United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
	)	**Docket No. 07-1529**
and	)	**Issued: December 3, 2007**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Fort Hood, TX, Employer	)	

Appearances:
Michael C. Paul, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from the February 13, 2007 merit decision of the Office of Workers' Compensation Programs which terminated her compensation as she refused to accept suitable employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective October 30, 2005 on the grounds that she refused suitable employment; and (2) whether appellant established that she was totally disabled after October 30, 2005.

FACTUAL HISTORY

On November 7, 2002 appellant, then a 52-year-old sales store checker, filed a traumatic injury claim alleging that she tripped over a bike rack that day and sustained an abrasion of her

left eye, left knee, front right leg and twisted her back. On February 14, 2003 the Office accepted appellant's claim for lumbar strain/sprain and left knee derangement. Appellant's claim was later accepted for a herniated disc at L3-4 level and an underlying deep venous thrombosis of the left lower extremity.

Dr. William S. Marsh, III, appellant's treating osteopath, released her to work part time with restrictions on October 7, 2003. He indicated that appellant was limited to part-time work four hours a day with lifting limited to 5 to 10 pounds, sitting, standing, walking and reaching above shoulder limited to one hour; climbing, kneeling, bending/stooping, twisting and pushing/pulling prohibited and driving limited to two hours.

In a January 26, 2004 report, Dr. Marsh listed his impressions as: (1) acute chronic low back pain syndrome which is clearly multifactoral in nature and involves degenerative disc disease, degenerate lumbar facet arthropathy as well as generalized spondylosis all of which are exacerbated by the work-related injury; (2) several areas of herniated nucleus pulposus at L3-4 and L4-5 with some neural foraminal narrowing and displacement of the nerve roots at that level; (3) ongoing sciatic component; (4) left shoulder impingement syndrome and/or possibly rotator cuff tear; (5) degenerative changes in the left knee secondary to the work-related injury; and (6) left lower extremity deep venous thrombosis following contusion to the left leg. He prescribed physical therapy.

On February 9, 2004 appellant was reemployed as a modified clerk at the employing establishment with wages of $233.20 per week. The Office reduced her wage-loss compensation based upon her actual earnings. Appellant stopped work on July 12, 2004.

In a May 25, 2004 report, Dr. Marsh diagnosed low back pain with lumbar radiculopathy secondary to herniated disc from work injury, left shoulder impingement and concommitant blood clot in the left lower extremity. On June 18, 2004 he indicated that he was discontinuing appellant's work hardening program as he felt "this is not effective for her and actually causing her worse pain despite the fact that she has reached maximum medical improvement and has been rated for that." Dr. Marsh noted that appellant's magnetic resonance imaging (MRI) scan showed an inferior labral lesion that was indeterminate in origin. In a July 20, 2004 report, he listed his impression as "low back pain with knee pain with underlying herniated disc from a work injury with left shoulder impingement that occurred at the same time with underlying concommitant deep venous thrombosis in the left lower extremity."[1]

By letter dated October 12, 2004, the Office referred appellant to Dr. Terry Beal, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated November 9, 2004, Dr. Beal listed appellant's diagnosis as low back pain and left knee pain with resulting deep venous thrombosis and left shoulder pain from the fall at work. He reviewed a history of the November 7, 2002 injury with contusion and strain to the left knee, lumbar strain, prolapsed

[1] Although this report is signed by Dr. Marsh, it appears to be written by a nurse because he indicated that appellant asked him for a CA-17 or CA-6 to meet the requirements for paid time off, but that he advised her that Dr. Marsh would need to do this.

L3-4 intervertebral disc with intermittent lumbar radiculopathy, history of thrombophlebitis to the left lower extremity first diagnosed in December 2002 and accepted as secondary to the November 2, 2002 injury; and chronic venous insufficiency of the left lower extremity. Dr. Beal listed secondary diagnoses as adhesive capsulitis of the left shoulder, diabetes mellitus, diabetic peripheral neuropathy and essential hypertension. He stated that appellant's problem with her left knee had resolved. Dr. Beal noted that she had degenerative problems in the lumbar spine and continued to have a multitude of lower back complaints or with limitations on sitting, standing and ambulation. He did not find any recurrent deep venous thrombosis but did note that appellant had developed chronic venous insufficiency to the left lower extremity and that this would be an ongoing problem. Dr. Beal noted a prolapsed L3-4 intervertebral disc, intermittent lumbar radiculopathy and chronic venous insufficiency of the lower extremity that was consistent with the bulk of her complaints. He advised that appellant could not perform work as a sales store checker as chronic venous insufficiency and swelling of her leg standing or ambulating for extended periods of time, residuals of the November 7, 2002 injury. Dr. Beal noted that part-time restricted work would be acceptable. He submitted work restrictions listing that appellant could work 4 hours a day, with walking and standing limited to 1 hour, twisting limited to a ¼ hour, bending/stooping limited to a ½ hour and squatting, kneeling and climbing prohibited.

In a report dated February 1, 2005, Dr. Marsh's nurse reiterated his impressions of low back pain, lumbar radiculopathy and knee pain, deep venous thrombosis and left shoulder injury all from work accident. Appellant was stable but could not work at a job. On March 8, 2005 Dr. Marsh's nurse noted that he saw no essential improvement due to appellant's underlying medical conditions and concurred with her request for retirement.

The Office found that a conflict existed between the opinions of Drs. Beal, the second opinion physician, and Dr. Marsh, appellant's treating physician, with regard to her work capabilities. By letter dated April 4, 2005, the Office referred appellant to Dr. J. Clark Race, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office sent Dr. Race a statement of accepted facts, a list of questions to be answered and a copy of the case file. In a medical report dated April 26, 2005, Dr. Race listed his impressions as chronic low back pain with evidence of degenerative facet joint disease of L4-5 and disc protrusion at L3-4; chronic left knee pain due to underlying mild tricompartmental osteoarthritis; and deep vein thrombosis, left leg, with mild, chronic venous changes in the left lower extremity. He responded to the Office's questions, as follows:

> "In answer to the questions posed, in my opinion, the effects of the derangement in the lateral meniscus of the left knee have resolved. It appears to have persistently limited left knee flexion with pain due to underlying degenerative changes. I have reviewed her MRI [scan] which does not show any evidence, in my opinion, of a significant meniscal tear or ligament injury. Regarding her lower back injury, she has persistent lumbar pain and limited range of motion. She also has evidence of persistent venostasis changes in the left lower extremity due to the injury of [November 7, 2002]. The lower back and left leg symptoms due to DVT [deep venous thrombosis] have not resolved. It is likely her back pain is, in large part due to her degenerative changes which were aggravated by the injury in question. Regarding her left shoulder, it appears that she may have

had an injury to that shoulder. However, the MRI [scan] does not show a rotator cuff tear. In my opinion, the subjective complaints in the left knee outweigh the objective findings. The lumbar spine findings showed deconditioning and limited range of motion which would be compatible with her underlying MRI [scan] findings. In my opinion, [appellant] is not capable of performing her date-of-injury job due to her inability to stand for long periods of time due to swelling in the left leg and pain in the lower back. Her inability to perform this job, in my opinion, is related to the injury in question. The effects of the work injury do persist in that [appellant] is unable to stand and walk for long periods of time. She is unable to comfortably bend and lift, using her lower back. [Appellant] also developed swelling in her left leg due to her venous thrombosis, causing persistent problems with her left leg. She is not confined to bed rest and is able to perform some activities of daily living. In my opinion, [appellant] is able to travel. She is able to walk for 15 to 20 minutes at a time. [Appellant] is able to feed herself and dress herself. She does have trouble getting out of the bathtub due to her back and knee. [Appellant] is able to be out of bed at least 12 hours a day and go outside and do some simple exercises such as walking. In my opinion, she would be able to operate a computer for limited periods of up to three or [four hours] per day. In my opinion, [appellant] could work a sedentary work four hours per day. She is not able to reach overhead with her left arm or do repetitive activities with her left arm due to her left shoulder problem. These work restrictions would be considered permanent at this point. I believe [appellant] has reached [m]aximum [m]edical [i]mprovement. In my opinion, no other treatments at this time would be expected to significantly improve her condition as she has already undergone physical therapy and conservative management."

Dr. Race found that appellant could work four hours a day with walking, standing, reaching above shoulder, operating a motor vehicle at work, operating a motor vehicle to and from work and squatting all limited to one hour each. He prohibited appellant from bending/stooping, twisting, pushing, pulling, kneeling, climbing and squatting. Appellant required 10-minute breaks every 2 hours.

By letter dated July 25, 2005, the employing establishment offered appellant a modified-duty position as a commissary clerk working 24 hours a week. It indicated that the position would involve intermittent standing/walking (no more than one hour each), lifting of not more than 10 pounds a hour a day and sitting no more than four hours with breaks every two hours. The employing establishment submitted a position description.

By letter dated August 22, 2005, the Office informed appellant that it had reviewed the job description and found that it was suitable with her medical limitations as provided by Dr. Race. The Office confirmed that the position remained open to appellant and informed her that she was expected to accept the position and report to duty. If she failed to accept this position, she was asked to provide a written explanation of her reasons within 30 days. The Office noted that, if appellant failed to report to the offered position and failed to demonstrate that her reasons were justified, her right to compensation would be terminated.

In documents received by the Office on August 26, 2005, appellant declined the job offer. She submitted a July 13, 2005 report from Dr. Marsh who advised that she was off work until an orthopedic surgery evaluation of her left shoulder was complete. In a July 29, 2005 report, Dr. James O. Morse, a Board-certified internist, indicated that appellant was being followed for diabetes and residuals of deep venous thrombosis in the left lower extremity following an on-the-job injury. He noted that appellant damaged her left shoulder from the same incident. Dr. Morse stated that previous attempts by appellant to return to work had resulted in exacerbations in swelling and pain to her left leg. He noted that this situation appeared to be permanent and that he did not expect it to improve. Dr. Morse stated "Therefore, I do not believe [appellant] will ever be able to return to work."

On September 18, 2005 appellant stated that since her accident of November 7, 2002 she had experienced swelling and cramping in her left leg, left ankle, back, left shoulder and both knees. She noted that she did not drive because her reaction time was slow due to her medications.

By letter dated September 27, 2005, the Office advised appellant that she had not provided a valid reason for refusing to accept the offered position. It notified her that she had 15 additional days to accept the position. If appellant did not accept the position or arrange for a report date within 15 days of the date of the letter, her entitlement to wage loss and schedule award benefits would be terminated.

By decision dated October 24, 2005, the Office terminated appellant's wage-loss compensation benefits effective October 30, 2005 as she failed to accept suitable employment. The Office noted that the medical evidence established that she could work four hours a day with restrictions based on the medical opinion of Dr. Race, the impartial medical examiner.

Appellant requested reconsideration on October 22, 2006 and submitted a September 21, 2006 medical report from Dr. Anthony Hicks, a specialist in occupational medicine, who reviewed medical records and concluded that appellant sustained multiple injuries due to a work-related fall and later developed a potentially life-threatening DVT for which her treating physician removed her from work. Dr. Hicks indicated that the opinion of Dr. Marsh must be respected when compared to a one-time evaluation. He found that appellant could not return to work. Dr. Hicks opined that it was likely that her current left shoulder/trapezial and upper back complaints were related to her work injury."

Dr. DeGaetano, an ostepath, reviewed appellant's record and Dr. Race's assessment. He agreed that she had chronic low back pain secondary to severe degenerative facet joint disease of L4-5, chronic left knee pain due to underlying tricompartmental osteoarthritis and chronic deep vein thrombosis of the left leg with chronic debilitating venous changes of the left lower extremities. Due to these abnormalities, Dr. DeGaetano noted that appellant would not be able to perform the position of commissary clerk.

On September 11, 2005 Dr. Mark Braun noted that appellant was his patient at the Darnall Army Community Hospital. He described her multiple medical issues as chronic lower extremity deep venous thrombosis related to her fall in 2002, diabetes mellitus, Type 2, hypertension and hyperlipidemia. On May 30, 2006 Dr. Braun noted that appellant developed a

clot in her left lower extremity after her work-related fall in 2002. Appellant experienced chronic pain and swelling in her left leg which limited her ability to walk and stand for prolonged periods greater than 20 minutes. Dr. Braun recommended that appellant wear compression stockings and keep her leg elevated when sitting. He concluded, "The integrity of [appellant's] veins will not improve, and her condition will persist indefinitely and will likely worsen over time."

In a medical opinion dated September 8, 2006, Dr. Marsh's nurse advised that he was following appellant and that her case was quite complicated as a result of the development of a deep vein thrombosis, secondary to activity changes from the work injury. He noted that appellant had pain in her back, left leg and left shoulder which has severe implications on walking, sitting, lying, bending, twisting and lifting. Dr. Marsh foresaw no significant improvement in her conditions.

By decision dated February 13, 2007, the Office denied modification of the October 24, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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.[4] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[5]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[7]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[2] *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

[7] 20 C.F.R. § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

ANALYSIS -- ISSUE 1

The Office properly found that a conflict arose between the opinions of Drs. Beal and Marsh with regard to appellant's work capabilities. Accordingly, the Office referred her to Dr. Race for an impartial medical examination. Dr. Race opined that appellant's subjective complaints in her left knee outweigh the objective findings. He noted that, although appellant was not capable of performing her date-of-injury job due to her inability to stand for long periods of time, she could work sedentary duty for four hours a day. Dr. Race limited walking, standing, reaching above her shoulder, operating a motor vehicle at work, operating a motor vehicle to and from work and squatting to one hour each. He prohibited appellant from bending, stooping, twisting, pushing, pulling, kneeling, climbing and squatting. Based on the opinion of Dr. Race, the employing establishment offered appellant a modified-duty position as a commissary clerk. The employing establishment noted that this position was within her physical restrictions. The Office found that the job offer was suitable and in accordance with the restrictions as set forth by Dr. Race, and gave appellant 30 days to accept the position. Appellant, in declining the job offer, submitted a statement by Dr. Marsh that she was off work until an evaluation on her left shoulder was complete. Dr. Marsh also stated that appellant would not be able to return to work. The Office did not find appellant's reasons for refusing suitable work valid and after proper notice was given, terminated her benefits.

The Office properly terminated appellant's benefits effective October 30, 2005. The Office noted that the position of commissary clerk was within the restrictions set by the impartial medical examiner, Dr. Race. As Dr. Race's opinion was supported by rationalized evidence and based on a proper factual background, it was entitled to special weight.[9] Appellant's allegations that Dr. Race's opinion was not entitled to any weight are without merit. The Board notes that the statement of accepted facts did not violate any regulations, as contended by her attorney. The statement of accepted facts is a written summary of the claims examiner's findings and facts pertinent to resolving a particular medical issue.[10] The Board finds that the statement of accepted facts in this case provided an accurate summary of the pertinent information. The impartial medical examiner had a copy of the file to review and, from his report, it is apparent that he reviewed the medical evidence of record. Although appellant's attorney objects to the description of the injury as not being complete, the Board notes that the description of appellant's injury as set forth in the statement of accepted facts is identical to the description that appellant gave in her claim form. The Board does not find that the description of the offered job was insufficient. It clearly indicated that appellant would be limited to intermittent standing/walking of no more than one hour each, would not lift more than 10 pounds for one

[8] *Manuel Gill*, 52 ECAB 282 (2001).

[9] *James F. Weikel*, 54 ECAB 660 (2003).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.4 (June 1995).

hour a day and could sit for four hours. The record contains a detailed description of the modified position of commissary clerk.

The evidence submitted by appellant in response to the proposed termination of benefits is not sufficient to overcome the special weight given to the opinion of the impartial medical examiner. Dr. Morse's conclusion that appellant would be unable to return to work as earlier attempts to work exacerbated her condition was not sufficiently rationalized nor was his brief note that appellant was off work until the shoulder evaluation was complete. Neither of these documents is sufficient to outweigh the special weight accorded to Dr. Race's opinion as the impartial medical examiner.[11]

The Board finds that the Office followed its established procedures in notifying appellant that the offered position was suitable[12] based on the special weight of the medical evidence attributable to Dr. Race, the impartial medical specialist. Thus, the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury after termination of compensation benefits.[13] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[14]

ANALYSIS -- ISSUE 2

In support of continuing employment-related disability, appellant submitted a medical report by Dr. Hicks dated September 21, 2006. Dr. Hicks reviewed the medical records and concluded that appellant sustained multiple injuries for which removed her from working. He concurred that appellant could not work. The Board finds that Dr. Hicks did not provide adequate medical rationale in support of his stated conclusion that appellant could not work at the modified-duty position while he critiqued the opinion of Dr. Race, he did not specifically address the modified-duty job. Dr. Hicks' opinion is not sufficient to overcome the weight accorded to the impartial medical specialist.

Dr. Braun noted that appellant was being treated for various conditions. He placed restrictions on appellant. However, it is not contended by any physician or by the Office that

[11] *Jaja K. Asarmamo*, 55 ECAB 200, 204 (2004).

[12] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); 20 C.F.R. §§ 10.516-10.517

[13] *Manuel Gill, supra* note 7.

[14] *Id.*

appellant has no restrictions; rather the issue was whether she could perform the limited duties of the offered position. Dr. Braun did not address whether appellant could perform modified-duty work.

The report of Dr. DeGaetano is also insufficient to overcome the weight of the impartial medical specialist. Dr. DeGaetano indicated that appellant could not perform the duties of commissary clerk but did not adequately explain the basis for his noted conclusion. Although appellant may have limited mobility, the position is based on work restrictions addressing walking, standing and sitting. Dr. DeGaetano did not explain why appellant could not perform these limited duties.

Finally, appellant submitted notes by Dr. Marsh's nurse with regard to her condition. The Board has held that the reports of a physician's assistant or a nurse are not considered medical opinion because they are not physicians as defined by the Act.[15] There is no evidence that these reports were countersigned by Dr. Marsh and therefore these reports cannot be considered medical evidence.

Appellant has not submitted rationalized medical evidence establishing that she was not medically capable of performing the modified-duty position.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective October 30, 2005 as appellant failed to accept suitable employment. The Board further finds that appellant failed to establish that she was totally disabled after October 30, 2005.

[15] 5 U.S.C. § 8101(2); *Lyle E. Dayberry*, 49 ECAB 369 (1998); *Vicki L. Hannis*, 48 ECAB 538 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2007 is affirmed.

Issued: December 3, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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