U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA WIKE and U.S. POSTAL SERVICE,
POST OFFICE, Fairbanks, AK

Docket No. 00-1047; Submitted on the Record;
Issued April 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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 30, 1982 appellant, then a 41-year-old letter carrier, injured her back while carrying a box of heavy stereo equipment in the performance of duty. The Office accepted appellant's traumatic injury claim for an acute lumbosacral strain. She missed four days of work and returned to limited duty on December 6, 1982. After several weeks appellant returned to regular duty.

On March 2, 1983 appellant was injured again at work when she slipped on ice and fell while delivering mail. She apparently hit both knees in the fall and complained of pain in the lower back and left shoulder. Appellant, however, did not miss any time from work and did not seek medical treatment.

On May 22 1984 appellant filed a claim for a recurrence of disability. She had previously retired from work effective July 15, 1983. The date of the original injury was listed as November 30, 1992. When her claim for a recurrence of disability was approved, she began receiving compensation on the periodic rolls.

The medical record indicates that appellant was initially treated in 1982 for lumbar radiculopathy by Dr. George Brown, an osteopath, who prescribed medication and lumbar stretching exercises. When appellant's symptoms failed to resolve after conservative treatment, she was referred to Dr. Young Hwan Ha, a Board-certified orthopedic surgeon.

In his December 19, 1983 report, Dr. Ha discussed appellant's work injuries and ordered tests including a myelogram and discogram. Medical records from the Fairbanks Memorial Hospital indicate that appellant was admitted on January 23, 1994 for a herniated disc at L4-5, L5-S1. Appellant underwent a chemonucleolysis at L4-5 and L5-S1 and chymopapain injection on January 24, 1984.

During the spring of 1984, appellant apparently moved to San Diego, California, where her follow-up care was undertaken by Dr. E.J. Politoske, a Board-certified neurosurgeon. X-rays taken of the lumbar spine on June 14, 1984 showed degenerative disc disease at L4-5 and L5-S1. An electromyography on June 18, 1994 also revealed irritation of the anterior segments at L5 on the right side. Under Dr. Politoske's guidance, appellant started an exercise and physiotherapy program to strengthen her back.

In a report dated September 24, 1984, Dr. Politoske's partner, Dr. Carl K. Rice, a Board-certified neurosurgeon, reported that during March 1993 appellant lost her footing on some ice but managed to avoid impact to the painful low back area by "catching her weight on a post with the right arm. Dr. Rice stated: "This is not inconsiderable since she was carrying a mailbag as well as the fact that she is a large person and the 'panic grab' included an awkward slide-down, injuring the right neck, shoulder and arm which continues as a region of concern, but most especially aggravating the low back." He indicated that appellant had undergone a chymopapain injection for severe discogenic nerve root irritability affecting L5-S1 and L4-5 on the left.

The Office referred appellant for a second opinion evaluation with Dr. Joel Heiser, a Board-certified orthopedic surgeon. In a report dated August 22, 1985, Dr. Heiser diagnosed a herniated disc and opined that appellant could perform light duty.

Although the employing establishment offered appellant a limited-duty position on October 6, 1986 she refused the job offer on October 20, 1986. Appellant based her refusal on an October 16, 1986 examination report by Dr. John Conley, a Board-certified neurosurgeon, which stated that she was totally disabled from work.[1]

In a June 8, 1987 report, Dr. Arthur Mead, a Board-certified orthopedic surgeon, noted that he had examined appellant at the request of Dr. Conley on April 13, 1987. Dr. Mead reviewed an April 27, 1987 magnetic resonance imaging (MRI) report and diagnosed multiple lower lumbar disc bulges at L4-5, L3-4 and L5-S1. He further diagnosed secondary right leg sciatic neuropathy confirmed by an October 16, 1986 electromyogram.

In a report dated June 11, 1987, Dr. Conley stated: "[appellant] has complete loss of the lumbosacral intervertebral disc space at L5-S1 and severe narrowing of the L4-5 intervertebral disc space." He opined that without surgical intervention appellant would not be able to perform even sedentary work since she complained of pain when she was required to sit for any reasonable length of time. Dr. Conley concluded that appellant was totally disabled from work.

The Office subsequently referred appellant for a second opinion evaluation with Dr. L. Mercer McKinley, a Board-certified orthopedic surgeon. In an April 1, 1988 report, he noted that appellant injured her back on November 30, 1982 when she was delivering a cardboard box that contained a stereo system and injured her back. Dr. McKinley discussed appellant's course of medical treatment and her continuing symptoms of lower back pain. He noted the presence of degenerative disc disease at L4-5 and L5-S1 and weighed the advantages

[1] Dr. Conley took over the medical practice of Dr. Politoske following his death. Dr. Conley reported that, as a result of the chemonucleolysis, appellant had marked loss of disc substance visible on the x-ray as of June 1984. He indicated that appellant's continuous pain was well supported by x-rays and his clinical findings.

of a facet block prior to performing a disc fusion. Dr. McKinley opined that appellant's back condition was directly related to her work injury of November 30, 1982. He did not mention the March 2, 1983 work injury.

In a work evaluation form dated March 9, 1988, Dr. Conley revised appellant's work restrictions and stated that she could work no more than 4 hours a day with a 10-pound lifting restriction, 1 hour of intermittent walking and squatting and no more than 2 hours of continuous sitting.

In a duty status report dated April 1, 1988, Dr. McKinley stated that appellant could lift up to 10 pounds intermittently, that she could sit, stand and walk for 3 hours, bend and stoop for 2 hours a day.

Since the employing establishment did not have available work, the Office made preparations to place appellant in a rehabilitation program. In the interim, however, she moved to Idaho with her family from October 1989 to February 1992.[2]

Upon appellant's return to California in February 1992, the Office referred her for a second opinion evaluation to ascertain her capacity for work. The examination was scheduled with Dr. Benjamin Cox, a Board-certified neurosurgeon, on July 27, 1994. In an August 3, 1994 report, he related that appellant had a history of a low back strain at work on November 30, 1982 and injuries to the right elbow, low back and right shoulder on March 2, 1983.[3] Dr. Cox reviewed the medical records. He noted that after chemonucleolysis appellant's back complaints continued but that she had "no evidence of a herniated disc condition, radiculopathy or pinched nerve" and no evidence of instability of the lumbar spine. Dr. Cox opined that from the time of appellant's March 2, 1983 work injury, she slowly developed a rototorsion strain of the vertical axis and that her shoulder condition should be considered a slow aggravation of her November 30, 1982 work injury. He stated: "This joint was torn by a springing action when she jammed her right elbow into the ice. Over the years the edges of the bones have ground against each other so that now [she] has a significant instability at the acromioclavicular joint on the right." Dr. Cox opined, however, that the shoulder condition would only preclude appellant from performing repetitive work at or above the shoulder level on the right. He concluded that appellant could return to sedentary work for 8 hours a day with lifting of 10 to 20 pounds.

In a report dated December 12, 1994,[4] Dr. McKinley diagnosed chronic lumbar-dorsal strain, degenerative disc disease with evidence of segmental instability at L4-5 and L5-S1 and a right shoulder injury with evidence of calcific rotator cuff tendinitis, a possible displaced fracture

[2] While appellant was in Idaho she was treated for a right shoulder pain. An MRI of the right shoulder on September 20, 1991 showed a small effusion but the rotator cuff was intact. It was noted that the erosive thinning of the articular cartilage was probably degenerative but that an active inflammatory component could not be ruled out. The Office refused to pay medical bills associated with appellant's treatment of the right shoulder condition, noting that it was not an accepted work injury.

[3] Appellant apparently told Dr. Cox that she had not injured her left shoulder and knees as reported on the CA-1 claim form.

[4] The Office specifically authorized Dr. McKinley to treat appellant.

and early degenerative arthritis of the right shoulder.[5] Dr. McKinley stated that appellant was vague about her physical capabilities, but he felt that if she underwent a physical therapy conditioning program then she could return to work "part-time, perhaps 4 hours a day, to a job that does not require any bending, twisting, prolonged sitting and no lifting of over 10 pounds, initially."

In a work evaluation report dated December 12, 1994, Dr. McKinley stated that appellant required physical therapy and could only work 3 to 4 hours a day, with restrictions of 2 hours sitting, walking and no lifting over 10 pounds.

On March 23, 1995 the employing establishment offered appellant a limited-duty job as a part-time general clerk for four hours a day beginning July 1, 1995 in Fairbanks, Alaska. It was noted that her hours would increase as she was medically released following physical therapy. The job was described as being consistent with her medical restrictions because it required: no lifting over 10 pounds, sitting with intermittent periods of stretching, standing or walking as desired and no overhead reaching with the right arm. It was further noted that appellant would be paid relocation expenses.

On July 20, 1995 the Office notified appellant that the part-time job offer constituted suitable work. The Office gave appellant 30 days to accept the job offer or provide reasons for her refusal of the job or she risked termination of her compensation.

In response to the suitability determination, appellant submitted an August 15, 1995 treatment note from Dr. Arthur Platt, a Board-certified orthopedic surgeon, which provided a two-line statement: "[Appellant] was seen in our office on [August 8, 1995]. At this time she is unable to perform the duties of mail carrier or clerk."[6]

On August 22, 1995 the Office advised appellant that her reason for refusing the offered job was unacceptable. She was given an additional 15 days to either accept the job offer or have her compensation terminated.

In a September 11, 1995 decision, the Office terminated appellant's compensation based on her refusal to accept suitable employment.[7]

Appellant requested a hearing, which was held on December 18, 1996.

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[5] Dr. McKinley noted that appellant had not complained of right shoulder pain when he first examined her in 1988. He opined, therefore, that any right shoulder condition that was caused by the work injury was resolved by 1988.

[6] Attached to Dr. Platt's August 15, 1995 treatment note was an electromyogram (EMG) and nerve conduction studies of the same date showing normal findings of the lumbar spine and lower extremities.

[7] The Office noted that appellant made a false statement in order to obtain authorization for a change of physicians from Dr McKinley to Dr. Platt; therefore, the opinion of Dr. Platt was deemed without probative value. The Office further noted that the part-time job was consistent with the physical restrictions of Dr. McKinley, who was the treating physician of record.

At the hearing, appellant submitted a December 16, 1996 report from Dr. Platt, stating that he had last seen appellant on December 11, 1996 for complaints of left shoulder pain. He indicated that appellant's right shoulder pain had subsided but that she now complained of severe left shoulder pain. On physical examination Dr. Platt noted marked limitation of range of motion. An MRI dated December 11, 1996 was noted as showing degenerative changes in the glenohumeral joint, joint effusion and degeneration of the rotator cuff.[8] Dr. Cox stated that, "all the injuries are causally related to the work-related accident." He concluded that appellant was totally disabled from her job as a letter carrier.

Appellant also argued at the hearing that the job offer was not suitable because she would have to relocate to Alaska, which would pose a tremendous financial hardship on her family. She submitted copies of two letters she mailed to postmasters in her commuting area requesting employment to show that she was not refusing "suitable" work in California.

On February 11, 1997 an Office hearing representative affirmed the September 11, 1995 decision.

On January 30, 1998 appellant requested reconsideration and submitted additional evidence.

In a February 4, 1998 report, Dr. Platt indicates that he has reviewed the decision of the Office hearing representative. He notes that at the time of appellant' work injury, medical records state that she fell not just on her back but on her right shoulder. Dr. Platt notes that while no objective evidence documented a right shoulder injury, the development of appellant's symptoms in the right shoulder were consistent with impingement syndrome and that the symptoms "can be gradual and intensity variable." He concludes that appellant's symptoms and laboratory findings in his office "can be causally related to her work injury." Dr. Platt further stated that appellant's medical condition would be adversely affected by her return to Alaska.

In an April 21, 1998 decision, the Office refused modification of the February 11, 1997 decision.

By letter dated April 7, 1999, appellant requested a "reconsideration hearing."

In a May 12, 1999 decision, the Office denied appellant's request for a hearing on the grounds that she had previously exercised her right to a hearing and was, therefore, only entitled to request reconsideration.[9]

On July 2, 1999 appellant clarified that her April 7, 1999 letter was a request for reconsideration and not a hearing.

In conjunction with her reconsideration request, appellant submitted a March 9, 1999 report from Dr. Platt indicating that she had ongoing shoulder symptoms and degenerative

[8] The MRI report is also contained in the record.

[9] The Board finds that the Office correctly denied appellant's request for a hearing.

changes in her lower back. Copies of an MRI scan were provided with the report.[10] He recommended facet blocks for treatment of the lower back. Dr. Platt, however, did not address appellant's capacity for work.

Appellant also submitted an October 7, 1998 report from Dr. Hirschberg. He related that appellant injured her right and left arm in a work-related fall, but made no mention of her injuring her back in that incident.[11] Dr. Hirschberg diagnosed that appellant had bilateral frozen shoulders, severe degenerative disease of the shoulders, adhesive capsulitis as well as increasing lumbar spine problems. He stated that there was some question of appellant going back to work where she would be required to use her arms and he felt this was "probably not something that she was able to accomplish" as the repetitive movement would irritate her shoulder problems.

In a decision dated September 22, 1999, the Office denied modification.

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.[12] Section 8106(c)(2) of the Federal Employee's Compensation Act[13] 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.[14] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[15] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[16]

Section 8106's implementing regulation[17] 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.[18]

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[10] An MRI of the right shoulder performed on March 5, 1999 showed that appellant had a broad based ulceration of the rotator cuff, degenerative changes and joint effusion with a marked risk for impingement. A lumbar spine MRI dated March 5, 1999 showed combined osseous, discogenic and early ligamentus central stenosis at L4-5.

[11] He stated that appellant described her injury as slipping on ice and holding onto a pole with a yanking sensation.

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

[13] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

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

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

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

[17] 20 C.F.R. § 10.516 (1999).

[18] *Id*.

Office procedures state that acceptable reasons for refusing an offered position include the withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[19] Unacceptable reasons include relocation for personal desire or financial gain, lack or promotion potential, or job security.[20]

The evidence of record reveals that appellant's treating physician and an Office referral physician were in agreement that appellant could return to light duty four hours a day. In accordance with appellant's work restrictions, the employing establishment offered appellant a job as a part-time modified clerk, which was approved by the Office as suitable work. On July 20, 1995 the Office complied with the procedural requirements of advising appellant of the suitability of the position offered and the sanctions for refusing the job. The Office further provided appellant with the opportunity to either accept the position or provide an explanation for her refusal. Within the 30-day time period allotted by the Office, appellant responded to the suitability notice by refusing the job offer and submitting a treatment note from a new physician, which simply stated without explanation that she was disabled from work. After finding appellant's reasons for refusing the suitable work offer to be unacceptable, the Office properly advised appellant that she had 15 days to accept the job or have her compensation terminated. Appellant, however, still did not accept the job. Thereafter, by decision dated September 11, 1995, the Office terminated appellant's compensation.

The Board has duly reviewed the record and finds the job offer to be suitable. Dr. McKinely, who was the only physician authorized to treat appellant on November 2, 1994, specifically stated that appellant could return to work four hours a day with restrictions so long as she continued with her physical therapy. Although she tried to contradict her own attending physician's opinion by submitting a report by Dr. Platt stating that she was "unable to perform the duties of mail carrier or clerk," Dr. Platt's opinion is of diminished probative value. He did not provide any rationale for his medical conclusions.[21]

While the case was before the Office hearing representative, appellant submitted an additional report from Dr. Platt dated December 16, 1996. That report is also lacking adequate rationale from which to conclude that she is disabled from performing the suitable work position. Specifically, Dr. Platt again failed to provide a diagnosis. He did not offer an opinion that appellant was unable to perform the suitable job offer. Rather, he only stated that appellant could not return to work in her prior job as a mail carrier. Dr. Platt's March 9, 1999 report, likewise does not discuss appellant's capacity for work and is of no probative value.

Although, Dr. Hirschberg stated that appellant "probably" would not be able to accomplish a return to work in a position that required her to use her arms, he did not consider the work requirements of the job offer to ascertain whether or not the part-time position was

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[19] *C.W. Hopkins*, 47 ECAB 725 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[20] *Arthur C. Reck*, 47 ECAB 339 (1996).

[21] Dr. Pratt also indicated that appellant had bilateral carpal tunnel syndrome. He did not state, however, that appellant could not work due to that condition.

medically suitable for appellant. Dr. Hirschberg's statement is also speculative and lacks any rationale for concluding that appellant could not work in the part-time position offered to her.

Thus, to the extent that the credible medical opinions from Drs. Conley and McKinley establish that appellant is able to return to work for four hours a day as a general clerk, the Board concludes that the position is suitable.[22]

Additionally, in this case, appellant left the employing establishment rolls when she retired from her job. The Office's Federal (FECA) Procedure Manual provides that if the employee has left the employing establishment rolls, a move or relocation from the area in which the employing establishment is located may give rise to an acceptable reason for refusing a job offered by the employing establishment. The procedure manual states that in cases where the claimant is no longer on the employing establishment rolls, the following may also be deemed acceptable reasons for refusing the offered job: "[A] medical condition (either preexisting or subsequent to the injury) of the claimant or a family member arises which contraindicates return to the area of residence at the time of injury."[23]

Appellant's contention at the hearing that the job offer was not suitable because she would have to move from California to Alaska is rejected by the Board. She has not provided any evidence to show that relocation is contraindicated by her medical condition. Dr. Platt's unreasoned opinion does not support appellant's refusal of the light-duty position and she is not justified in rejecting suitable work solely because she does not wish to relocate to Alaska.

Finally, the Board finds that Office procedures were properly followed in notifying appellant of the penalties for refusing an offer of suitable work. When she refused to accept the job offer, the Office notified appellant that her reasons for refusing the position were unacceptable and gave her an additional 15 days to accept the position or risk having her compensation benefits terminated. Thus, the Office acted within its discretion in finding that appellant refused an offer of suitable work and thereby terminated her compensation.

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[22] Appellant correctly pointed out to the Office that Dr. Cox was not a Board-certified physician. The Board notes, however, that Dr. Cox's opinion is reasoned and is corroborated by the opinion of appellant's treating physician, who is Board-certified.

[23] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemploymen: Determining Wage-Earning Capacity,* Chapter 2.813.11(d)(7) (August 1991).

The decision of the Office of Workers' Compensation Programs dated September 22, 1999 is hereby affirmed.

Dated, Washington, DC
April 26, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member