

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUE T. WHITTAKER and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

*Docket No. 98-2384; Submitted on the Record;
Issued November 1, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 8, 1996 on the grounds that she neglected suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for review on the merits in its decision of July 10, 1998.

In this case, the Office accepted that appellant developed employment-related bilateral radial nerve compression and a subsequently authorized decompression of ulnar and radial nerves with medial epicondylectomy of both arms. The Office placed appellant on the periodic rolls and paid appropriate compensation benefits.

In September 1994, the employing establishment offered appellant a limited-duty job of postage due revenue desk based on restrictions provided by appellant's treating physician, Dr. Anthony Wheeler, a Board-certified neurologist, on August 18, 1994, Dr. Wheeler approved of the limited-duty assignment offer on September 9, 1994 and then later rescinded his acceptance of the suitability of the job. By decision dated April 7, 1995, an Office hearing representative set aside a January 23, 1995 decision of the Office, which had terminated appellant's compensation benefits on the grounds that appellant refused to accept suitable employment. The case was remanded for the Office to obtain a copy of a videotape of an individual actually performing the duties of the limited-duty position offered so that appellant's treating physician, Dr. Anthony Wheeler, could determine whether appellant could perform the job as demonstrated.

In a letter dated July 17, 1995, Dr. Wheeler reviewed the videotape of the job and indicated that the limited-duty job was a repetitive motion type activity and thus was not suitable with appellant's restrictions. An Office referral physician, Dr. Joseph J. Estwanik, a Board-certified orthopedic surgeon, who had previously examined appellant on September 21, 1995, reviewed the videotape of the job on October 17, 1995. He noted that appellant was restricted from repetitive reaching above shoulder height, but found that the job required no overhead or

above shoulder work. Dr. Estwanik opined that this type of low demand and nonabove shoulder work was medically suitable for appellant in an eight-hour day. The Office found that there was a conflict of medical opinion evidence between Drs. Wheeler and Estwanik and referred appellant for an impartial medical examination by Dr. Gary Mangum, a Board-certified orthopedic surgeon.

In a report dated January 11, 1996, Dr. Mangum noted appellant's history of injury, medical history and performed a physical examination. He stated that he reviewed the records and noted that, although appellant continued to complain of pain and discomfort, there were no physical findings of residuals at the present time. Dr. Mangum stated that appellant had findings, in the early part of her medical history, which were compatible with bilateral carpal tunnel syndrome and ulnar nerve compression, but did not appear to have those problems at the present time nor could he relate the pain and discomfort appellant has about her shoulders and upper thorax with either of those conditions. He noted that her cervical spondylosis was contributing was difficult to determine. Dr. Mangum opined that appellant could work with her hands and found the job, which he reviewed on the video, was appropriate for appellant. He further opined that appellant had nonwork-related conditions which affected her ability to work, but would not prevent her from doing the selected job. Dr. Mangum stated that the work restrictions placed on appellant were on a theoretical basis since the physical examination did not reveal anything to prevent appellant from progressing her activities on an as tolerated basis. He stated that the work, as outlined on the video, was the type that was repetitive; however, appellant could work at her own speed. Dr. Mangum further noted that it did not appear that appellant had to do the job at a particular manner each time and she was not restricted to hand use in that she could alter the way she did the job.

On March 5, 1996 the employing establishment offered appellant a position as a postage due review clerk. The position corresponded to the physical restrictions delineated by Dr. Wheeler on August 18, 1994 and was noted to be in accordance with Dr. Mangum's recommendations. Appellant refused the job offer. On April 4, 1996 the Office advised appellant that the offered position had been found to be suitable to her capabilities and was currently available. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that, if she failed to accept the offered position and failed to demonstrate that the failure was justified, her compensation would be terminated.

On April 30, 1996 appellant declined to accept the offered position of postage due review clerk, stating she did not know what was expected as to her production, inquiring whether there was a trial period for the job and disagreeing with Dr. Mangum's statement that the job could be done in ways not involving her hands.

On June 24, 1996 the employing establishment reoffered appellant the position as a postage due review clerk. The position corresponded to the physical restrictions delineated by Dr. Wheeler on August 18, 1994 and was noted to be in accordance with Dr. Mangum's recommendations. On July 1, 1996 appellant declined to accept the offered position and referenced her letter of April 30, 1996 for her reasons of refusal. On August 27, 1996 the Office advised appellant that the offered position had been found to be suitable to her capabilities and

was currently available. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that, if she failed to accept the offered position and failed to demonstrate that the failure was justified, her compensation would be terminated.

In a September 23, 1996 letter, appellant reiterated her reasons for refusing the position as previously noted in her April 30, 1996 letter. In a June 27, 1996 letter, Dr. James J. Powers, Board-certified in physical medicine and rehabilitation, advised that appellant's condition would not allow her to return to doing repetitive upper extremity work and, if forced to do so, could result in marked disability.

By letter dated November 4, 1996, the Office informed appellant that her reasons for refusing the position were not found acceptable. It noted that the offered position was within the work restrictions imposed by Dr. Mangum and that his findings and conclusions constituted the weight of the medical opinion. The Office allowed an additional 15 days for appellant to accept the position.

In a November 10, 1996 letter, appellant reiterated that the selected job was made up of constant, repetitive use of the upper extremities. She noted that even Dr. Mangum stated that the job was repetitive and that repetition was the concern here, not speed of doing the job. Appellant further disagreed with Dr. Mangum's assessment of how she could perform the selected position.

By decision dated November 21, 1996, the Office terminated appellant's compensation benefits effective December 8, 1996 finding that she had refused to work after a suitable job offer was made by the employing establishment. In a decision dated March 3, 1997 and finalized March 4, 1997, an Office hearing representative affirmed the Office's termination of benefits.

By letter dated June 9, 1997, appellant requested reconsideration of the Office's prior decision and submitted additional medical evidence.

In an April 29, 1997 report, Dr. David S. Baker, a Board-certified hand surgeon, noted that appellant continued to experience upper extremity pain, which appeared to be located in the trapezius muscles and was related to her activity level. He stated that appellant described the proposed job to him and demonstrated the functions, which would be required. Based on his knowledge of appellant's condition and the strong prior relationship to appellant's upper extremity problems to repetitive motion activities, Dr. Baker opined that appellant would be highly susceptible to exacerbation of her current continuing problems and the possible development of further symptoms produced by repetitive motion activities.

In a May 22, 1997 report, Dr. Powers noted appellant's history of injury and medical history and performed a physical examination. He stated that he reviewed appellant's job description, the new assignment as a postage due review clerk, as well as the restrictions Dr. Wheeler recommended. Dr. Powers noted that appellant had some residuals of her prior nerve compression, but agreed that her primary problem was the myofascial pain. He stated that, without question, appellant could not do the job as a postage due review clerk. As the job was described, appellant would be sitting at a desk and repeating the same activity throughout an

eight-hour shift. Dr. Powers stated that the maximum appellant could be in any one work station was no more than 15 to 20 minutes. Based on appellant's history, Dr. Powers stated that he did not think that appellant had the endurance for even a four-hour-a-day job. He recommended a general aerobic program to build appellant's endurance as she was barely independent in self-care.

In a May 23, 1997 report, Dr. Gerald M. Rosenberg, a Board-certified orthopedic surgeon, noted appellant's medical history and performed a physical examination. He stated that he reviewed her description of the postage due clerk position and agreed with appellant's description that this was a repetitive activity, which would be untenable for her postop status. Dr. Rosenberg stated that he did not think appellant would ever be able to do that type of job and opined that appellant should not work at that position. He stated that appellant was capable of some remunerative work within the limitations outlined.

Office notes from Dr. Wheeler for the period January 3 through May 27, 1997 were also provided. No comments were provided on whether appellant could perform the selected position.

In a merit decision dated July 22, 1997, the Office found that the medical reports submitted with appellant's request for reconsideration were insufficient to warrant modification of the prior decision.

By letter dated August 3, 1997, appellant requested reconsideration of the Office's decision and raised arguments pertaining to the second opinion evaluation of Dr. Estwanik, requesting that his report be stricken from the record as he contradicted himself. In a decision dated August 11, 1997, the Office noted that appellant had presented the same argument before the Office of Hearings and Review and denied reconsideration as the evidence submitted in support of the request for reconsideration was of a cumulative and repetitious nature.

By letter dated August 13, 1997, appellant reiterated the argument presented in her August 3, 1997 letter and requested reconsideration. In a decision dated September 24, 1997, the Office found that appellant's letter neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant further reconsideration.

In an undated reconsideration request from appellant, which the Office received September 29, 1997, appellant presented arguments and submitted medical evidence.

In an August 14, 1997 addendum to his report of May 23, 1997, Dr. Rosenberg noted that he reviewed the videotape of the postage due clerk and stated that appellant's description of the job was accurate. He stated that his recommendation remained unchanged. Dr. Rosenberg reiterated his opinion that performing this job would be harmful to appellant now as well as in the future.

In an August 11, 1997 letter, Dr. Powers advised that he reviewed the videotape of the job as a postage due clerk. He noted that the job entailed some reaching and, with the restricted motion of appellant's neck, advised that excessive stress is put on the scapular muscles.

Dr. Powers continued to opine that continued treatment was appropriate and that appellant was unable to perform the selected job at the present time.

Office notes from Dr. Wheeler for the period September 17 and October 15, 1997 were also provided. No comments were provided on whether appellant could perform the selected position.

In a merit decision dated October 30, 1997, the Office found that the information and evidence submitted with appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

By letter dated November 4, 1997, appellant requested reconsideration reiterated her argument pertaining to Dr. Estwanik. In a decision dated December 8, 1997, the Office found that appellant's letter neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant merit review of the claim.

By letter dated December 10, 1997, appellant requested reconsideration and submitted additional evidence.

In a November 12, 1997 letter, Dr. Powers reiterated his opinion that, based upon his examination of appellant and review of the tape showing the duties of the job, appellant did not have the present capacity in her muscles to do the job of a postage due clerk.

Treatment notes along with a November 24, 1997 letter from Dr. Wheeler were submitted. The only reference to the question of whether appellant could do the selected job was a May 22, 1995 treatment note, previously of record, which stated that review of the attached video was that appellant could not return to this kind of work since it requires almost constant hand manipulation use.

In a decision dated February 5, 1998, the Office found the arguments and evidence submitted to be of a repetitious nature and, therefore, insufficient to warrant merit review of the claim.

By letter dated March 10, 1997, appellant requested reconsideration of the Office's decision and submitted additional medical evidence.

In a February 25, 1998 report, Dr. T. Hemanth Rao, a Board-certified neurologist, examined appellant and noted that, clinically, appellant has significant weakness of the hand intrinsic muscles bilaterally and has difficulty with rapid alternating and fine finger movements. The cause of her weakness was probably due to her multiple peripheral nerve entrapments in both upper extremities. Another component may be a cervical radiculopathy. He reviewed the videotape of the selected position and opined that, given her complaints and physical findings, she would be unable to engage in this type of chronic repetitive type of work. A copy of his neurological examination was provided.

In a merit decision of March 27, 1998, the Office found that the evidence submitted with appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

By letter dated June 5, 1998, appellant again requested reconsideration and submitted arguments along with new evidence from Dr. Rao. In an April 13, 1998 report, Dr. Rao reiterated his opinion that, based upon his examination and review of the videotape, appellant would be unable to engage in this type of chronic, repetitive type of work. In a decision dated July 10, 1998, the Office found the evidence submitted to be irrelevant, cumulative or repetitious and, therefore, insufficient to warrant reconsideration of the prior decision.

The Board finds that the Office properly terminated appellant's compensation on the grounds that she neglected suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.¹ This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)² of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(e)³ of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 showing before a determination is made with respect to termination of entitlement to compensation.⁴ To justify termination, the Office must show that the work offered was suitable⁵ and must inform appellant of the consequences of refusal to accept such employment.⁶ According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.⁷

The Office properly terminated appellant's compensation benefits for neglecting to work after suitable work was procured for her. The Office determined that there was a conflict in the medical opinion between Dr. Wheeler, appellant's attending Board-certified neurologist and the

¹ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.124(c).

⁴ *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

⁶ *See Maggie L. Moore*, *supra* note 5; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

Office physician, Dr. Estwanik, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant could perform the limited-duty job of postage due review clerk based on the restrictions provided by Dr. Wheeler on August 18, 1994. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Mangum, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.⁸

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹ The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Mangum, the impartial medical specialist selected to resolve the conflict in the medical opinion as to whether the selected position was medically suitable for appellant.

The Board has carefully reviewed the opinion of Dr. Mangum and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history, an examination and review of the selected position, as demonstrated on the video. Dr. Mangum opined that appellant could work with her hands and specifically stated that the job reviewed on the video was appropriate for appellant. He stated that the work restrictions placed on appellant were on a theoretical basis since the physical examination did not reveal anything to prevent appellant from progressing her activities on an as tolerated basis. Dr. Mangum provided medical rationale for his opinion that the selected position was suitable as he noted that appellant had the ability to work at her own pace and could alter the way she used her hands. As Dr. Mangum's report was based on a proper factual background and provided findings in support of his conclusion that the selected position was medically suitable for appellant, his report is entitled to the weight of the medical evidence.

Prior to the initial termination of appellant's compensation, the record contained a June 27, 1996 letter from Dr. Powers and treatment notes from Dr. Wheeler. Dr. Power provided no medical rationale for his opinion that appellant would never be able to do "repetitive upper extremity work." Furthermore, the Board notes that Dr. Power's opinion that appellant's return to work could result in marked disability is not an acceptable medical rationale. The fear of future injury is not sufficient to justify a refusal of employment otherwise found to be suitable.¹⁰ As the treatment notes from Dr. Wheeler failed to provide an opinion on whether appellant could perform the selected position supported by medical rationale, his reports are of limited probative value. Accordingly, these reports are insufficient to overcome the weight accorded Dr. Mangum's opinion or to create a new conflict.

⁸ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ *Edward P. Carroll*, 44 ECAB 331 (1992).

Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation benefits effective December 8, 1996.

After the Office's November 21, 1996 decision, terminating appellant's compensation effective December 8, 1996, appellant submitted additional medical evidence and raised arguments, which she felt showed that she was justified in refusing the selected position. Given that the Board has found that the Office properly relied on the opinion of the impartial medical examiner, Dr. Mangum, in terminating appellant's compensation effective December 8, 1996, the burden shifts to appellant to establish that she is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and finds that it is not of sufficient probative value to establish that she can not perform the selected position on a full-time basis.

In his April 29, 1997 report, Dr. Baker opined that appellant would be highly susceptible to exacerbation of her current continuing problems and the possible development of further symptoms produced by repetitive motion activities. Dr. Baker's report is of limited probative value as the fear of a future injury is not sufficient to justify a refusal of employment otherwise found to be suitable.¹¹ In his May 23, 1997 report, Dr. Rosenberg opined that he did not think appellant would ever be able to do the postage due clerk position as it was a repetitive activity. Likewise, Dr. Rao, in his report of February 25, 1998, opined that appellant would be unable to engage in the chronic repetitive work of the selected position. These reports, however, are of limited probative value as there is no adequate medical rationale, other than a repetitive activity would be untenable for her postop status, to support their conclusion that the postage due clerk position was not medically suitable for appellant.

In his reports of May 22 and November 12, 1997, Dr. Power opined that appellant did not have the present capacity to do the job as a postage due clerk and was only able to work a maximum of 15 to 20 minutes in any one work station. However, his report is of limited probative value on the relevant issue of the present case, in that it does not contain adequate medical rationale in support of its conclusions that appellant's lack of endurance was causally related to her employment injury, which would render the selected position medically unsuitable.¹² Dr. Power noted that appellant had some residuals of her prior nerve compression, but agreed that her primary problem was myofascial pain. He noted that appellant was barely independent in self-care, but failed to explain the medical process through which appellant's employment-related bilateral radial nerve compression could result in such an utter lack of endurance or the maximum of 15 to 20 minutes work in any one work station.

The Board further finds that the Office properly denied merit review in its decision of July 10, 1998.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulations provide that a claimant must: (1) show that the Office

¹¹ *Id.*

¹² *See Leon Harris Ford*, 31 ECAB 514, 518 (1980).

¹³ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of

erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁴ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹⁵ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁶

In the present case, appellant's compensation was terminated on the grounds that she neglected suitable work. The additional evidence appellant submitted with her June 5, 1998 reconsideration request was a copy of the videotape of the selected position and an April 13, 1998 report from Dr. Rao wherein he reiterated his opinion that appellant would be unable to engage in the chronic, repetitive type of work from the selected position. Dr. Rao's April 13, 1998 report, therefore, was duplicative of evidence already submitted and was thus properly found to be irrelevant and not sufficient to require reopening of appellant's case for further review of the merits of her claim pursuant to section 8128. The videotape of the selected position does not address in the issue in this case. Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from established facts.¹⁷ The Office did not abuse its discretion in denying a merit review in this case.

compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.138(b)(1) and (2).

¹⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁶ 20 C.F.R. § 10.138(b)(2).

¹⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated July 10, March 27 and February 5, 1998, December 8, October 30, September 24 and August 11, 1997 are hereby affirmed.

Dated, Washington, DC
November 1, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member