U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONA R. WIEDENBECK and DEPARTMENT OF VETERANS AFFAIRS, LOUGARIS MEDICAL CENTER, Reno, NV

Docket No. 03-1089; Submitted on the Record;
Issued October 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to wage-loss compensation benefits under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

This is appellant's second appeal before the Board. In the prior appeal, the Board set aside Office decisions dated September 1 and February 17, 1998 and remanded the case for further development on the issue of whether appellant sustained a recurrence of disability commencing August 15, 1997, causally related to her November 19, 1987 low back injuries.[1] The facts and circumstances of the case are set forth in the prior decision and are hereby incorporated by reference.[2]

On August 17, 2000 the Office accepted that appellant sustained a recurrence of disability commencing August 15, 1997 and paid retroactive compensation benefits.

On August 23, 2000 appellant underwent lumbar spinal surgery for removal of lumbar spine hardware at L3-4 and L5-S1, exploration of the fusion bilaterally and nerve root exploration with laminotomy at L3-4 and L5-S1.

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[1] Appellant's original claim was accepted for low back strain, a disc bulge at L2-3 and a herniated nucleus pulposus at L4-5, for which she underwent surgery on July 27, 1999 and August 23, 2000. Following her November 19, 1987 injury appellant, who originally worked at the employing establishment as a licensed practical nurse, worked as a warranty clerk and cashier at an automotive care center, as a secretary and as an office manager/bookkeeper until September 1993 when she stopped work altogether.

[2] Docket No. 99-153 (issued June 16, 2000).

By medical progress notes from Dr. Patrick S. Herz, a Board-certified orthopedic surgeon, noted as follows:

> "Since I last saw [appellant], her acute condition has cleared and she is back to her baseline situation.... We will need a formal [f]unctional [c]apacity [e]valuation completed to determine her long term disability. [Appellant] tells me today emphatically that she is not going to return to work under any circumstances and I have explained to her that we rarely see insurance compan[ies] allow a permanent and total disability for spinal disorders such as this. She told me that 'my condition is their fault from the start' and she did not want to return to work regardless of how sedentary the job activity may be."

A functional capacity evaluation was completed on February 13, 2001 upon referral by Dr. Herz. Appellant was interviewed and tested, her physical work tolerance was determined and the tester noted:

> "[Appellant] self-terminated this evaluation after 2.75 hours of the 4[-]hour evaluation and declined to perform several portions of testing (*i.e.,* functional lifting with boxes, carrying, stairs and additional standing and sitting tasks) due to [a] reported high level of low back pain and right and left leg weakness. Pain behavior was displayed intermittently throughout the evaluation with static and dynamic tasks and consisted of grimacing, slow guarded movement and rubbing of the low back and legs. Pain complaints were also offered intermittently throughout the evaluation....
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> "Despite [the] validity of the profile for areas tested, it is felt that return to work to a realistic work environment would be difficult to achieve and/or maintain. This is based on [appellant's] reported symptoms and perceived inability to work since hardware removal, reported recent sensory changes, low positional tolerances, decreased functional mobility, a reported significantly decreased ADL [activities of daily living] status and termination of the evaluation before scheduled completion."

The examiner noted that appellant would not be able to return to her preinjury job as a licensed practical nurse but that she might be able to function at a sedentary level from knee to shoulder height in a home-based clerical business that would allow her to self-pace and alternate sitting, standing, walking, work positions and breaks as needed.

On March 5, 2001 Dr. Herz reviewed appellant's functional capacity evaluation and determined that it was not a valid study due to lack of completion, appellant's inability to complete various functional tasks and her pain behavior. He felt that he could not make a determination about her ability to work.

On April 9, 2001 Dr. Herz referred appellant to a spine clinic for a spine evaluation.

On June 21, 2001 appellant underwent a spine evaluation with Dr. Richard W. Blakey, a Board-certified orthopedic surgeon. He reviewed her history, conducted an examination and

opined that they needed to rule out any evidence of an ongoing structural problem, including obtaining another magnetic resonance imaging (MRI) scan.

A July 18, 2001 MRI scan of the lumbar spine was reported as demonstrating a broad-based disc bulge at the L2-3 interspace with associated central canal bilateral neuroforaminal stenosis, a suspected annular fiber tear, general postoperative change of laminectomy and fusion from L3 through S1, no evidence of recurrent disc bulges and loculated fluid collections which did not appear to be contiguous with the thecal sac, but which were noted at the site of prior laminectomy. With gadolinium contrast, the MRI scan findings were of surgical fixation from a posterior direction of L3, L4 and L5, decreased disc space L3-4 and L5-S1 and evidence of fluid-filled cystic space extending from L3 to S1 measuring 6.5 centimeters in length and 1.75 cm in depth lying within the laminectomy defect immediately posterior to the thecal sac with an appearance most consistent with pseudomeningocele, but without evidence of disc bulge, protrusion or herniation.

On August 23, 2001 Dr. Blakey noted that the neurological evaluation revealed no sign of weakness or reflex changes in either lower extremity and no electromyogram (EMG) changes, and that the repeat MRI scan showed mild canal stenosis at L2-3 above the fusion, but that it was not great enough to warrant surgery.

A behavioral medicine evaluation, conducted on September 7, 2001, consisted of a mental status examination, a clinical interview and test administration and were reported as demonstrating minimal levels of disability compared to most pain patients. The reporting clinical psychologist, Dr. Blake H. Tearnan, found that appellant was not very active but generally seemed happy and content for the most part in adapting to her monotonous lifestyle consisting of minimal levels of activities, few demands and ongoing disability payments. He noted that appellant had "little intention for returning to work and reported zero confidence in her ability to return to productive work."

During an October 2, 2001 individual counseling session Dr. Tearnan reported that appellant reported minimal levels of disability, that she was much more functional than 90 percent of their pain patients and that she would do well in a work environment. He noted that: "[u]nfortunately, [appellant] has insisted [that] she has no intention of returning to work and more th[a]n likely wants to move toward SSDI [Social Security Disability Insurance] disability."

Dr. Herz saw appellant again on March 5, 2002 and diagnosed cervical spondylosis, rule out compressive neuropathy, rule out carpal tunnel syndrome and rule out intracranial pathology.

By report dated March 19, 2002, Dr. Herz addressed the Office's question as to whether appellant could do sedentary work, noting "[b]ased on the fact that she does not have a serious injury involved, *i.e.* there is no fracture, serious nerve damage or tumor present, then it would be my opinion that she should be able to tolerate a sedentary work activity protocol. However, I am quite certain [that] [appellant] will disagree with this recommendation."

In a report dated May 21, 2002, Dr. Herz advised the Office: "[i]t is my opinion that [appellant] can participate in sedentary work on a full time basis."

On June 20, 2002 the employing establishment offered appellant the position of medical clerk and attached the job description. The job was mainly sedentary, but required some bending, walking, standing and carrying patient records, light sterile supplies and mail.

By letter dated June 21, 2002, the Office advised the employing establishment that the sedentary position seemed suitable for appellant, but that Dr. Herz had to review and approve of it and advise of its appropriateness.

By response dated June 25, 2002, Dr. Herz noted: "[i]t is my opinion that [appellant] is capable of sedentary job activities and I would release her for work as a medical clerk as described in your June 20, 2002 correspondence."

By letter dated July 10, 2002, the employing establishment again offered appellant the position of medical clerk. It noted that the job was sedentary consistent with Dr. Herz's May 21, 2002 letter.

By letter to appellant dated July 11, 2002, the Office advised appellant that the position of medical clerk, offered by the employing establishment, was suitable to her partially disabled condition. It also advised that Dr. Herz had reviewed the physical requirements of the position and found that she was capable of performing the duties. The Office advised that upon acceptance she would be paid compensation based on the difference between the pay of the offered position and the pay of her position on the date of injury. The Office gave appellant 30 days within which to accept the offered position and return to work or to provide the reasons for her refusal. It also advised appellant of the provisions of 5 U.S.C. § 8106(c).

By response dated August 6, 2002, appellant requested more time within which to respond.

On August 16, 2002 the Office replied to appellant noting that the light-duty position offered was suitable and consistent with her limitations, that it had been approved by her treating physician and that she had been properly informed of these findings. The Office noted that she provided no reasons for her refusal in her August 6, 2002 reply, that the Office had determined that her apparent refusal of the offered position was unjustified and that no further reason for refusal would be considered. The Office, therefore, granted appellant an additional 15 days within which to accept the position, before compensation would be terminated under the provisions of 5 U.S.C. § 8106(c).

By response dated August 26, 2002, appellant claimed that her rights were not addressed and she requested authorization for another orthopedic opinion.

By decision dated September 16, 2002, the Office terminated appellant's wage-loss compensation entitlement on the grounds that she refused an offer of suitable work. The Office found that the sedentary position of medical clerk was suitable both medically and vocationally to appellant's condition, that it had been approved by her physician as suitable to her condition and that she had been properly notified of such on July 11, 2002. The Office further noted that, after being notified of the job's suitability and approval on August 16, 2002, appellant was advised that the position was still available and that her reasons for refusal were not justified and

that, if she did not accept the position within 15 days, 5 U.S.C. § 8106(c) would be invoked. The Office noted that, to that date, appellant had not accepted the offered position.

The Board finds that the Office properly terminated appellant's compensation benefits.

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.[3] The Office has the 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 the position been offered is within the employee's work restrictions, setting forth the specific job requirements of the position.[4] 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.[5] The Office met its burden in the instant case.

In this case the position was suitable to both appellant's vocational and physical condition. As a former licensed practical nurse, warranty clerk, secretary and office manager/bookkeeper, she possessed all of the prerequisite vocational knowledge, skills and experience required of the job of medical clerk. Further, appellant did not object to the job on the basis that its substantive duties were beyond her intellectual or technical capacity. As appellant had experience as a nurse, a clerk, a secretary and an office manager, the Office properly found that the position of medical clerk was vocationally suitable for her.

The Office also properly found that this position was suitable to appellant's medical limitations as it was sedentary, in accordance with Dr. Herz's recommendation and had been specifically approved by him as being suitable to her medical condition and limitations.

Appellant was, therefore, properly offered the position by the employing establishment, which was approved by the Office as being suitable and which appellant's treating physician found suitable to her present condition. She was properly advised by the Office that it was suitable, was advised that her physician had found it suitable and was advised that she had 30 days within which to accept the position or to provide reasons for refusal.

An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[6] When appellant did not accept the job offer, instead sending a letter requesting more time, her reasons for refusal were properly reviewed and found to be without basis, nonexistent and not justified. She was then

[3] 5 U.S.C. § 8106(c)(2).

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

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

[6] 20 C.F.R. § 10.124.

properly advised that her reasons for refusal were unacceptable and she was given an additional 15 days within which to accept the position. As appellant did not accept the position within that time frame, she refused suitable work.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 16, 2002 is hereby affirmed

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Dated, Washington, DC
October 28, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member