U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ADRIENNE L. CURRY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Birmingham, AL

Docket No. 01-1791; Submitted on the Record;
Issued August 22, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

On June 14, 1996 appellant, then a 28-year-old program clerk/typist, filed an occupational disease claim asserting that her major depression was a result of her federal employment. The Office accepted her claim for depressive reaction and, later, for major depression, improved, with residual symptoms. Appellant received compensation for temporary total disability on the periodic rolls.

A conflict arose between appellant's treating psychiatrist, Dr. Jane L. Daw and Office referral psychiatrist, Dr. A. Gerry Hodges, over appellant's capacity to work. Dr. Hodges reported on September 28, 1998 that appellant was not disabled by her psychiatric condition. Dr. Daw reported on October 19, 1998 that appellant was totally disabled by her major depression and anxiety disorder not otherwise specified. She recommended that appellant not return to the employing establishment for any type of employment. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Charles V. Ford, a Board-certified psychiatrist. The Office asked Dr. Ford to address, among other things, whether appellant could perform the position of information receptionist, which would require her to work in a different building at the employing establishment.

On March 19, 1999 Dr. Ford reported that he had reviewed the records submitted by the Office, including the statement of accepted facts and reports from Drs. Daw and Hodges. He related appellant's history and current complaints. Dr. Ford described findings on mental status examination and psychological testing. He offered a principal diagnosis of major depression, moderate to severe, with associated features of obsessive-compulsiveness, single episode. Dr. Ford found that appellant's major depression was causally related to factors of her federal employment. She could not return to her prior position because it would constitute a "hostile environment" and would likely further aggravate her condition. Further, he found evidence that appellant's depression continued at a significant level "that would interfere with her capacity to

work in any position that would require prolonged concentration or decision-making where there were conflicting demands." Dr. Ford continued:

> "I do believe that [appellant] could work on a limited basis in a nondemanding position (e.g. greeting persons or providing information). The position, as described, that was offered to [appellant] as 'information receptionist' is not in my opinion appropriate for her to return to work. The job is described as a 'floater' with a variety of different sites. In addition, duties are not well defined and may require a variety of decisions of priority as to which task to attend to. It is this type of situation that led to her depression. To be very specific as to the type of job that I would recommend for [appellant], I believe that she needs a highly structured setting and well[-]defined duties that do not require a high degree of concentration or complex decision making. She should not be placed in a situation where she has to prioritize a variety of different demands or attend to multiple responsibilities simultaneously. It would be appropriate for [appellant] to work four hours per day for several months until and with increasing confidence she could assume full-time work. With an appropriate work rehabilitation program, I believe that she could be back to full-time work in approximately one year."

On April 28, 1999 the employing establishment offered appellant the position of program clerk office automation, in which she would work in the employee health unit scheduling employee physicals and tests and maintaining employee health records.

On June 30, 1999 the Office advised appellant that the position of program clerk office automation was suitable to her work capabilities and was currently available. The Office explained that it was basing this determination on the impartial medical evaluation of Dr. Ford, whose opinion represented the weight of the medical evidence. The Office gave appellant 30 days to accept the offer or explain her reasons for refusing it. The Office notified her of the provisions of 5 U.S.C. § 8106(c)(2).

Appellant responded that she was medically restricted from returning to the employing establishment.

On August 3, 1999 the Office addressed appellant's response. The Office explained that the weight of the medical evidence rested with the opinion of the impartial medical specialist, Dr. Ford, who opined that she was capable of modified employment. Noting that the offered job was specifically based on the restrictions imposed by Dr. Ford and remained available, the Office found that appellant's reasons for refusing the job were unacceptable. The Office gave appellant 15 days to accept the offer without penalty; if she did not accept the job within 15 days, the Office would terminate her compensation under 5 U.S.C. § 8106(c).

On August 19, 1999 the Office received a July 26, 1999 report from Dr. Daw, who opined that appellant was unable to perform in any type of employment.

On August 25, 1999 an Office senior claims examiner found that further development of the evidence was required on the issue of suitability. He had reviewed the job offer and could

not determine whether it was suitable. He noted that the impartial medical specialist, Dr. Ford, failed to complete a work restriction evaluation showing appellant's psychiatric limitations. Also, it was unclear whether appellant could return to a position located at the employing establishment. Dr. Daw was of the opinion that appellant should not return to the employing establishment for any type of employment. Dr. Hodges noted appellant's fear of returning to work in another job at the employing establishment. Dr. Ford's opinion on this issue was unclear. For these reasons the senior claims examiner found that "the job offer definitely needs to be reviewed by an appropriate physician prior to any finding that this position is suitable."

The Office requested a supplemental report from Dr. Ford clarifying whether appellant could return to work at the employing establishment in the position of program clerk office automation.

On October 1, 1999 Dr. Ford replied that it was his belief, based on his earlier evaluation of appellant, that the position offered was consistent with the guidelines and limitations that he had previously described: "[t]herefore, I anticipate that [appellant] should be able to fulfill this position in a satisfactory manner."

On October 21, 1999 the Office forwarded Dr. Ford's October 1, 1999 report to appellant and advised that the reports of the impartial medical specialist represented the weight of the medical evidence. The Office gave appellant 15 days to accept the offered position without penalty and advised that her compensation would be terminated under 5 U.S.C. § 8106(c) if she failed to do so. "Also," the Office advised, "we will not consider any further reasons for refusal."

In a decision dated November 5, 1999,[1] the Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2). The Office found that the weight of the medical evidence rested with the opinion of Dr. Ford, the impartial medical specialist, whose October 1, 1999 report was unequivocal in approving the position offered.

In a decision dated November 21, 2000, an Office hearing representative affirmed the termination of appellant's compensation. The hearing representative found that the Office's suitability finding was based on the weight of the medical evidence and that appellant was afforded appropriate notice.

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be

[1] November 5, 1999 was the 15th day from the Office's final notice of October 21, 1999.

[2] 5 U.S.C. § 8106(c)(2).

terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[3] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

When the Office made its June 30, 1999 finding that the position of program clerk office automation was suitable, it based its finding on the March 19, 1999 report of the impartial medical specialist, Dr. Ford, finding that his opinion represented the weight of the medical evidence. It is well established that when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5]

On August 25, 1999, however, the Office determined that further development of the evidence was required "prior to any finding that this position is suitable." Dr. Ford, who had not reviewed the position of program clerk office automation, did not make clear whether appellant could return to a position that was located at the employing establishment. To correct this deficiency, the Office determined that an appropriate physician must review the job offer before it made any suitability finding.

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[6] In this case, the Office determined that Dr. Ford's March 19, 1999 report required clarification and was insufficient to support a finding that the position of program clerk office automation was suitable. The significance of this determination is that a conflict in medical opinion still existed on June 30, 1999 when the Office found the position to be suitable.

The Office obtained clarification when it received Dr. Ford's supplemental report of October 1, 1999, but this report does not retroactively validate the Office's June 30, 1999 suitability finding. The Board has held that the Office may not find a position suitable and then obtain the medical evidence to show it.[7]

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[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[6] *April Ann Erickson*, 28 ECAB 336, 341-42 (1977).

[7] *Barbara L. Chien*, 53 ECAB __ (Docket No. 00-1646, issued June 7, 2002) (the Office's original finding of suitability was void because the report of the impartial medical specialist, upon which the Office based its finding, was insufficient to resolve the outstanding conflict); *see James W. Henson*, Docket No. 92-50 (issued December 18, 1992) (where a conflict at the time of the Office's suitability finding was resolved after termination of compensation, the Board held that the Office may not retroactively cure its original failure to establish that the position was suitable at the time it was offered).

When it obtained the impartial specialist's supplemental report resolving the issue of suitability, the Office should have given appellant 30 days to accept the offer or explain her reasons for refusing it.[8] By notifying her instead that she had 15 days to accept without penalty and that no further reasons for refusal would be considered, the Office deprived appellant of the due process protections addressed in *Maggie L. Moore*.[9] When the Office changes the basis of its finding that the offered position is suitable, the claimant is entitled to notice and a meaningful opportunity to be heard on that basis.

The November 21, 2000 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
August 22, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[8] *Barbara L. Chien*, *supra* note 7. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d). (July 1997) (if it is not possible to determine whether a claimant's reason for refusal is justified without further investigation of the issues, the claims examiner should contact the claimant for clarifying information and set another 30-day deadline).

[9] 42 ECAB 484 (1991), *reaff'd on recon*., 43 ECAB 818 (1992).