

**United States Department of Labor
Employees' Compensation Appeals Board**

R.W., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Stewart, GA, Employer**

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**Docket No. 07-1893
Issued: December 4, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 12, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs' dated June 15, 2007, which terminated her monetary compensation based on her refusal of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective June 15, 2007 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On May 19, 1999 appellant, then a 44-year-old supply clerk, fell down stairs and injured both knees while in the performance of duty. The Office accepted her claim for bilateral knee chondromalacia, bilateral knee contusion, aggravation of lumbar degeneration, lumbar displacement, bilateral osteoarthritis, hypertension and fatigue, disc herniation at L4-5 and displacement of lumbar intervertebral disc without myelopathy. It authorized left knee

arthroscopies which were performed on October 7, 1999 and April 9, 2001 and lumbar fusion which was performed on April 27, 2005. Appellant returned to work part time on November 8, 1999 and worked intermittently until stopping work on August 11, 2004.

Appellant came under the treatment of Dr. Christopher M. Vaughn, a Board-certified orthopedist, who treated appellant for bilateral knee and back injuries sustained in a slip and fall accident at work. In reports dated May 4, 2001 to May 21, 2004, he noted appellant's complaints of persistent left knee pain and lumbar pain and referred her to a physiatrist. An October 29, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine revealed advanced discogenic degenerative changes at L4-5 and straightening of the normal spine curvature. An electromyogram dated January 20, 2004 revealed moderate to severe right carpal tunnel syndrome.

Appellant was treated by Dr. John M. Shutack, a Board-certified neurologist, for persistent lumbar pain. A September 30, 2004 discogram taken for Dr. Shutack revealed lumbar degenerative disc disease, lumbosacral radiculitis and lumbago. In reports dated March 14 to 11, 2005, he diagnosed lumbar herniated disc, lumbar segmental instability, lumbar radiculitis and low back pain and recommended a L4-5 and L5-S1 posterior lumbar interbody fusion, which was performed on April 27, 2005. In reports dated August 22 and October 5, 2005, Dr. Shutack recommended physical therapy and advised that appellant was totally disabled. Appellant also submitted reports from Dr. Vaughn dated June 6 to July 7, 2005, who treated appellant for greater trochanteric bursitis of the left hip.

On October 17, 2005 the Office requested Dr. Shutack to determine appellant's work capacity. On November 2, 2005 Dr. Shutack noted that appellant underwent a functional capacity evaluation which supported sedentary restrictions. However, he opined that appellant was totally disabled from any work due to her lumbar spine. The October 24, 2005 functional capacity evaluation noted that appellant could perform sedentary work and sedentary physical demand level with restrictions on lifting and carrying between 5 and 12.5 pounds.

On December 21, 2005 the Office referred appellant for a second opinion to Dr. Douglas P. Hein, a Board-certified orthopedic surgeon, to determine if she had residuals of her work-related condition and her work capacity. In a March 29, 2006 report, Dr. Hein reviewed appellant's history of injury and treatment. He diagnosed left knee patellar chondromalacia and instabilities, chondromalacia of the right knee and history of herniated nucleus pulposa at L4-5 with surgical treatment. Dr. Hein noted that appellant's complaints exceed those that could be supported by objective criteria. Appellant had obvious and supportable evidence of surgical treatment of the left knee with residuals of crepitus, mild decreased range of motion, cartilage damage to the patella femoral and evidence of surgically treated herniated disc at L4-5. Dr. Hein opined that appellant could not perform the regular duties of a supply clerk due to restrictions on sustained lifting, bending or climbing or squatting. However, she could perform light to moderate duties. Dr. Hein noted that appellant reached maximum medical improvement. In a work capacity evaluation he noted that appellant could work eight hours per day with restrictions on walking, standing, pushing, pulling and lifting limited to one hour and 20 pounds and no bending, stooping, squatting, kneeling or climbing.

Appellant was treated for chronic low back pain by Dr. Gene S. Kennedy, a Board-certified family practitioner, from December 9, 2005 to March 15, 2006. Dr. Kennedy diagnosed herniated nucleus pulposus, insomnia, depression and anxiety symptoms. On February 14, 2006 Dr. Vaughn diagnosed left hand pain and internal derangement of the left knee.

On April 19, 2006 the employing establishment offered appellant a full-time limited-duty position as an automation clerk. The job was sedentary in nature and did not require walking or standing and she was permitted to take breaks and stretch as needed. On April 26, 2006 appellant declined the position. In a May 10, 2006 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it. On June 2, 2006 she declined the position due to her work-related medical condition. On June 15, 2006 the Office advised appellant that it considered her reason for refusing the position and found it unacceptable. It afforded appellant 15 additional days to accept the job offer.

Appellant submitted reports from Dr. Vaughn dated May 23 to August 29, 2006, who diagnosed bilateral knee pain and recommended steroid injections. A July 7, 2006 myelogram of the lumbar spine revealed mild circumferential bulging of the disc causing compression at L3-4. On July 10, 2006 Dr. Shutack opined that she reached maximum medical improvement. Other reports from Dr. Kennedy dated July 17 to August 16, 2006 diagnosed low back pain, herniated disc, insomnia, leg pain and chronic pain syndrome.

On August 21, 2006 the Office found a conflict of medical opinion between Dr. Shutack, appellant's treating physician, who advised she was totally disabled due to residuals of her work-related injury and Dr. Hein, an Office referral physician, determined that she could return to work subject to restrictions. To resolve the conflict, the Office referred appellant to Dr. Clark Deriso, a Board-certified neurosurgeon.

In an October 10, 2006 report, Dr. Deriso noted appellant's history and reviewed the records provided to him. Physical examination revealed negative straight leg raises, no abnormalities of the hips, no focal neurological deficits, examination of the left knee revealed well-healed wounds, full range of motion, no swelling or ligamentous instability and general global tenderness. He diagnosed postoperative pedicle screw fixation and fusion L4-5 and L5-S1 with chronic back pain and left knee pain etiology undetermined. He advised that the lumbar fusion did not appear to have complications or neurological sequelae. Dr. Deriso noted no limiting factors for performance of the sedentary position with an opportunity to get up after two to three hours of sedentary work.

On November 20, 2006 the Office requested clarification from Dr. Deriso. If asked that he review the limited-duty job offer of April 19, 2006 to comment on appellant's capacity to perform the position and also prepare a work capacity evaluation.

On November 28, 2006 Dr. Deriso reviewed the April 19, 2006 limited-duty job offer. He opined that appellant would be able to fully perform the duties of the position. He noted no objective findings upon examination that would prevent her from performing the modified work duties. In a work capacity evaluation, he advised that appellant was able to work full time with

restrictions of sitting limited to eight hours, bending and stooping limited to two hours, lifting limited to four hours with no more than 20 pounds and kneeling limited to four hours.

On February 7, 2007 the Office informed the employing establishment that the April 19, 2006 modified automation clerk position was unsuitable because it did not indicate whether voice activated software was an accommodation for appellant's bilateral hand condition.

On February 7, 2007 the employing establishment offered appellant a full-time limited-duty position as an automation clerk with no bending, stooping, squatting, kneeling or climbing and no more than one hour of walking or standing. The job was sedentary in nature, no required walking or standing, appellant was permitted to take breaks and stretch as needed and voice activated software was provided and installed on the computer workstation in the work area with no requirement to type. The position wages are \$16.07 per hour.

On February 8, 2007 appellant declined the position. In a February 5, 2007 report, Dr. Kennedy diagnosed low back pain, herniated disc, hypertension, obesity and rhinitis. He opined that appellant reached maximum medical improvement. Dr. Kennedy did not address the job offer.

In a March 8, 2007 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

Appellant submitted reports from Dr. Kennedy dated November 9, 2006 to April 3, 2007. Dr. Kennedy reported his diagnoses. On March 22, 2007 Dr. Vaughn treated appellant for bilateral knee pain. On March 26, 2007 Dr. Shutack noted treating appellant for increasing low back pain. He reviewed the proposed job description and advised that appellant reported that she could not sit or stand for any length of time, was unable to perform household duties, had to lie down through the day, could not stand for any length of time and must change positions constantly from sitting to standing. Dr. Shutack recommended that she not work. He opined that appellant could not perform the duties listed in the job description. Dr. Shutack noted work restrictions of no sitting or standing for any length of time and no lifting, bending, stooping or climbing. On April 23, 2007 appellant presented with worsening low back, hip and leg pain. Dr. Shutack indicated that a lumbar spine MRI scan revealed transitional syndrome at L3-4 and he recommended she remain off work. On April 21, 2007 appellant declined the job offer.

On May 8, 2007 the Office advised appellant the position of a modified automation clerk was suitable work. It considered the reasons she provided for refusing the position and found them to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

Appellant submitted additional reports from Dr. Kennedy. On June 1, 2007 he treated appellant for low back pain with a history of herniated nucleus pulposus and lumbar fusion. He opined that these conditions remained disabling. Dr. Kennedy stated that appellant could not work in any job due to her subjective pain and ongoing neurosurgical evaluation for progressive symptoms. Dr. Shutack diagnosed post lumbar laminectomy syndrome, history of lumbar herniated disc and bilateral knee pain. He noted that appellant's condition was directly related to

her accepted injury and disabling. Dr. Shutack advised that appellant could not work in any capacity. A May 25, 2007 lumbar spine computerized tomography scan noted postoperative changes at L4-5 and L5-S1, possible partial interbody fusion at L5-S1 and a L3-4 bulge.

In a decision dated June 15, 2007, the Office terminated appellant's monetary compensation benefits effective that day finding that she refused an offer of suitable work.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her 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, it 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 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.³

With respect to the procedural requirements of termination under 5 U.S.C. § 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.⁴ If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford her a final opportunity to accept the position.⁵

ANALYSIS

The Office accepted appellant's claim for bilateral knee and low back conditions and authorized surgical procedures. The record also shows appellant had other conditions such as carpal tunnel syndrome. The Office terminated appellant's compensation effective June 15, 2007 based on her refusal of suitable work. The Board finds that the Office established that the offered position of February 7, 2007 was suitable work.

¹ 5 U.S.C. § 8106(c)(2).

² *M.L.*, 57 ECAB 746, 750 (2006); *Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

³ *See M.L.*, *supra* note 2; *Albert Pineiro*, 51 ECAB 310, 312 (2000).

⁴ *Alfred Gomez*, 53 ECAB 149, 150 (2001); *see Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

⁵ *Id.*

The Office properly determined that a conflict in medical opinion arose between her attending physician, Dr. Shutack, a Board-certified neurologist and the Office referral physician and Dr. Hein, a Board-certified orthopedic surgeon. They disagreed as to whether appellant's accepted conditions had resolved and whether she remained totally disabled.⁶ The Office properly referred appellant to Dr. Deriso to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁷

In an October 10, 2006 report, Dr. Deriso reviewed the case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Deriso noted an essentially normal physical examination and diagnosed postoperative pedicle screw fixation and fusion L4-5 and L5-S1 with chronic back pain and left knee pain etiology undetermined. He noted no limiting factors for performance of a sedentary position with an opportunity to get up after two to three hours of sedentary work. In a supplemental report dated November 28, 2006, Dr. Deriso reviewed the April 19, 2006 limited-duty job offer and opined that appellant would be able to fully perform the functions of this position. He noted no objective findings upon examination which would prevent her from performing the modified work duties. In a work capacity evaluation of the same date Dr. Deriso noted that appellant was able to work full time with restrictions of sitting limited to eight hours, bending and stooping limited to two hours, lifting limited to four hours with no more than 20 pounds and kneeling limited to four hours.

The Board finds that the opinion of Dr. Deriso is well rationalized and based upon a proper factual background. It is entitled to special weight and establishes that appellant has the capacity to work in the offered restrictions he set forth. Dr. Deriso reviewed the entire case record and statement of accepted facts and had examined appellant. He reported that appellant could work full time subject to the restrictions set forth above. Dr. Deriso's opinion is probative evidence and reliable. The Board finds that Dr. Deriso's opinion establishes that the position is medically suitable to her work restrictions.⁸

The record reflects that the physical restrictions of the modified position offered to appellant on February 7, 2007 conform to the limitations provided by Dr. Deriso. The physical requirements of the position indicated that there would be no bending, stooping, squatting, kneeling or climbing, no more than one hour of walking or standing, the position was sedentary in nature, there was no required walking or standing, appellant was permitted to take breaks and stretch as needed and voice activated software was provided. The Board finds that the physical

⁶ 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

⁷ *Solomon Polen*, 51 ECAB 341 (2000).

⁸ See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (regarding factors that bear on the probative value of medical opinions).

requirements of the offered position are consistent with the restrictions set forth by Dr. Deriso and that the offered position is medically suitable.

To terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.⁹ It properly followed its procedural requirements in this case. On March 8, 2007 the Office advised appellant that the offered position was suitable and allotted her 30 days to either accept or provide reasons for refusing the position. Appellant submitted additional reports from Dr. Kennedy, who addressed her continuing pain and her diagnoses. Dr. Vaughn also treated appellant for bilateral knee pain. This evidence was insufficient to show that the offered position was not medically suitable. Drs. Kennedy and Vaughn's treatment notes listed her symptoms. The physicians did not address the suitability of the offered position. Dr. Shutack reviewed the proposed job description and stated that appellant reported that her symptoms precluded her from many daily activities, such as sitting or standing. He recommended that appellant remain off work and that she could not perform the duties of the offered job. However, Dr. Shutack merely repeated appellant's opinion of her work capacity without providing a well-rationalized explanation as to why she could not perform¹⁰ the offered position. He failed to explain how appellant's medical conditions prevented her return to work in the offered position. Moreover, Dr. Shutack was a physician who was on one side of a medical conflict that the impartial specialist resolved. His additional reports are insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹¹ The medical evidence is not sufficient to establish that appellant remained unable to perform the offered position at the time it was offered or prior to the termination of benefits.¹²

Thereafter, on May 8, 2007 the Office advised appellant that her reasons for not accepting suitable work were unacceptable and allowed her 15 days to accept the offer. Appellant again submitted reports from Dr. Kennedy. However, the physician did not provide a rationalized opinion addressing the offered position or the reasons why appellant's medical conditions prevented her from returning to work in the modified position. As noted, Dr. Shutack was on one side of the medical conflict that was resolved by Dr. Deriso. Although he opined that appellant was unable to work in any capacity, he did not offer any new medical findings or rationale to support his opinion.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's monetary compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

⁹ See *Maggie L. Moore*, *supra* note 4.

¹⁰ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹² See *Gayle Harris*, 52 ECAB 319, 322 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2007 is affirmed.

Issued: December 4, 2008
Washington, DC

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

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

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