U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANN MARIE CUST and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

*Docket No. 00-907; Submitted on the Record;*
*Issued February 15, 2002*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 18, 1998, based upon her refusal of suitable work.

The Office accepted that on December 26, 1986 appellant, then a 29-year-old mail clerk, sustained low back strain and a herniated nucleus pulposus when she lifted a sack of mail. Concurrent conditions not due to injury were noted as fibromyalgia and a congenital spine abnormality. Appellant stopped work on December 26, 1986 and thereafter received appropriate compensation benefits; periodic medical reports were submitted.

On August 19, 1996 the Office requested that appellant's treating physician provide an updated medical report addressing appellant's disability for work. Dr. Lawrence N. Metz, a Board-certified neurologist, completed the Office form questionnaire indicating that appellant could work only one to two hours per day, with no more than two hours walking, one hour sitting and standing, and no lifting, bending, squatting, climbing, kneeling or twisting. Dr. Metz indicated that appellant could not perform pushing or pulling or reaching above the shoulder, and could do only limited fine manipulation.

The Office then scheduled appellant for a second opinion evaluation by a panel consisting of a neurologist and a psychiatrist. The panel evaluation took place on December 10, 1997 and was conducted by Dr. Brian Mercer, a Board-certified neurologist, and Dr. J. Peter Strang, a Board-certified psychiatrist. In a joint report the panel reviewed appellant's factual and medical history including a thorough review of the records. It evaluated appellant's current status and symptomatology, and it reported the results of neurologic and psychiatric examination. The panel reported objective neurologic injury-related residuals as chronic right S1 radiculopathy, but noted that examination revealed nonorganic findings, a positive Waddell's rotation test and that the degree of reported symptoms exceeded objective findings. The panel recommended that appellant participate in a pain behavior/psychologically oriented program for pain management, but opined that the likelihood of appellant's voluntarily participation was low.

The panel reported psychiatric findings as no evidence of any cognitive disorder, major affective syndrome or psychotic disorder. The panel concluded that appellant had a chronic pain syndrome, but noted that she had some rigid attitudes and passive-aggressive features, and that she declined to complete psychological testing. The panel concluded that, from a formal psychiatric standpoint, there were no limitations or restrictions, and noted that appellant was not interested or amenable to participation in a biobehavioral pain management program.[1] The panel noted its concurrence with Dr. Metz, who in a May 31, 1988 report indicated that "there is probably a good deal of psychogenic overlay to her symptomatology."

Further, the panel concluded that a return to work needed to be on a gradual basis due to deconditioning, and it completed a work capacity evaluation indicating that appellant could work 8 hours per day with lifting limited to 20 pounds and limited lumbosacral motions. Other limitations were no repetitive or sustained lumbosacral motions, the ability to change position from sitting to standing as needed and no climbing.

On February 10, 1998 the employing establishment offered appellant a job as a modified clerk with no lifting over 20 pounds, no repetitive or sustained motions, no climbing stairs and the ability to change position from sitting to standing as needed. The employing establishment noted as follows:

> "Your work hours will begin gradually starting at two hours work per shift for two weeks. Work hours will then increase to four hours per shift for [the] next two weeks. On the fifth week, your work hours will increase to six hours per shift for two weeks. By the seventh week, your work hours will increase to a full eight hours per shift."

On March 10, 1998 the Office advised appellant that she had been offered a "temporary" position for a modified clerk which the Office found to be suitable to appellant's partially disabled condition.[2]

By report dated April 14, 1998, Dr. Metz stated that appellant had lumbar radiculopathy and a hip problem and was advised not to work at this time.

By letter dated April 15, 1998, the Office again advised appellant that Drs. Mercer and Strang had found that she was able to work, that Dr. Metz identified no objective evidence of abnormality, and that therefore the weight of the medical evidence demonstrated that she could gradually return to work with restrictions. It further reiterated that the offered position was suitable to appellant's condition, that appellant had had 30 days within which to accept it, that she had offered no substantive medical evidence to support continuing disability for work during that time and that therefore she had 15 days within which to accept the position or compensation would be terminated.

[1] Such a program was attempted in 1989 without success.

[2] The job offer was actually for a permanent job assignment.

By report dated April 24, 1998, Dr. Metz noted that appellant had an abnormal electromyogram (EMG) which showed evidence of denervation, speculated that appellant "may have a rheumatic condition including possible fibromyalgia," and opined that "[b]ecause of the multiplicity of her medical problems, I think that she will have difficulty working an eight-hour shift."

On April 29, 1998 appellant accepted the offered position and added on the acceptance form: "with the following conditions: that prior to increasing my h[ours] I am to see Dr. Mercer and Dr. Metz to determine if I am physically capable of an increase in h[ours]; [and] (2) I am seeking a change of h[ours] to days because I [a]m physically disabled come night time d[ue] to pain medication."

Appellant returned to work on April 30, 1998 for two hours per day.

By letter dated May 18, 1998, Dr. Mercer stated that based upon his December 10, 1997 evaluation of appellant: "[Appellant] may return to work at two hours per day for two weeks. She may then work four hours per day for two weeks; followed by six hours per day for another two weeks. At the end of that time she may return to work for a full eight hours per day."

By letter dated May 27, 1998, the Office advised appellant of Dr. Mercer's opinion as to her ability to increase hours and it included a work schedule with target dates for increasing hours. It noted that she had returned to work for two hours per day on April 30, 1998 and advised that she was expected to increase her hours to four hours per day no later than June 1, 1998. The Office further advised that appellant was expected to increase to six hours per day on June 15, 1998 and to eight hours per day beginning June 29, 1998.

By letter dated May 27, 1998, Dr. Metz noted that appellant "was advised to continue working four hours each day since she has only been back one month after several years of still having her symptoms." By letter dated June 5, 1998, Dr. Metz noted that appellant had lumbar and cervical radiculopathy and brachial plexopathy, and he opined that, since appellant was having major problems sleeping during the day, she should be changed to a day schedule.

Appellant increased her working hours to four hours per day but no further.

By report dated June 12, 1998, Dr. Metz stated that appellant "had legitimate findings of lumbar radiculopathy, cervical radiculopathy and brachial plexopathy." He noted that appellant was willing to work, but found that working nights caused major problems with sleeping during the day and that therefore she should have a day schedule. Dr. Metz further noted that appellant "should work four hours per day until the beginning of September," and that she "could then attempt to work six hours per day, not to exceed more than that."

By letter dated June 16, 1998, the Office advised appellant that it had been informed that she declined to increase her work hours beyond four hours per day. It advised that Dr. Metz, in his June 12, 1998 report, had not provided sufficient probative evidence or opinion to support her refusal to increase her working hours and that by refusing to increase her hours, she was declining to work at a suitable limited-duty job after it was procured for her. The Office advised that if she continued to refuse to increase her hours, as found to be appropriate to her condition, her compensation would be terminated under 5 U.S.C. § 8106(c)(2). The Office gave appellant

15 days within which to increase her hours or her compensation would be terminated under 5 U.S.C. § 8106(c)(2).

By letter dated July 9, 1998, the Office noted that, as of that date, appellant should have increased her hours to eight per day, and it stated that Dr. Mercer had found that she was capable of working eight hours at that time. The Office reiterated that such a job had been found to be suitable to appellant's condition. The Office noted that it had enclosed a copy of a job offer for an eight hour per day limited-duty job consistent with appellant's activity restrictions. The Office advised that it found that appellant's refusal to return to eight hours of limited duty per day was a refusal under 5 U.S.C. § 8106(c)(2), and that she had 30 days from the date of the letter within which to accept the eight hour per day position or her compensation benefits would be terminated.

Appellant, however, continued to work four hours per day.

By letter dated July 17, 1998, appellant argued that she could not be expected to increase her working hours immediately to eight hours per day. She claimed that she was not conditioned to work eight hours per day.

By letter dated August 6, 1998, the Office explained that Dr. Metz's reports provided no medical rationale for why he felt appellant could not work an eight hour per day shift and did not address Dr. Mercer's findings of nonorganic findings as they affected appellant's condition and it noted that Dr. Mercer had found on December 10, 1997 that a gradual return to work was appropriate to appellant's condition. The Office reiterated the provisions of 5 U.S.C. § 8106(c)(2).

By decision dated August 19, 1998, the Office terminated appellant's compensation entitlement effective August 18, 1998 finding that she had refused to work at suitable employment after it was procured for her. The Office found that Drs. Mercer and Strang constituted the weight of the medical evidence and established that appellant could return to work gradually up to eight hours per day with activity restrictions. It found that Dr. Metz had presented no probative evidence or objective findings to contradict Drs. Mercer's and Strang's opinion or to show that appellant remained disabled for work.

By report dated September 9, 1998, Dr. Metz noted the following: "[Appellant] was advised she can do six hours if she is working days. She has a problem with sleep and pathologic fatigue which is aggravated by [night] work."

However, on December 23, 1998 Dr. Metz stated that appellant had both cervical and lumbar radiculopathy, that she should not be working more than four hours a day on days and not nights, and that she should not do climbing, kneeling, bending, pulling, pushing or fine manipulation due to her brachial plexus injury. He further opined that appellant could lift 5 pounds frequently and 10 pounds occasionally.

Appellant requested an oral hearing before an Office hearing representative, which was held on February 16, 1999. She testified that she never refused suitable employment and was working four hours per day, that she had not been offered a pain management program and that she had never met the nurse assigned to her case. Appellant further claimed that she had

accepted the position with the stipulation that she be able to see Drs. Mercer and Metz before any increase in hours to determine if she was capable of increasing her hours from two hours per day. She also alleged that she was disabled from working nights due to pain medications.

By decision dated April 8, 1999, the hearing representative affirmed the August 19, 1998 decision finding that the gradual return to work as a modified clerk as offered by the employing establishment was suitable to appellant's condition according to the weight of the medical evidence of record. The hearing representative found that the opinions of Drs. Mercer and Strang constituted the weight of the medical opinion evidence of record and established that appellant could gradually return to working eight hours per day limited duty. The hearing representative found that the assistance of a rehabilitation nurse was not a requirement prior to appellant returning to work and that referral to a pain management program was also not a requirement for appellant's return to work.[3] The hearing representative found that appellant had refused to fully perform her assigned work after suitable employment had been procured for her.

Following the April 8, 1999 decision appellant resubmitted the September 9, 1998 letter from Dr. Metz.

By letter dated April 9, 1999, appellant argued that the medical evidence did not support that she could perform limited duty eight hours per day, that the Office failed to develop the evidence for a consequential injury, that she did not refuse or neglect suitable work,[4] and that she provided acceptable reasons for refusing the limited-duty job offer working eight hours per day. Appellant argued that Dr. Mercer's opinion was not rationalized, that she was not given a referral to a pain management program as suggested by the panel, that her stipulation about accepting the job was ignored, that the rehabilitation nurse was never involved and that Dr. Metz's reports were ignored. Attached was a copy of the job offer accepted by appellant, with her stipulations.

By letter dated May 27, 1999, appellant requested reconsideration of the April 8, 1999 decision.

Appellant submitted an August 11, 1999, Form CA-17, on which Dr. Metz had written: "[Appellant] should continue working no more than four hours per day and she should work days and not at night. She should not do climbing, kneeling or bending. Twisting, pulling and pushing are deleterious to her and she has problems with her neck and brachial plexus which she has had. She could lift 5 pounds relatively frequently and occasionally 10 pounds."

By decision dated August 30, 1999, the Office denied appellant's request for modification of the April 8, 1999 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that appellant was offered an eight hour per day job with a gradual acclimatization to the work environment, that appellant did accept the position and performed it working for four hours per day, but that she refused to increase her

[3] As the record reflected, this pain management program approach had been tried unsuccessfully in 1989.

[4] Appellant cited to *Katherine Bocko*, Docket No. 97-0077 (issued December 28, 1998) for the proposition that the Office erred in terminating compensation for refusal to accept suitable employment when she was working reduced hours at the job.

hours as required to six hours on June 15, 1998 and to eight hours beginning June 29, 1998, such that she neglected to perform the eight hour per day job procured for her. The Office opined that appellant provided no acceptable reasons for refusing to work eight hours per day.

The Board finds that the Office properly terminated appellant's compensation benefits effective August 18, 1998, based upon her refusal of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c)(2), the Office must establish that appellant refused an offer of suitable work. 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 him is not entitled to compensation.[6] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be 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.[7] 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 by appellant was suitable.[8] The Office met this burden in reliance on the rationalized medical opinions of Drs. Mercer and Strang.

In this case, appellant's treating physician continued to provide brief reports merely stating that appellant had radiculopathies and could not work eight hours per day. No objective evidence to support this work limitation was identified and no explanation of why appellant remained totally disabled for limited duty was provided. As appellant's physician's reports were totally unrationalized, they are of diminished probative value as to her ability to work.

The second opinion medical specialists, however, had the benefit of a complete and accurate factual and medical background; they conducted a thorough examination and evaluation including testing, diagnosed appellant's S1 radiculopathy and provided a well-rationalized combined report based upon examination and testing results of appellant, which found that appellant could gradually return to an eight hour per day job with certain activity limitations. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether appellant can work a limited-duty job in her partially disabled condition. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the partial disability and the required

[5] *Harold S. McGough*, 36 ECAB 332 (1984).

[6] 5 U.S.C. § 8106(c)(2).

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

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

work restrictions and limitations.[9] As these second medical opinions were based on a complete and accurate factual and medical history and on observation, examination and objective testing results, and as they are supported with explanations as to how the medical opinions were reached, they are probative. As the panel report is of probative value and Dr. Metz's reports are of diminished probative value, a conflict in medical opinion evidence does not occur. The reports of Drs. Mercer and Strang constitute the weight of the medical opinion evidence of record and establish that appellant was capable of gradually returning to a full-time limited-duty position.

The employing establishment thereafter took the activity restrictions delineated by Drs. Mercer and Strang and created a special limited-duty modified clerk position for appellant, based upon those restrictions, which she could start working at gradually and work up to working eight hours per day. The Office provided a set schedule for appellant to follow, to gradually increase her work hours as her endurance increased.

As the weight of the medical evidence established that appellant could gradually return to full-time employment with activity restrictions and as the position offered to appellant was created specifically for appellant, based upon the activity restrictions derived from the panel, the Office found that this tailored position was within appellant's work restrictions, was compatible with appellant's age, education and work experience, and was therefore suitable to appellant's partially disabled condition. The Office advised appellant of the position's suitability by letter dated March 10, 1998.

Appellant "accepted" the position and returned to work on April 29, 1998 for two hours per day. She increased her hours to four hours per day as per the job schedule, but after working for two weeks for that duration, appellant declined to increase her work hours further. In support of appellant's refusal to further increase her hours, appellant submitted further evidence from Dr. Metz.

The Office advised appellant on June 16, 1998 that Dr. Metz's reports did not provide sufficient probative evidence or opinion to support her refusal to increase her working hours, and that by refusing to increase her working hours to six and then eight hours per day according to the offered position's schedule, she was refusing to work at suitable work that had been procured for her. The Office gave appellant 15 days within which to increase her hours and it explained the provisions of 5 U.S.C. § 8106(c)(2).

On July 9, 1998 the Office reiterated that the eight hour per day position offered to appellant was suitable to her condition and it gave her another 30 days within which to increase her working hours.

Appellant did not increase her working hours and she resubmitted duplicative medical evidence from Dr. Metz which merely repeated his earlier unrationalized opinions.

[9] *See Donna Faye Cardwell*, 41 ECAB 730 (1990); *Lillian Cutler* 28 ECAB 125 (1976).

The Board has explained that 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.[10] As Dr. Metz's reports were cursory, omitted objective evidence of continuing disability, and were unrationalized as to why appellant could not physically work eight hours per day, they are insufficient to support appellant's refusal to increase her working hours.

By letter dated August 6, 1998, the Office again explained to appellant's representative that Dr. Metz's reports provided no support for her refusal to increase her working hours. However, appellant refused to increase her working hours.

Therefore, as appellant declined to increase her work time to six and then to eight hours per day, she neglected to perform the eight-hour per day suitable work procured for her.

The decisions of the Office of Workers' Compensation Programs dated August 30 and April 8, 1999 are hereby affirmed.

Dated, Washington, DC
February 15, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] 20 C.F.R. § 10.124.