United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 07-132**
	)	**Issued: April 6, 2007**
DEPARTMENT OF THE NAVY, NAVAL MEDICAL COMMAND STATIONS, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 18, 2006 appellant filed a timely appeal from the October 4, 2006 decision of the Office of Workers' Compensation Programs terminating her wage-loss compensation 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 September 15, 2006 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On April 12, 2000 appellant, then a 61-year-old accounting technician, filed an occupational disease claim, Form CA-2, alleging that her diagnosed carpal tunnel syndrome was caused by her computer, filing and typing duties. On June 20, 2000 the Office accepted her

claim for carpal tunnel syndrome in both hands. Appellant underwent a carpal tunnel release in her right hand on August 23, 2000 and in her left hand on November 1, 2000. She retired voluntarily on December 31, 2000.

On November 12, 2001 Dr. Arnold Markman, a Board-certified occupational medicine practitioner, examined appellant at the request of the Office to determine the extent of her disability. He found that she was not totally disabled, but had permanent partial disability. Dr. Markman indicated that appellant was precluded from prolonged or repetitive fingering, gripping and grasping and lifting over five pounds. He stated that she could answer telephones with a headset and minimal message taking.[1]

By letter dated April 15, 2002, the Office informed appellant that she was required to participate in a vocational rehabilitation program with the goal of returning her to suitable employment. Appellant worked with rehabilitation counselor Deborah Raphael from May to December 2002. Ms. Raphael was doubtful of her successful reemployment because of her age, medical problems, motivation level, vocational skills, educational background and the labor market in San Diego. In her final vocational rehabilitation report, dated January 20, 2003, Ms. Raphael recommended that appellant's rehabilitation case be closed because her medical condition and the industrial limitations made her unemployable.

In February 2003, appellant moved from San Diego, California to Moline, Illinois.

By letter dated March 15, 2004, the Office referred appellant to a vocational rehabilitation specialist in Illinois with the goal of returning her to employment. The specialist, Debbie Girard, arranged for an examination by Dr. Edward Moody, a Board-certified occupational medicine practitioner, to determine her ability to return to work.

On April 7, 2004 Dr. Moody conducted a physical examination of appellant and reviewed her medical record. In a report dated April 16, 2004, he opined that the symptoms in her hands were not "wholly attributable to failed carpal tunnel releases." Based on the distribution of the pain and appellant's medical history, Dr. Moody stated that diabetic neuropathy, osteoarthritis or arthritis could be contributing factors to appellant's symptoms. He indicated that she might have osteoarthritis in her spine, which could lead to cervical nerve root irritation. Dr. Moody recommended several diagnostic examinations to establish the cause of appellant's hand pain and a functional capacity evaluation to gauge her work capacity.

On June 15, 2004 appellant underwent a motor and sensory nerve study of her upper extremities. The test demonstrated nerve slowing in both arms and ulnar nerve entrapment at the left elbow, but no recurrent nerve entrapment in the carpal tunnels. Dr. Moody interpreted the results as evidence of peripheral neuropathy related to appellant's diabetes. A June 18, 2006 x-ray of appellant's cervical spine showed advanced degenerative disc disease at the C5-6 level.

[1] Dr. Markman reiterated this opinion in a report dated April 19, 2002: "I remain of the opinion that [appellant] can still perform some useful work with regards to her hands. She is given a permanent preclusion from [sic] minimal use of both hands, no prolonged fingering, gripping or grasping, no lifting over five pounds. If [appellant] answers a telephone, she needs a headset."

On July 14 and 15, 2004 appellant underwent a modified functional capacity evaluation.[2] Greg Monson, the physical therapist, who conducted the evaluation, reported that appellant demonstrated a high level of disability. He also noted some discrepancies in appellant's effort during testing and indicated that, as a result, the evaluation outcomes were likely conservative. Mr. Monson stated that appellant was "probably capable of working at least on a part-time basis at the sedentary level."

Dr. Moody reviewed the functional capacity examination conducted by Mr. Monson on July 30, 2004 and found that it was "probably a fairly accurate" representation of appellant's work abilities. He stated that appellant was "probably" fit for work at a sedentary level and could "probably" work full time provided that not much handwork was required. Dr. Moody noted weight limits on her ability to lift, carry, pull and push. He stated that appellant could occasionally bend, but could not squat, kneel, crawl or climb a ladder. Dr. Moody also stated that she tolerated sitting better than standing, but needed to change positions occasionally. He found that no additional follow-up was needed.

On August 17, 2004 Dr. Moody completed a work capacity evaluation form for appellant with the same restrictions found in his July 30, 2004 report.[3] Additionally, he noted that she could type on a keyboard for brief, intermittent periods and could walk, stand and reach occasionally. Dr. Moody indicated that by "occasionally" he meant 3 to 33 percent of the time.

On October 19, 2004 Ms. Girard submitted her final vocational rehabilitation report to the Office, along with the results of a labor market survey of Moline, Illinois. She indicated that she was closing appellant's file at the request of the Office.

On April 17, 2006 the employing establishment offered appellant work as a part-time light-duty clerk at the San Diego Naval Medical Center. The medical limitations of the job were based on Dr. Moody's July 30, 2004 report. The position required four hours of work per day doing intermittent and nonprolonged sitting, walking, standing bending, simple grasping and fine manipulation. The position required the ability to intermittently lift 5 pounds from the floor, carry 10 pounds and push or pull 10 pounds. The employing establishment noted that it had no positions available in or around Moline, Illinois.

On April 23, 2006 appellant declined the job offer, citing her inability to relocate to San Diego and her inability to perform the duties of the job in the provided description.

On May 12, 2006 the Office informed appellant that the light-duty clerk position offered by the employing establishment on April 17, 2006 was suitable in accordance with the medical restrictions set by Dr. Moody. It confirmed that the position was still available for acceptance. The Office stated that, within 30 days, appellant must either accept the position or provide a written explanation of her reasons for declining it. It explained that her compensation would be

[2] The Board notes that Ms. Girard, the vocational rehabilitation specialist, found the results of the examination to be incomplete, especially as related to the number of hours appellant could work. She sought to have the report supplemented, but this never occurred.

[3] Dr. Moody reissued his July 30, 2004 report on August 18, 2004.

terminated if she declined the position without justification. Appellant did not respond to the Office's letter within the allotted time.

By letter dated June 16, 2006, the Office informed appellant that the reasons for declining the position that she had given to the employing establishment were not valid. It provided her 15 days to accept the position without penalty and informed her that no further reason for refusal would be accepted.

Appellant telephoned the Office on June 21, 2006 and stated that she was unable to perform the job duties because she had more medical conditions than those listed in Dr. Moody's report. The Office informed her that she would have to submit written evidence of these medical conditions. The record indicates that new medical evidence was never sent. Appellant did not submit the evidence.

By decision dated October 4, 2006, the Office terminated appellant's compensation benefits effective September 15, 2006 for failure to accept suitable employment.[4] The Office found that she had provided no valid reason for her failure to accept suitable employment. It also found that Dr. Moody's July 30, 2004 report was well rationalized, thorough and unequivocal.

LEGAL PRECEDENT

The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered.[5] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[6] Before compensation can be terminated 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. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), the Office has the burden of showing that the work offered to and refused by appellant was suitable.[7]

Office regulations provide that in determining what constitutes "suitable work" for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[8] It is well

[4] The decision was initially sent on September 15, 2006, but because the appeal rights were mistakenly forgotten the decision was resent on October 4, 2006.

[5] 5 U.S.C. §§ 8101-8193, 8106.

[6] *Stephen A. Pasquale*, 57 ECAB ___ (Docket No. 05-614, issued February 8, 2006).

[7] *M.L.*, 57 ECAB ___ (Docket No. 06-136, issued September 25, 2006).

[8] 20 C.F.R. § 10.500(b).

established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[9] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[10]

ANALYSIS

On May 12, 2006 the Office informed appellant that the part-time light-duty job offered by the employing establishment constituted suitable work. The Office found that the position was commensurate with the medical restrictions set forth in the July 30, 2004 report of Dr. Moody, a Board-certified occupational medicine practitioner. The Board finds that the Office improperly relied on Dr. Moody's opinion when determining that the position offered by the employing establishment constituted suitable employment.

Appellant underwent a functional capacity evaluation on July 14 and 15, 2004. Dr. Moody reviewed this evaluation on July 30, 2004 and found that it was "probably a fairly accurate" representation of her work abilities. He stated that she was "probably" fit for work at a sedentary level and that appellant could "probably" work full time provided that not much handwork was required. Dr. Moody also noted the specific weight and activity limits found in the functional capacity evaluation.

The Board finds that Dr. Moody's report was not a reasonably certain medical opinion and, therefore, did not form a valid basis for the work suitability determination. Though he provided some concrete physical restrictions, Dr. Moody's interpretation of their impacted on appellant's level of disability was vague. Dr. Moody stated that the functional capacity evaluation was "probably" "fairly accurate" and that appellant could "probably" work part time or full time. The Board has held that medical opinion evidence such as this, which is couched in speculative language, is of diminished probative value.[11] The Board, therefore, finds that the Office improperly relied on Dr. Moody's 2004 report because of its speculative nature.

The Office is required to take into consideration an employee's current physical limitations when determining the suitability of a position. For this reason, the Board has held that when determining whether a given position is medically suitable for a disabled employee, the Office is required to use a reasonably current medical evaluation.[12] The Board has also held that the passage of time lessens the relevance of functional capacity evaluations.[13] Dr. Moody's

[9] *Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004).

[10] *Id.*; *Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005).

[11] *Kathy A. Kelley*, 55 ECAB 206, 211 (2004).

[12] *Carl C. Green, Jr.*, 47 ECAB 737 (1996) (six-month-old medical reports are reasonably current for purposes of wage earning capacity determination); *Cf. Keith Hanselman*, 42 ECAB 680 (1991) (two-year-old medical report and year-old work restriction evaluation form were not reasonably current for wage-earning capacity determination); *Anthony Pestana*, 39 ECAB 980 (1988) (three-year-old medical evaluation is not reasonably current for wage-earning capacity determination).

[13] *Ellen G. Trimmer*, 32 ECAB 1878, 1882 (1981) (two-year old work tolerance limitation report was outdated).

report, and the functional capacity evaluation on which it was based, was nearly two years old at the time the Office used it to determine the suitability of the offered position. In similar cases, the Board held that medical opinions that were nearly two years old were not reasonably current.[14] The Office also notes that appellant's record demonstrated that she had a history of medical conditions, including degenerative disc disease, osteoarthritis, diabetes and diabetic neuropathy that were likely to deteriorate over time. Because of the likelihood that her condition had changed since August 2004, the Office did not reasonably rely on Dr. Moody's reports to determine appellant's current physical limitations in May 2006. The Board finds that the medical evaluation relied on by the Office was not "reasonably current."

The Board finds that the Office did not establish the suitability of the offered position because it relied on Dr. Moody's opinion which was speculative and not reasonably current.

CONCLUSION

The Board finds that the Office did not properly terminate appellant's compensation benefits effective September 15, 2006 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2006 is reversed.

Issued: April 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[14] *Keith Hanselman*, *supra* note 12; *Ellen G. Trimmer*, *supra* note 13.