United States Department of Labor
Employees' Compensation Appeals Board

ROBIN COX, Appellant	)	
	)	**Docket No. 05-1153**
and	)	**Issued: October 18, 2005**
DEPARTMENT OF DEFENSE, DEFENSE INFORMATION SYSTEMS AGENCY, Arlington, VA, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 27, 2005 appellant, through her attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated April 8, 2005, terminating her compensation benefits effective April 17, 2005 on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective April 17, 2005 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On June 21, 1999 appellant, then a 45-year-old computer specialist, filed a traumatic injury claim alleging that on April 12, 1999 two of her three herniated cervical discs were compressed to her spinal cord as a result of either moving tables, chairs, video equipment and computers to set up a room for briefings and reconfiguring computer hardware or while

reconnecting a cable to her home computer that she primarily used for work. On September 30, 1999 the Office accepted appellant's claim for a sprain of the left deltoid and trapezius and a herniated nucleus pulposus at C5-6 and C6-7. The Office also authorized an anterior cervical discectomy and spinal fusion which were performed on May 18, 1999. The Office subsequently authorized appellant to undergo a posterior cervical decompression and fusion which was performed on May 5, 2000.

The Office referred appellant, together with the case record including a description of the computer specialist position, a statement of accepted facts and list of questions to be addressed, to Dr. John Meyerhoff, a Board-certified internist, and Dr. Sheima Baig, a Board-certified physiatrist, for a second opinion medical examination.

Dr. Baig submitted a February 24, 2003 report in which he noted appellant's complaints of pain in the cervical area and left upper extremity and provided a history of the April 12, 1999 employment injury and her medical treatment. On physical examination he reported his muscle strength and range of motion findings regarding appellant's upper extremities and cervical spine. In response to the Office's questions, Dr. Baig stated that neurologically appellant's upper extremities were intact, there was decreased range of motion of the cervical spine due to cervical fusions and electromyogram/nerve conduction studies were normal. He opined that her condition was causally related to the accepted employment injury. Dr. Baig diagnosed fibromyalgia and opined that it was probably related to the April 12, 1999 employment injury. He stated that appellant's thyroid condition and pain in the knees were not employment related but residual pain in her left upper extremity were related to the accepted employment injury. Dr. Baig stated that appellant could work part time if the job was sedentary. He further stated that she was restricted to lifting no more than 10 pounds and no lifting overhead, pushing, pulling, stooping and bending. Dr. Baig recommended 15-minute breaks after 2 hours of work and limited computer keyboard use for a maximum of 4 hours per day out of an 8-hour workday. In an accompanying work capacity evaluation, he indicated that appellant could perform her usual work duties six hours a day with the previously noted restrictions.

Dr. Meyerhoff submitted a March 3, 2003 report in which he provided a history of appellant's April 12, 1999 employment injury, medical treatment and family background. He reported his findings on physical examination of appellant's lower extremities and cervical spine and reviewed previous magnetic resonance imaging (MRI) scan results. Dr. Meyerhoff diagnosed degenerative joint and disc disease, status post cervical spine surgery, symptoms consistent with fibromyalgia and a history of hypothyroidism and adrenal hyperplasia. In response to the Office's questions, he stated that appellant's fibromyalgia was related to the April 12, 1999 employment injury, although it was difficult to be definitive about the etiology of this condition. Dr. Meyerhoff further stated that appellant's polymyalgia rheumatic, adrenal hyperplasia and hypothyroidism conditions were not related to the accepted employment injury. He indicated that she suffered from osteoarthritis and degenerative joint and disc disease in the cervical spine prior to her employment injury and later developed disc protrusion as a result of the accepted employment injury. Dr. Meyerhoff stated that it was possible that appellant aggravated the underlying changes in her cervical spine which caused her to become more symptomatic. He opined that this aggravation was permanent. Dr. Meyerhoff further opined that appellant's fibromyalgia and paresthesias in her hands constituted residuals of the April 12, 1999 employment injury. He stated "I do not believe that the patient has any medical condition

not related to the accepted injury which would prevent her from working at all." Dr. Meyerhoff stated that appellant was not disabled from performing all work as she was probably able to perform the physical requirements of her computer specialist position despite her concern that the position required her to sit for extended periods of time in situations where breaks were not appropriate and that this situation would be exacerbated by the type of chairs used in the workplace. In an accompanying work capacity evaluation dated March 4, 2003, Dr. Meyerhoff indicated that appellant was unable to perform her usual work duties or work eight hours a day because she experienced chronic pain which prevented her from sitting for extended time periods and limited appellant's ability to drive due to limited motion of her neck. He further indicated appellant's physical limitations.

In a letter dated June 9, 2003, appellant advised the Office that she and her family were moving from Woodbridge, Virginia to Albuquerque, New Mexico as of June 21, 2003 and provided her new address. On June 25, 2003 the Office completed a change of address form for appellant, noting the Albuquerque, New Mexico address. By letter dated September 23, 2003 and mailed to her Albuquerque address, the Office informed appellant that her case record was being transferred to the Dallas District Office and that she should address any future correspondence regarding her claim to that office. In a July 12, 2004 letter, she advised the Office about her new address in Tijeras, New Mexico.

By letter dated August 30, 2004 and mailed to appellant's Tijeras address, the Office advised her that the acceptance of her claim had been expanded to include fibromyalgia. In a letter of the same date, the Office requested that Dr. Barrie W. Ross, a treating Board-certified physiatrist, review Dr. Baig's February 24, 2003 report and determine whether appellant was able to perform sedentary work on a part-time basis. By letter dated September 17, 2004, the Office further expanded the acceptance of appellant's claim to include depression.

On September 13, 2004 Dr. Ross responded to the Office's August 30, 2004 letter by stating that she agreed with Dr. Baig's finding that appellant could perform sedentary work on a part-time basis. Based on Dr. Baig's opinion, the employing establishment, in a January 14, 2005 letter, offered appellant a modified light-duty part-time position of information specialist in Falls Church, Virginia.

By letter dated January 24, 2005, the Office requested that Dr. Ross review an enclosed description of the offered position and advise whether appellant was capable of performing the duties of the position. On January 24, 2005 Dr. Ross responded that appellant could return to work and perform the duties of the offered position.

In a letter dated February 17, 2005, the Office advised appellant that a suitable position was available and that, pursuant to 5 U.S.C. § 8106(c)(2), she had 30 days to either accept the job or provide an explanation for refusing the offer. The Office further advised that it would be terminating her compensation based on her refusal to accept a suitable position pursuant to section 8106(c)(2). Appellant's attorney advised the Office on February 24, 2005 that she forwarded a copy of the February 17, 2005 suitability letter to him and that he was not copied on the letter. He requested that the Office send a copy of the letter to him and that he would respond within 30 days of the date of that letter. On March 2, 2005 the Office sent a copy of the February 17, 2005 letter to appellant's attorney. By letter dated March 8, 2005, the Office

advised counsel that he was courtesy copied on the original February 17, 2005 letter which he acknowledged being in possession of on February 22, 2005. The Office advised him that a response should be rendered 30 days from February 22, 2005.

By letter dated March 21, 2005, appellant's counsel rejected the employing establishment's job offer on her behalf. He contended that neither Dr. Baig nor Dr. Ross reviewed a description of the offered position and the employing establishment failed to sufficiently describe the duties and physical requirements of the offered position. Counsel further contended that Dr. Baig's February 24, 2005 medical report was insufficient to establish suitability of the offered position because he failed to consider appellant's fibromyalgia and emotional conditions which were accepted by the Office. He accused the Office of attempting to remedy this defect by obtaining a current medical opinion from Dr. Ross. Counsel contended that Dr. Ross's opinion was not based on a review of appellant's medical records or physical examination and it was not rationalized. He further contended that neither Dr. Baig, nor Dr. Ross commented on the impact of appellant's medication on her ability to perform the duties of the offered position. Counsel noted that she advised the Office on June 9, 2003 of her move to Albuerque, New Mexico and it was unreasonable at that time for her to move across country to accept the offered position because she and her husband had been living in New Mexico since 2003 and she had retired from the employing establishment.

By letter dated March 24, 2005, the Office found appellant's reasons for rejecting the position unacceptable. The Office advised her that she had 15 days in which to accept the offered position or it would terminate her compensation. In a March 29, 2005 letter, appellant argued that the medical evidence of record was insufficient to establish that she could perform the duties of the offered position. She stated that the physicians who knew her best were in Virginia and that she was still trying to establish herself in New Mexico.

By decision dated April 8, 2005, the Office terminated appellant's compensation benefits effective April 17, 2005 on the grounds that she refused an offer of suitable work. The Office found no evidence of record sufficient to establish that she was unable to perform the duties of the offered position.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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 a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under

[1] 5 U.S.C. § 8106(c)(2).

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

5 U.S.C. § 8105(c), which is a penalty provision, the Office has the burden of showing that the work offered and refused or neglected by appellant was suitable.

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other locations.[3]

ANALYSIS

The primary issue presented in this case is whether suitable employment was possible or practical in or around Tijeras, New Mexico, the location where appellant and her husband resided at the time of the job offer. In letters dated June 9, 2003 and July 12, 2004, appellant had informed the Office of her residence in Albuerque and Tijeras, New Mexico, respectively. Therefore, by the time she received the notice of the new job offer and the Office's letter finding the work to be suitable, she and her husband had relocated to New Mexico. The Office acknowledged that appellant resided in New Mexico, by completing a change of address form and addressing correspondence to her New Mexico addresses. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee resided at the time of the job offer. The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in New Mexico after it had been informed of appellant's decision to move to New Mexico. The Office should have developed this aspect of the case before finding the offer suitable.

The previous pertinent regulation applied only to former employees, which were employees terminated from the agency's employment rolls.[4] The regulation in effect since 1999 contains no such restrictive language.[5] The regulation now states that the employer "should" offer suitable reemployment where the employee currently resides, if possible. In this case, appellant would have needed to move to Falls Church, Virginia to accept the offered position. The Office, therefore, should have developed the issue of whether suitable reemployment was possible in the Tijeras, New Mexico area. The Board finds that the Office erred in terminating appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[6]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective April 17, 2005 under 5 U.S.C. § 8106(c) and the implementing regulation.

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[3] 20 C.F.R. § 10.508 (1999).

[4] 20 C.F.R. § 10.123(f) (1987).

[5] *Sharon L. Dean*, 56 ECAB __ (Docket No. 04-1707, issued December 9, 2004).

[6] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2005 decision of the Office of Workers' Compensation Programs be reversed.

Issued: October 18, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board