U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHERINE MILLS and DEPARTMENT OF VETERANS AFFAIRS, HUDSON VALLEY VETERANS ADMINISTRATION HEALTHCARE, Montrose, NY

Docket No. 02-1232; Submitted on the Record;
Issued February 11, 2003

DECISION and ORDER

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

The Office accepted that appellant, then a 48-year-old nursing assistant, sustained a right leg contusion and lumbar and cervical strains as a result of a May 19, 1993 work injury. Appellant has not returned to work. The Office paid appropriate wage-loss compensation.

By decision dated July 9, 1999, the Office terminated appellant's compensation benefits effective July 10, 1999 on the grounds that she refused an offer of suitable work. By decision dated December 30, 1999, an Office hearing representative vacated the July 9, 1999 decision finding that the November 6, 1998 opinion of Dr. Michael L. Bernstein, a Board-certified orthopedic surgeon selected as the impartial medical specialist, was not well rationalized with regard to appellant's standing and sitting abilities and the job duties to be performed. Accordingly, the case was remanded for further development with regard to Dr. Bernstein's opinion and the job offer.

Dr. Bernstein re-reviewed appellant's medical record along with his notes and answered the Office's additional questions in his report of June 19, 2000. He additionally issued a new OWCP-5c work-capacity evaluation form dated June 16, 2000 setting forth appellant's restrictions.

The Office offered appellant a limited-duty job of nursing assistant on September 7, 2000 based on Dr. Bernstein's June 16, 2000 Form OWCP-5c.

In a letter dated September 28, 2000, the Office notified appellant that this position was found to be suitable and that she had 30 days to accept the position or provide an explanation of the reasons for refusing it. The Office also stated that, if appellant refused employment without

reasonable cause or failed to report to work when scheduled, that her compensation benefits for wage loss would be terminated.

In an October 23, 2000 letter, appellant's attorney advised that the medical reports over the years found that appellant's work injury resulted in an injury to her cervical spine at C5-6, with evidence of herniation as described on the May 6, 1999 magnetic resonance imaging (MRI) scan. He referred to Dr. John P. Handago's August 22, 2000 report, which was attached, noting that appellant had been advised to have a consultation with a neurosurgeon. Appellant's attorney contended that the modified job was identical to appellant's job prior to her injury and required constant physical exertion. He argued that Dr. Bernstein did not explain the medical basis for his conclusion that appellant could perform the types of physical work described in the job description.

Attached was an August 22, 2000 medical report from Dr. Handago, an orthopedic surgeon and appellant's treating physician, who stated that on the course of appellant's evaluations, on physical examination, she had continued findings consistent with a cervical disc herniation. Findings on physical examination were given and appellant was advised to have a consultation with a neurosurgeon for a cervical discectomy. Dr. Handago continued to opine that appellant was totally disabled and would be unable to return to any gainful employment in the near future.

In a letter dated October 31, 2000, the Office advised appellant that her reasons for refusing suitable employment were insufficient. With regard to Dr. Handago's opinion that appellant should have a consultation with a neurosurgeon, the Office stated that it had referred appellant to a second opinion evaluation with Dr. Burak, who opined that appellant was able to return to work eight hours per day in a limited-duty capacity, although, the residuals continued. The Office stated that this resulted in a conflict of medical opinion which caused the need for an impartial medical examination with Dr. Bernstein. The Office noted that Dr. Bernstein reviewed all the medical evidence of file, including the MRI of May 6, 1999, in formulating his opinion that the job offer was consistent with appellant's physical limitations. The Office further noted that Dr. Bernstein had addressed that appellant should have a neurosurgical consultation and authorized a one-time consultation with a neurosurgeon. Appellant was given 15 days to accept the position.

By decision dated January 24, 2001, the Office terminated compensation benefits effective January 28, 2000 on the basis that appellant refused an offer of suitable work. The Office found that the weight of the medical opinion rests with Dr. Bernstein. In a letter dated February 7, 2001, appellant requested an oral hearing, which was held on October 19, 2001. By decision dated January 31, 2002, an Office hearing representative affirmed the Office's prior decision.

The Board has duly reviewed the case record and concludes that the Office met 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 proving that the employees' disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] 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.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4] 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.[5] 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.[6]

The Board notes that, although the Office referred to Dr. Bernstein as being an impartial medical specialist in this case, Dr. Bernstein is not an impartial medical specialist. Review of the procedural history of this case reflects that the original conflict in medical opinion occurred between Dr. Handago, appellant's attending physician and Dr. Eric K. Zitzmann, a Board-certified orthopedic surgeon and an Office referral physician, concerning issues regarding causal relationship and continuing disability of the work-related injury. Appellant was properly referred to Dr. Burak, a Board-certified orthopedic surgeon, to serve as the impartial medical specialist in this case and to resolve the conflict in medical opinion evidence. In reports dated March 24, 1997 and June 23, 1998, Dr. Burak opined that appellant was capable of light-duty work which did not require heavy lifting or repetitive bending. As over a year had passed since Dr. Burak's March 23, 1997 examination of appellant, the Office referred appellant to Dr. Michael Bernstein, a Board-certified orthopedic surgeon for an updated evaluation. It is well established that a suitable work determination must be based on a reasonably current medical evaluation.[7] As the report from the impartial medical specialist, Dr. Burak, was over one year old at the time of the Office's July 9, 1999 determinate of appellant's suitable employment, the Office properly found that Dr. Burak's reports could not form a valid basis for that determination.[8] Accordingly, the Office properly referred appellant for a medical examination by Dr. Bernstein. He was not resolving a conflict and, thus, will be considered an Office referral physician.

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

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

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

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

[5] 20 C.F.R. § 10.516 (1999).

[6] *See John E. Lemker*, 45 ECAB 258 (1993); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

[7] *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

[8] *See Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981).

Thus, the question in this case is whether the Office properly determined that the modified position of nurse assistant was suitable. 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.[9] A review of the current job description along with the current medical evidence indicates that there is sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations.

In his April 19, 2000 report, Dr. Bernstein noted the history of injury and provided the findings of his physical examination. The May 6, 1999 MRI scan showed osteophyte formation of the cervical spine at the C5-6 level with a slight herniation at that level. A cervical sprain with persistent pain and intermittent radiculitis in the right upper extremity and a lumbosacral sprain with chronic lumbar dysfunction and intermittent right radiculitis were diagnosed.

In his June 19, 2000 report, Dr. Bernstein diagnosed appellant with a cervical sprain with persistent pain, intermittent radiculitis of the right upper extremity and a lumbosacral strain with chronic lumbar dysfunction. Dr. Bernstein stated that objective findings related to the chronic cervical and lumbar sprain included limitation of motion of the cervical and lumbar spine. No objective neurological deficits were noted. Dr. Bernstein stated that the medical findings indicated that the accepted conditions were still active and unchanged from his prior examination of November 6, 1998.[10] He stated that appellant's most obvious symptom was pain, which is not an objective finding. Dr. Bernstein opined that appellant was not totally disabled and that her

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

[10] In his November 6, 1998 report, Dr. Bernstein noted the history of injury and presented his findings upon examination. His impression was that of objective findings which related to a cervical strain and a resolving lumbosacral sprain. Dr. Bernstein noted that appellant's symptoms appear related to prolonged diffuse and muscle weakness. He stated that, although a muscle strengthening program and aggressive physical therapy should have been helpful after her initial injury and symptoms, he was not convinced that such a program would be effective in alleviating appellant's symptoms approximately five years after the injury. He noted that an MRI scan, prepared by appellant, revealed disc abnormality. However, there was no objective evidence to indicate a true radiculopathy or neurologic loss secondary to any cervical injury relating to May 1993. Dr. Bernstein further opined that appellant would be able to work light or sedentary work with certain restrictions. These restrictions involve no prolonged sitting or standing, ability to change position. Physical work such as lifting anything over 10 pounds or working overhead are included in her limitations.

limitations pertaining to walking, standing and reaching were defined in her prior work-capacity evaluation. He further opined that the employment offer as a modified nurse assistant was consistent with her limitations and that the current work limitations were unchanged from January 6, 1999.[11] Dr. Bernstein stated that appellant had been advised in the past to seek a neurosurgical evaluation. He stated that her MRI scan evidence of a disc herniation did not appear related to her employment, which had ceased in 1993. With regard to the specifics of appellant's sitting and standing, Dr. Bernstein referred to the January 6, 1999 restriction evaluation form. Dr. Bernstein noted that appellant was permitted to stand intermittently throughout a workday, stand up to 30 to 40 minutes at one time with similar periods of sitting between standing. Sitting was unlimited and sitting from 45 to 60 minutes at a time would not be productive of symptoms. In an OWCP-5c work-capacity evaluation form of June 16, 2000, Dr. Bernstein opined that appellant could walk, reach and reach above her shoulder for no more than 4 hours; stand, twist and operate a motor vehicle for no more than 3 hours; push, pull and lift for no more than 2 hours with no more than 10 pounds; and squat, kneel and climb for no more than 1 hour. A 15- to 20-minute break was also required every 2 hours.

The Office offered appellant a limited-duty job of nursing assistant on September 7, 2000 based on Dr. Bernstein's June 16, 2000 restrictions. The physical requirements of the position were: intermittent squatting -- 1 hour per day; intermittent kneeling -- 1 hour per day; intermittent pushing at 1 to 10 pounds less than 2 hours; intermittent twisting -- 3 hours per day; intermittent standing -- 3 hours per day; operating a motor vehicle -- 3 hours per day; intermittent walking -- 3 hours per day; intermittent reaching -- 4 hours per day; intermittent reaching above the shoulder -- 4 hours per day. Appellant was further noted to work an 8-hour shift with a 15- to 20-minute break every 2 hours.

The Board finds that the work restrictions set forth by Dr. Bernstein conform with the specifications of the modified nursing assistant position offered to appellant.

The Board notes that Dr. Bernstein's restrictions took into account the MRI scan evidence of a disc herniation, and he found that it did not disable appellant from modified work. The Federal (FECA) Procedure Manual 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] While Dr. Bernstein did not consider appellant's disc herniation to be work related, the physical restrictions set forth by Dr. Bernstein did not relate any disability to the MRI scan or her cervical condition. The Board further notes that the other contemporaneous medical reports submitted by appellant do not address physical limitations or

[11] In a Form OWCP-5c dated January 6, 1999, Dr. Bernstein advised that appellant would be able to walk 3 to 4 hours, reach, including reaching above shoulder, for 4 hours; and stand, twist and operate a motor vehicle for 3 hours. Appellant was only allowed to push or pull no more than 20 pounds for 2 hours and lift no more than 10 pounds for 2 hours. Squatting, kneeling, climbing were limited to 1-hour durations with a 30-minute break every 2 hours.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (December 1993).

job restrictions. Appellant has not submitted any medical evidence showing that she is unable to perform the limited-duty job.

Accordingly, the Board finds that the offered position was medically suitable. The Office properly advised appellant that the position was suitable and the reasons offered for refusing were insufficient. Therefore, the Board finds that the Office properly terminated appellant's compensation benefits based on a refusal of suitable work under 5 U.S.C. § 8106(c).

The decision of the Office of Workers' Compensation Programs dated January 31, 2002 is affirmed, as modified.

Dated, Washington, DC
February 11, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member