United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 08-1274**
	)	**Issued: May 11, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
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 April 1, 2008 appellant timely appealed a January 25, 2008 merit decision of the Office of Workers' Compensation Programs that affirmed the termination her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on August 5, 2006 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On November 21, 2002 appellant, then a 47-year-old letter carrier, sustained injury when a pit bull bit her as she was delivering mail. The Office accepted a dog bite to the right forearm with cellulitis and adhesive capsulitis of the right shoulder.[1] Appellant stopped work on

[1] The Office previously accepted that appellant sustained dog bites to both legs on June 28, 2002. Appellant was released to full duty on August 29, 2002.

November 21, 2002 and did not return. On November 25, 2003 she underwent right shoulder surgery, which included procedures for noninjury-related degenerative conditions. Due to complications from the surgery and the adhesive capsulitis, the Office placed appellant on the periodic rolls in October 2003.

In a September 20, 2005 report, Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon and Office referral physician, diagnosed dog bite to right forearm with consequential cellulitis, right shoulder adhesive capsulitis requiring surgical release and right subacromial impingement syndrome status post surgical treatment. He opined that the subacromial impingement syndrome and the resulting surgical procedure were not related to the November 21, 2002 work injury. Dr. Boeck opined that aggravation was not a consideration in this case. He advised that appellant was disabled from her usual letter carrier duties because of limited motion in her right shoulder. Although there were no limitations as to the number of hours appellant could push, pull or lift, she could perform no more than three hours of reaching with the right arm, no reaching above the shoulder on the right side, was restricted on operating a motor vehicle and had a 20-pound pushing, pulling and lifting limitation.

In a January 9, 2006 report, Dr. Oscar J. Moore, an internist, disagreed with Dr. Boeck. He began treating appellant on August 28, 1989 and reported that there was no evidence of any skeletal disease until her work injury on November 21, 2002. Dr. Moore noted that appellant was initially treated for forearm injuries resulting from the dog bite. Subsequently, appellant had complaints of increasing pain in the right shoulder, which arose from having to wrestle her arm free of the dog's grip and twisted her shoulder. Dr. Moore advised that there was no evidence, history or reference to any previous injury to the right shoulder in appellant's medical records. He stated that Dr. Boeck contradicted himself in assigning work restrictions, noting that appellant continued to have painful range of motion in her right shoulder, difficulty lifting over 10 pounds and reaching above her shoulder without reactivating her painful syndrome.

The Office found a conflict in medical opinion arose between Dr. Boeck, the second opinion physician, and Dr. Moore, appellant's treating physician, regarding her capacity for work. On February 28, 2006 it referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Gerald M. Paul, a Board-certified orthopedic surgeon, for an impartial evaluation.

In a report dated April 12, 2006, Dr. Paul diagnosed right shoulder subacromial decompression, status post right shoulder subacromial decompression and right forearm cellulitis secondary to dog bite. He advised that appellant's right shoulder and right forearm problems were related to the November 21, 2002 work incident. Dr. Paul noted that a right shoulder x-ray revealed minimal degenerative changes involving the acromioclavicular joint as well as a slight spur by the greater humeral tuberosity. He noted residuals of a slight restriction of right shoulder range of motion, slight right forearm tenderness and marked loss of right arm grip strength. In commenting on an investigative report, Dr. Paul noted that appellant did not appear to be favoring her right shoulder and exhibited a normal range of motion without strain or discomfort. He opined that appellant should be permanently precluded from activities requiring frequent strenuous use of the right upper extremity at or above shoulder level. Dr. Paul opined that appellant did not need additional medical treatment.

In a May 2, 2006 letter, the Office requested Dr. Paul to clarify his opinion in light of the investigative report and his examination findings. It also requested that he clarify appellant's work restrictions. In a June 1, 2006 supplemental report, Dr. Paul advised that appellant sustained 10 percent upper extremity impairment. After viewing the videotape evidence, he amended appellant's work restrictions to preclude frequent strenuous use of her right upper extremity above shoulder level. Dr. Paul advised the remainder of his opinion remained unchanged.

On June 28, 2006 the employing establishment offered appellant modified duty as a letter carrier based on Dr. Paul's work restrictions. The modified position involved casing and mail delivery. Appellant would be required to case mail for up to three hours. She would be provided a platform, to avoid reaching above shoulder level more than 75 percent of casing activities. Appellant would also make mail deliveries for between four to six hours per day. The work restrictions would not require frequent strenuous use of her right upper extremity above the shoulder level.

On June 29, 2006 the Office advised appellant that the offered position was suitable. Appellant was notified that, if she failed to accept the position or demonstrate that the failure was justified, her right to wage-loss compensation would be terminated pursuant to section 8106 of the Federal Employees' Compensation Act.[2] She was given 30 days from the date of this letter to respond.

On July 7, 2006 appellant telephoned the Office inquiring where to send documentation from the Social Security Administration (SSA) which had found her totally disabled as of February 2005. In the memorandum of the telephone conversation, the Office claims examiner noted that appellant asserted that she remained totally disabled. Appellant was advised that the workers' compensation program was different from that under the SSA.

By decision dated July 31, 2006, the Office terminated appellant's wage-loss schedule award benefits effective August 5, 2006 on the grounds that she refused an offer of suitable work. It noted that appellant failed to provide written reasons for refusing the offered position.

The Office received additional evidence from appellant on August 1, 2006. Appellant submitted a July 26, 2006 provisional acceptance of the modified position offer "pending review of Social Security letter and pending approval of retirement application." A February 24, 2005 order from the SSA Office of Hearing and Appeals found appellant disabled since November 21, 2002 under the Social Security Act.

On August 25, 2006 appellant requested reconsideration. In a letter of the same date, she asserted that she submitted evidence to the Office within 30 days of its June 29, 2006 letter and provided a copy of an Express Mail receipt dated July 28, 2006. Appellant also contended that a 1996 injury to her feet and ankles, affected her ability to work.

By decision dated October 25, 2006, the Office denied modification of the July 31, 2006 decision.

[2] 5 U.S.C. §§ 8101-8193; 8106(c).

On October 24, 2007 appellant requested reconsideration. She submitted a January 5, 2007 magnetic resonance imaging (MRI) scan of the right shoulder, a December 29, 2006 MRI scan of the lumbar spine, a January 29, 2007 MRI scan of the right foot, a January 5, 2007 MRI of the right ankle and a December 29, 2006 MRI scan of the left ankle. In an October 24, 2007 report, Dr. Moore advised that appellant's right upper extremity condition had not resolved and was complicated by progressive pain in the lumbosacral spine and shoulders. He indicated that she had pain in the right lower extremity, including the foot.

By decision dated January 25, 2008, the Office denied modification of its October 25, 2006 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act, which 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] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

Section 10.517(a) of the Federal Employees' Compensation Act implementing regulations provides that, an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability. If the employee presents such reasons and it determines such reasons are unacceptable, the Office will notify the employee of that determination and that he or she has 15 days within which to accept the offered work without penalty.[8]

Section 8123(a) of the Federal Employees' Compensation 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

[3] *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008).

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[6] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R § 10.517(a); *see Ronald M. Jones*, 52 ECAB 190 (2000).

[8] *Id*. at § 10.516.

examination.[9] 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.[10]

ANALYSIS

The Office accepted appellant's conditions of dog bite to the right forearm with right shoulder cellulitis and adhesive capsulitis. It terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective August 5, 2006 on the grounds that she refused an offer of suitable work. The Board finds the Office properly terminated appellant's compensation benefits effective August 5, 2006.

In developing the medical evidence, the Office properly determined that a conflict in medical opinion arose as to appellant's ability to work. Dr. Boeck, a second opinion physician, and Dr. Moore, appellant's attending physician, disagreed as to her capacity for work.[11] It referred appellant to Dr. Paul for an impartial medical examination.

In an April 12, 2006 report, Dr. Paul diagnosed status post subacromial decompression of the right shoulder as well as cellulitis of the right forearm. Based on his examination findings, he found objective residuals of slight restriction of right shoulder range of motion, slight right forearm tenderness and marked loss of right arm grip strength. Dr. Paul mentioned that appellant did not seem to favor her right shoulder and appeared to exhibit a normal range of motion on an investigative videotape. He opined that appellant should be permanently precluded from activities requiring frequent strenuous use of the right upper extremity at or above shoulder level. In a June 1, 2006 supplemental report, Dr. Paul addressed the investigative materials and advised that appellant was precluded from frequent strenuous use of her right upper extremity above shoulder level.[12] No further medical treatment was required. The Board finds that the opinion of Dr. Paul is entitled to the special weight of the medical evidence because it is sufficiently well rationalized and based on proper factual background. The Board further notes that the requirements of the modified letter carrier position are within the work restrictions set by Dr. Paul. Accordingly, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[13]

Prior to terminating compensation under 5 U.S.C. § 8106(c), the Office must first inform the claimant of the consequences of refusal to accept suitable work and allow the claimant an

[9] 5 U.S.C. § 8123(a).

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

[11] *See Geraldine Foster*, 54 ECAB 435 (2003).

[12] It was proper for the Office to secure a supplemental report from Dr. Paul as the Board has held that, when it obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect. *V.G.*, 59 ECAB ___ (Docket No. 07-2179, issued July 14, 2008).

[13] *See John E. Lemker*, 45 ECAB 258 (1993).

opportunity to provide reasons for refusing the offered position. If the claimant presents reasons for refusing the offered position, it must inform the claimant if it finds the reasons inadequate to justify the refusal of the offered position and afford the claimant a final opportunity to accept the position. If the Office fails to inform appellant of whether or not the reasons offered were sufficient to justify refusal of the suitable work position, it has failed to meet the procedural requirements of section 8106(c)(2).[14]

In a June 29, 2006 letter, the Office advised appellant that the offered position was suitable work and afforded her the opportunity to either accept the position or provide her reasons for declining the offer. It did not receive any response from appellant within the 30-day period allotted. Although appellant contends that she timely responded to the Office's June 29, 2006 letter, the record reflects it did not receive any evidence until August 1, 2006. On July 7, 2006 she inquired during a telephone call as to where to submit materials to the Office. As noted, the submitted evidence was not received by the Office until following the July 31, 2006 decision. Thus, the Office complied with its procedures and gave appellant an opportunity to respond to the proposed termination and properly terminated her monetary benefits when no response was received within the allotted time.

The Board finds that the Office has established that the modified letter carrier position offered by the employing establishment was suitable at the time it was offered.

Once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[15] The Board has carefully reviewed the medical evidence and appellant's arguments in support of her refusal of the modified letter carrier position and finds that they are not sufficient to support her refusal of the position.

The medical reports received subsequent to the July 31, 2006 decision are insufficient to either overcome Dr. Paul's opinion or create a new conflict in the medical evidence.

Dr. Moore reiterated appellant's right upper extremity had not resolved and that she experienced pain in other areas. He was on one side of the conflict in medical opinion for which appellant was referred to Dr. Paul.[16] Dr. Moore also did not provide any opinion, that appellant was unable to perform the limited-duty position during the time period it was offered and available to her. The other medical evidence submitted by appellant, did not provide any opinion regarding her capacity to perform the offered position.

Appellant also submitted a copy of a February 24, 2005 decision from the SSA approving her disability benefits, retroactive to November 21, 2002. She additionally presented a July 26,

[14] *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[15] *Brian O. Crane*, 56 ECAB 713 (2005).

[16] Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical specialist or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

2006 qualified acceptance of the modified position based on the results from the SSA. To the extent that appellant refused the position because she was pursuing a disability retirement, the Board notes that retirement is not an acceptable reason for refusing an offer of suitable work.[17] Furthermore, a determination of an employee's rights or remedies under other statutory authority is not determinative as to her entitlement to benefits under the Federal Employees' Compensation Act.[18]

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective August 5, 2006 and that appellant did not, thereafter, establish that her refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment effective August 5, 2006 and that appellant did not, thereafter, establish that her refusal of suitable work was justified.

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

[18] *H.S.*, 58 ECAB ___ (Docket No. 07-582, issued June 14, 2007).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 25, 2008 is affirmed.

Issued: May 11, 2009
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