U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRONNA NICHELSON and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Jeffersonville, IN

Docket No. 01-1264; Submitted on the Record;
Issued April 16, 2002

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 on the grounds that she refused an offer of suitable work.

On January 24, 1999 appellant, then a 31-year-old statistical clerk, filed an occupational disease claim, alleging that she developed pain in her right wrist and shoulder because she was required to perform continuous writing in her job. The Office accepted the claim for right hand and wrist tendinitis. Appellant received intermittent periods of compensation for wage loss from January 13, 1999 until she stopped work entirely on May 11, 1999. Thereafter, she received compensation on the periodic rolls.

Appellant initially sought treatment for her work injury with Dr. Michelle Moran, a family practitioner, who diagnosed tendinitis secondary to repetitive motion. She prescribed medication and a splint, but when appellant failed to improve after several weeks of care, she referred appellant to an orthopedic specialist.

In a report dated February 16, 1999, Dr. Thomas Sehlinger, a Board-certified orthopedist, noted appellant's complaints of right wrist pain and tenderness over the first dorsal compartment. He diagnosed first dorsal compartment tenosynovitis (de Quarvain's syndrome) of the right wrist. Dr. Sehlinger opined that appellant's condition was aggravated by typing in her job. It was noted that appellant received a cortisone injection to relieve her pain.

An electromyography (EMG) performed on April 7, 1999 showed mild neuropathic changes in the myotomal distribution at C5-8 roots. Nerve conduction studies (NCS) of the same date were normal.

In a treatment note dated April 13, 1999, Dr. Sehlinger indicated that he was unsure what to make of the EMG finding and whether or not it had any clinical significance. He reported that appellant continued to complain of tingling and aching of the right extremity, which he believed

was the result of overuse syndrome. Dr. Sehlinger opined that appellant could return to sedentary work with no repetitive use of her upper extremities and no lifting over five pounds.

In a May 5, 1999 treatment note, Dr. Sehlinger stated that he was unable to pinpoint appellant's diagnosis and thought that her symptoms were consistent with "a probable myofascial-type problem." He recommended that appellant discontinue her pain medication and undergo a six-week course of physical therapy. Dr. Sehlinger then referred appellant to Dr. Wolff, a Board-certified hand surgeon.

In a report dated May 19, 1999, Dr. Wolff diagnosed "multiple nerve compression syndrome involving the thoracic outlet on the right side, apparently work related." Following a course of physical therapy, he released appellant for a return to work for three hours a day with the use of a voice-activated assistance program effective July 8, 1999.

Although appellant was approved for part-time work, the employing establishment was unable to provide training for a voice-activated assistance program until August 3, 1999. Appellant was scheduled to return to work at 7:30 a.m. on August 3, 1999 but she did not report for duty at the designated time. Instead, appellant arrived later in the day presented a handwritten note to her supervisor stating as follows: "I ... request [leave without pay] [f]rom Aug[ust] 3 to 4 [, 1999] until which [time] I can be seen by Dr. Wolff. Sitting at the computer for a short period of time increases the pain."

In an August 10, 1999 letter, appellant's attorney related that appellant had not refused to work on August 3, 1999 but that she had simply been unable to perform her duties.

In an August 20, 1999 letter, the employing establishment directed appellant to return to work or else provide acceptable medical documentation specifying why she could not perform the job as approved by her treating physician.

The record indicates that Dr. Wolff subsequently scheduled appellant for a functional capacity evaluation (FCE) on August 27, 1999. In an August 27, 1999 report, he advised that appellant had refused to actively participate in the FCE and, therefore, he could make no further recommendation with respect to her work restrictions.

On September 9, 1999 the Office notified appellant that the modified clerk position constituted suitable work. Appellant was informed that she had 30 days to either accept the offered job or to provide reasons for her refusal of the offer of suitable work or else she risked termination of her compensation.[1]

On September 30, 1999 appellant responded to the suitability determination by submitting a copy of the FCE report that was already of record, a copy of a letter from the rehabilitation nurse scheduling appellant for an examination with Dr. Ellen M. Ballard, a physiatrist, for September 15, 1999 and a September 24, 1999 progress report prepared by the

[1] On September 9, 1999 the Office also advised appellant that her personal note stating that she was unable to sit at a computer was insufficient to override Dr. Wolff's recommendation that she return to work using a voice-activated program.

rehabilitation nurse, noting that Dr. Ballard had not changed appellant's work restrictions following her evaluation of appellant on September 15, 1999.[2]

The record indicates that the Office received a copy of Dr. Ballard's September 15, 1999 report on October 18, 1999. She reported physical findings and stated that "[appellant] may work with the restrictions as outlined by Dr. Wolff until she is seen in recheck." Dr. Ballard indicated that she would order an x-ray and suggested that if the film was negative she would question whether appellant had some functional overlay affecting her ability to perform her job.

Appellant was apparently seen in recheck with Dr. Ballard on October 6, 1999. In her report, she noted that appellant's x-ray was normal but that her grip strength had deteriorated since her last visit. Dr. Ballard recommended a repeat EMG, which was scheduled for October 25, 1999. This report was also date-stamped as received by the Office on October 18, 1999.

Appellant on her own accord went to see Dr. David H. Thurman, a Board-certified physician in physical medicine and rehabilitation, on October 14, 1999. Based on the results of an EMG and NCS performed on October 14, 1999, Dr. Thurman diagnosed right carpal tunnel syndrome.

In a report dated October 26, 1999, Dr. Ballard discussed the October 14, 1999 EMG results and opined that the findings could not be specifically related to appellant's work activities. She concluded that appellant had reached maximum medical improvement from her work-related strain and that her continuing complaints of pain were unsubstantiated by any objective evidence.

On November 4, 1999 appellant underwent surgery consisting of a right carpal tunnel release.

In a November 12, 1999 decision, the Office terminated appellant's compensation.

On November 24, 1999 appellant requested a hearing.

Appellant subsequently submitted at the hearing on October 23, 2000, an October 17, 2000 report from Dr. Richard H. DuBou, a Board-certified orthopedic surgeon, indicating that appellant suffered from work-related carpal tunnel syndrome and cubital tunnel syndrome. He opined that appellant had been totally disabled from work from the time of the November 4, 1999 surgery until approximately January 6, 2000. Dr. DuBou noted that appellant underwent surgery for her cubital tunnel syndrome on July 28, 2000 and has been unable to work during her postoperative period.

In a decision dated January 11, 2001, an Office hearing representative affirmed the Office's November 12, 1999 decision.

[2] Dr. Wolff had recommended that appellant be referred for pain management as he no longer felt that he could offer her treatment.

The Board finds that the Office erred in terminating appellant's compensation

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.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act[4] 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.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

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.[7] 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.[8]

In this case, appellant's treating physician stated that she could work for three hours a day with the aid of a voice-activated computer system. The employing establishment agreed to modify appellant's clerk position to conform to her work restrictions and appellant was scheduled to return to work on August 3, 1999 to begin training. Inasmuch as the modified clerk position conforms with appellant's work restrictions as outlined by Dr. Wolff, the Office correctly found the job was suitable.

Following the suitability determination, appellant was properly given 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered job. Appellant subsequently submitted a copy of a FCE report previously of record, a letter from the rehabilitation nurse scheduling appellant for an examination and a progress note from the rehabilitation nurse. Because appellant submitted additional evidence within the 30-day period provided by the Office for responding to the suitability determination, she was entitled to have her evidence evaluated to determine whether or not she provided acceptable reasons for refusing the offer of suitable work. Thereafter, she was entitled to an additional 15 days to accept the offered job. Thus, the Board finds that the Office did not properly terminate appellant's compensation for the reason that it did not fully afford her the procedural protections set forth in *Maggie L. Moore*.[9] Specifically, the Office, after advising appellant in its August 10, 1998 letter that it found her reason for rejecting the offer unjustified, did not afford appellant 15 days to

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

[4] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

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

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

[7] 20 C.F.R. § 10.516 (1999).

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

[9] *Id*.

accept the position. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work.[10]

Furthermore, appellant submitted medical evidence at the hearing that was not properly evaluated by the Office with respect to the issue of suitability. In a report dated October 17, 2000, Dr. Ballard advised that appellant had been totally disabled from work due to the conditions of carpal tunnel and cubital tunnel syndrome for the period November 4, 1999 until January 6, 2000. The physician indicated that appellant had undergone surgery on November 4, 1999 and had been unable to work during her postoperative period. In evaluating this evidence, the Office hearing representative found that Dr. DuBou's report failed to establish that appellant was justified in not accepting the offer of suitable work since the Office had not accepted the conditions of carpal tunnel syndrome and cubital tunnel syndrome as work related. The Board notes, however, that in order to carry its burden of proof to show suitability of an offered job, the Office must consider whether a condition acquired by appellant subsequent to his work injury might prevent him from carrying out the duties or physical requirements of the offered position, even if that condition is not work related.[11] To the extent that the Office did not perform such an evaluation of Dr. DuBou's October 17, 2000 report, the Board concludes that the Office erred in terminating appellant's compensation.

The January 11, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
April 16, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] *See Maggie Moore, supra* note 8; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.8144(c) (December 1993).

[11] *See Edward J. Stabell*, 49 ECAB 566 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) which provides that "If medical reports in the file document a condition which has arisen since the compensable injury and this condition disables the claim from the offered job, the job will be considered unsuitable even if the subsequently-acquired condition is not work related."