr. Reding responded to an Office inquiry as to the extent of appellant's disability. Dr. Reding noted that he had not seen appellant in approximately one and a half years. He indicated that at the time of his last examination appellant complained of persistent back and leg pain attributable to degenerative disc disease and a central bulge or herniation at L4-5. Dr. Reding noted that appellant had reached maximum medical improvement. He further noted, however, that appellant's problems were subjective in nature and that her mild limitation of motion in the spine was more consistent with truncal obesity as there were "no visible or palpable abnormalities in the lumbar area."

In reports dated April 7 and November 1, 1995, Dr. Reding advised that appellant had returned to see him on those dates complaining of continuing back pain. He reported that appellant had essentially normal physical findings with no objective neurological defect. Although Dr. Reding prescribed medication and outpatient physical therapy for appellant, he reiterated that her complaints were subjective in nature.

In a report dated May 9, 1996, Dr. Reding noted that he had examined appellant on that date and that she continued to complain of moderate back pain with occasional radiation of pain down her legs. He opined that appellant had reached maximum medical improvement noting that she was active at home performing light housework. Dr. Reding concluded that appellant could perform light work, with no heavy lifting and a lifting restriction of 15 pounds. He noted, however, that it might be unreasonable to expect appellant to work at age 64.

In a work capacity evaluation form dated September 5, 1996, Dr. Reding recommended finding light work to "see if [appellant] can do it." He opined that appellant could work six hours per day.

The Office issued a schedule award on October 24, 1996 for a five percent impairment of both the left lower extremity and the right lower extremity. The period of the award was from January 19 to August 8, 1994.

The employing establishment subsequently offered appellant a job in the textile care section of its environmental management service. The duties of the job were listed as sorting, folding, stacking and counting clean wash cloths. It was noted that appellant could stand or sit

as desired. It was further noted that appellant would be exposed to heat, lint and drafts from open doors, noise and varying weather conditions.

On November 6, 1997 the Office advised appellant that the offer of employment was considered to be suitable work and within her medical resttrictions. Appellant was given 30 days to either accept the job offer or to provide an explanation or evidence justifying her refusal of the offered job.

Appellant initially accepted the job offer on November 19, 1997, but she did not report to work. On November 24, 1997 appellant informed the employing establishment that she was refusing the job offer due to continuing back pain. She requested that her disability compensation be reverted back to disability retirement with the Office of Personnel Management.

Appellant submitted a November 21, 1997 report by Dr. Daniel C. Dillard, a family practitioner, who noted that he had treated appellant for back pain for several years with no relief. He stated, "I do not believe that she can go back to work. Because of her condition, she cannot stand for long periods of time bending and picking up heavy loads of laundry. She does not need to be around drafts that will make her condition flare up any worse."

In a letter dated December 3, 1997, appellant argued that she was not physically capable of performing the duties of the offered position. She alleged that Dr. Reding had not examined her since 1992, and therefore he was not in a position to know her back condition. She also alleged that she suffered from a chronic sinus condition, which would be aggravated by exposure to heat, lint and drafts if she accepted the job offer.

In a letter dated December 12, 1997, the Office informed appellant that her reasons for refusing the offered job were unacceptable and that she had 15 days to accept the position.

On January 7, 1998 the Office asked Dr. Reding to review a copy of the offered job description.

In a January 12, 1998 letter, Dr. Reding stated:

> "I received your additional inquiry regarding [appellant]. You apparently have offered her a job in the laundry service that involves sorting, folding, stacking and counting clean washcloths. I believe her back condition, as I understand it, should allow her to perform that type of work and I would certainly release her to that."

In a January 29, 1998 letter, appellant again argued that she had not been examined by Dr. Reding since 1992. She requested that the Office refer her to another physician for an examination.

By letter dated January 30, 1998, the Office informed appellant that her reasons for refusing the offered position were deemed unacceptable. The Office advised appellant that she had 15 days to either accept the job or risk termination of her compensation.

In a decision dated April 8, 1998, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

On October 23, 1998 appellant requested reconsideration and submitted additional evidence including: (1) instructional papers for receiving an epidural steroid injection, although appellant's name was not listed on the papers; (2) copies of hospital admission sheets and ambulatory discharge instructions; and (3) a copy of the April 8, 1998 Office decision. Appellant also submitted a March 17, 1998 report from Dr. Scott Bowen, a Board-certified orthopedic surgeon. He advised that appellant had undergone an anterior cervical disc excision and fusion for left arm pain and numbness. He noted that appellant's right wrist had been hurting since the surgery and suggested that she might have a C-7 or C-8 radiculopathy.

Appellant further submitted an April 6, 1998 report from Dr. Scott M. Schlesinger, a Board-certified neurologist. He indicated that appellant was seen for followup from a C6-7 anterior cervical discectomy and fusion for left C7 radiculopathy. Dr. Schlesinger noted that appellant still had some tingling in her right hand, and pain in her back and legs. He stated, "I believe that all her problems are due to the work injury that she described occurring in 1990. She says this is when her neck and arm symptoms began."

In a report dated September 10, 1998, Dr. Janelle Van Zandt, a neurologist, reported that appellant had first been seen by her in January 1998 for complaints of back and leg pains. She apparently ordered an MRI that revealed a disc bulge herniation at L3-4 and L4-5, along with less severe bulges at L1-2 and L2-3. Dr. Van Zandt did not address appellant's capacity for work.

In a decision dated November 5, 1998, the Office denied modification of the April 8, 1998 decision.

Appellant next requested reconsideration on December 15, 1998.[1] Appellant submitted an October 23, 1998 report from Dr. Schlesinger, indicating that she was recovering nicely following a C6-7 anterior discectomy and a lumbar decompressive laminectomy from L3 through S1 performed on September 22, 1998. Dr. Schlesinger stated, "I do n[o]t believe that appellant will be able to return to any sort of significant work given her age and the two surgeries she has undergone."

In a report dated November 23, 1998, Dr. Van Zandt, stated:

> "It is my opinion based on extensive tests, examinations and consultation with other neurological specialists that due to [appellant's back and neck] pain resulting from the on-the-job injury she sustained in 1990, she has been unable to work and will not be able to return to work. Therefore, she could not possibly have been able to work in the position she was offered on November 6, 1997."

In a decision dated March 3, 1999, the Office denied modification of its prior decisions.

[1] Appellant submitted a copy of a document from the Arkansas Neurodiagnostic Clinic notifying her of a lumbar epidural procedure scheduled for February 19, 1998.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

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.[6] 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.[7]

In the instant case, the initial question is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the position of textile worker was within appellant's physical restrictions since appellant's treating physician, Dr. Reding, specifically reviewed the requirements of the job and stated that she could perform that type of work.[8]

Upon receipt of the suitability determination, appellant initially accepted the job offer but then failed to report to work. She subsequently submitted a November 21, 1997 report from Dr. Dillard advising that she was physically incapable of bending over and picking up heavy loads of laundry. The Board, however, does not find Dr. Dillard's opinion to be persuasive since the physician overstated the physical requirements of the offered position. The job description indicates that appellant would only be required to fold washcloths and that it was designed to meet appellant's sedentary work restriction. There is no indication in the record that appellant would be required to bend and pick up heavy loads of laundry. Because Dr. Dillard did not have an accurate understanding of the offered job, his opinion fails to establish that appellant was justified in refusing the offer of suitable work.

Appellant also argued that she was unable to accept the offered position based on a chronic sinus condition, but she did not submit rationalized medical evidence to corroborate that argument. Although Dr. Dillard stated that appellant "need not be around drafts that will make

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[2] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Betty F. Wade*, 37 ECAB 556 (1986).

[3] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516–517 (1999).

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

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

[6] 20 C.F.R. § 10.516-517 (1999).

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

[8] The Board notes that, despite appellant's contentions, the record indicates that appellant was treated by Dr. Reding after 1992, with the most recent evaluation being on May 9, 1996.

her condition flare up worse," the physician did not specify the nature of the "condition." Such a vague and conclusory statement is insufficient to justify appellant's refusal of a suitable job.

Inasmuch as the Office followed proper procedures in notifying appellant that the job offer was deemed suitable and she was informed of the consequences of declining that job, the Board finds that the Office correctly issued a decision on April 8, 1998 terminating appellant's compensation on the grounds that she refused an offer of suitable work.

After appellant's compensation was terminated, she submitted additional evidence to justify her rejection of the offered job. The Board notes, however, that none of the reports by Drs. Schlesinger or Bowen address whether appellant was physically capable of performing the job of a textile worker at the time it was offered to appellant. Dr. Bowen merely referenced that appellant had additional surgery in March 1998, after termination of her compensation. Dr. Schlesinger opined that appellant's additional surgery and age would prevent her from working but his opinion is not rationalized to support modification. Similarly, although Dr. Van Zandt indicated that appellant would not have been able to perform the offered job, she did not describe the nature of the offered position in relation to appellant's physical capabilities. She also did not state with any medical reasoning the basis for her opinion. Because Dr. Van Zandt's opinion is not rationalized, it fails to establish that appellant was justified in rejecting an offer of suitable work.

The medical evidence indicates that the job offered to appellant was consistent with her physical limitations, and there is no support for appellant's stated reasons in declining the job offer. Therefore appellant's refusal of the job offer cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated March 3, 1999, November 5 and April 8, 1998 are hereby affirmed.

Dated, Washington, DC
October 4, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member