United States Department of Labor
Employees' Compensation Appeals Board

W.F., Appellant	)	
and	)	**Docket No. 10-1828**
	)	**Issued: May 13, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Lakeland, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 1, 2010 appellant, through her attorney, filed a timely appeal from a May 11, 2010 merit decision of the Office of Workers' Compensation Programs terminating her compensation for refusing suitable work. Pursuant to the Federal Employees' Compensation Act[1] and 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 entitlement to compensation effective December 20, 2009 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On January 5, 2002 appellant, then a 39-year-old mail processor, filed a claim for an injury to her lower back and buttocks occurring on that date in the performance of duty. She

[1] 5 U.S.C. § 8101 *et seq.*

stopped work on January 5, 2005 and did not return. The Office accepted the claim for lumbosacral sprain, a back contusion, bilateral lumbago, lumbar spondylosis with myelopathy, thoracic and lumbosacral neuritis or radiculitis and chronic pain syndrome. Appellant received compensation for total disability. On January 5, 2005 she underwent an intradiscal electro thermal annuloplasty at L5-S1.[2]

In a July 17, 2007 response to the Office's status inquiry of June 22, 2007, Dr. Jonathan Greenberg, an attending Board-certified neurosurgeon opined that appellant had a chronic S1 sacral radiculopathy with secondary lumbago. Additionally, he indicated that the subjective complaints are consistent with his findings and that his restrictions were permanent.

In a July 23, 2007 state work capacity evaluation form, Dr. Greenberg, found that appellant could work with limitations on carrying under 5 pounds and pushing and pulling under 10 pounds. He found that she could not climb, bend or reach overhead and further provided restrictions on walking, standing and twisting.

On October 1, 2007 Dr. Richard Steinfeld, a Board-certified orthopedic surgeon and Office referral physician, diagnosed chronic low back pain and bilateral radiculopathy. He found that appellant was unable to perform her usual employment but could work four to six hours a day sitting and standing up to four hours and pushing, pulling and lifting up to 10 pounds. Dr. Steinfeld further determined that she could twist, bend, stoop and operate a motor vehicle at work and to and from work for two to four hours per day.

The Office determined that a conflict in medical opinion arose between Dr. Greenberg and Dr. Steinfeld regarding the extent of appellant's work restrictions. It referred her to Dr. Diana D. Carr, a Board-certified orthopedic surgeon, for an impartial medical examination. On July 23, 2008 Dr. Carr reviewed the medical evidence of record and the history of injury. On physical examination she found no evidence of muscle spasm and decreased sensation on the right below the knee. Dr. Carr diagnosed S1 radiculopathy as evidenced by electromyogram, chronic pain syndrome as diagnosed by a psychologist and possible lumbarized S1 resulting in six lumbar vertebrae on x-ray. She attributed appellant's S1 radiculitis and chronic pain syndrome to her January 5, 2002 work injury. Dr. Carr found that appellant required treatment for her chronic pain syndrome. She asserted that without treatment for chronic pain syndrome, appellant could perform "sedentary occupations lifting about 5 to 10 pounds on an intermittent basis [and] 1 to 5 pounds on a regular basis." Dr. Carr further found that appellant could drive 15 to 30 minutes to work but "may need a back support and adjustment of her car so that her leg is in a comfortable position while operating the brake and gas pedals." In an accompanying work restriction evaluation, she determined that appellant could work with restrictions on walking and standing for 10 to 20 minutes per hour, operating a motor vehicle to and from work for 15 to 30 minutes, pushing, pulling and lifting 1 to 5 pounds regularly and 5 to 10 pounds occasionally. Dr. Carr advised that appellant should not twist, bend, stoop, squat, kneel or climb.

[2] By decision dated May 11, 2005, the Office denied appellant's request for an increased pay rate. On July 12, 2006 it modified its May 11, 2005 decision and adjusted her pay rate based on information supplied by the employing establishment. In a decision dated October 12, 2006, the Office modified its July 12, 2006 decision to reflect that appellant was entitled to an adjusted pay rate from March 19 to July 8, 2006.

On September 8, 2008 Dr. Carr clarified that appellant could push 15 to 20 pounds, pull 20 pounds and lift 5 to 20 pounds for one to two hours per day. On October 2, 2008 she found that appellant could work a total of six to eight hours per day.

The employing establishment offered appellant the position of modified mail processing clerk working six hours a day. On February 9, 2009 appellant refused the position because it exceeded her driving and lifting restrictions and necessitated repetitive work duties. She related that it took her 40 to 60 minutes to drive to work.

On February 3, 2009 Dr. Kevin Nowicki, a Board-certified orthopedic surgeon, treating appellant for injuries under another file number, related that she had unchanged pain and tenderness of the right proximal forearm but no de Quervain's syndrome. He advised that she could work with no repetitive motion of the upper extremities and no lifting over 15 pounds.

On March 6, 2009 the Office requested that Dr. Carr explain whether appellant could drive a motor vehicle 34 minutes to and from work. It noted that 34 minutes was the amount of time it took for appellant's to get to and from her work location according to a computer mapping service.

On March 26, 2009 Dr. Carr stated:

> "I believe [that appellant] could drive 34 minutes to and from work provided she had a backrest or lumbar support and if the seat could be adjusted so that she is a proper distance from the gas pedal. She sat well during the exam[ination]. The history lasted nearly that long and [appellant] had previously been waiting in the waiting room so I think 34 minutes is not unreasonable."

On May 21, 2009 the employing establishment mailed appellant a lumbar spine support to use in her motor vehicle.[3]

On October 5, 2009 the employing establishment offered appellant a position as a modified mail processor clerk working for six hours a day from 10:00 p.m. to 4:00 a.m. The duties consisted of answering the telephone with physical requirements of intermittent lifting of 5 to 10 pounds 1 to 2 hours per day, intermittent sitting up to 5 hours, intermittent standing and walking 10 to 20 minute per hour and intermittent pushing 15 to 20 pounds 1 to 2 hours per day. The position required no twisting, bending, stooping, squatting, kneeling, climbing or repetitive upper extremity movement.

On October 7, 2009 appellant contended that she was unable to drive based on restrictions of her attending physicians. She also maintained that it took her 47 minutes rather than 34 minutes to drive to the work location.

[3] In a report dated May 21, 2009, Dr. John C. Amann, a Board-certified neurosurgeon, found that appellant should not perform overhead work or lift over 25 pounds.

On October 13, 2009 the Office found the position suitable to appellant's work restrictions advised her that she had 30 days to accept the position or provide reasons for her refusal.

On November 3, 2009 appellant maintained that she was permanently disabled. She submitted evidence from two computer mapping services showing that it took either 40 or 41 minutes to drive from her residence to the work location. Appellant noted that the impartial medical examiner had evaluated her over a year prior and requested a new examination.

By letter dated November 25, 2009, the Office advised appellant that her reasons for refusing the job offer were not acceptable and that the position remained available. It provided her 15 days to accept the position and indicated that it would not consider any further reasons for not accepting the position.[4]

By letter dated December 4, 2009, appellant again noted that Dr. Carr found that she could only drive 34 minutes.

In a report date November 10, 2009, received by the Office on December 10, 2009, Dr. Greenberg diagnosed lumbosacral radiculopathy on the right side. He stated, "[Appellant] is capable of driving but will need a car modification for the ability to use her left foot for acceleration and braking. Alternatively, hand controls could be used."

By decision dated December 16, 2009, the Office terminated appellant's entitlement to compensation and a schedule award effective December 20, 2009 on the grounds that she refused an offer of suitable work.[5] It found that if she took a break she could drive less than 30 minutes at a time while commuting to and from work.

On December 23, 2009 appellant, through her attorney, requested a telephone hearing. She also submitted a December 23, 2009 report from Dr. Greenberg, who found that she was permanently disabled from work due to her inability to drive.

A hearing was held on March 2, 2010. Appellant maintained that it took her 47 minutes to get to work. She asserted that she could not safely drive because of severe leg pain. Appellant's attorney argued that the Office erred in failing to develop whether her fibromyalgia and depression prevented her from performing the offered position and also argued that she was unable to perform the position as she was unable to drive.

On April 14, 2010 Dr. Greenberg listed work restrictions and asserted that appellant could not drive over 30 minutes.

By decision dated May 11, 2010, the hearing representative affirmed the December 16, 2009 decision.

[4] Dr. Greenberg referred appellant for a functional capacity evaluation. On November 17, 2009 the evaluator indicated that she was unable to classify appellant due to her "self[-]limiting behavior."

[5] On December 11, 2009 the Office verified that the job offered by the employing establishment remained available.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] In this case, it terminated appellant's compensation under section 8106(c)(2) of the Act,[7] 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.[8] 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.[9] 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.[10]

Section 10.517(a) of the Act's implementing regulations provide 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.[11] 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.[12]

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, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.[13] 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 by appellant was suitable.[14]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[15] The determination of whether an employee is physically capable of performing a

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[6] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Id*. at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[9] *Ronald M. Jones*, 52 ECAB 190 (2000).

[10] *Joan F. Burke*, 54 ECAB 406 (2003).

[11] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 9.

[12] *Id*. at § 10.516.

[13] *See Linda Hilton*, 52 ECAB 476 (2001).

[14] *Id*.

[15] 20 C.F.R. § 10.517(a).

modified assignment is a medical question that must be resolved by medical evidence.[16] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[17]

ANALYSIS

The Office accepted that appellant sustained lumbosacral sprain, a back contusion, bilateral lumbago, lumbar spondylosis with myelopathy, thoracic and lumbosacral neuritis or radiculitis and chronic pain syndrome due to a January 5, 2002 work injury. It determined that a conflict arose between Dr. Greenberg, her attending physician, and Dr. Steinfeld, an Office referral physician, regarding the extent of her work restrictions. The Office referred appellant to Dr. Carr, a Board-certified orthopedic surgeon, for resolution of the conflict.[18]

On July 23, 2008 Dr. Carr diagnosed employment-related S1 radiculitis and chronic pain syndrome. She thoroughly examined appellant and provided a reasoned opinion that appellant was capable of working in a sedentary capacity. Dr. Carr provided limitations on walking and standing for 10 to 20 minutes each hour and operating a motor vehicle 15 to 30 minutes to and from work. On September 8, 2008 she determined that appellant could lift 5 to 20 pounds, push 15 to 20 pounds and pull 20 pounds for one to two hours a day and work a total of six to eight hours per day. In a report dated March 26, 2009, Dr. Carr clarified that appellant could drive 34 minutes to and from work with a back support. When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[19] Dr. Carr's opinion represented the weight of the evidence and establishes that appellant was capable of working six to eight hours per day with the identified restrictions.

On February 3, 2009 Dr. Kevin D. Nowicki, appellant's physician for a separate work injury, indicated that appellant could work with no lifting in excess of 15 pounds or repetitive movements of the upper extremities.

On October 5, 2009 the employing establishment offered appellant a position working six hours per day from 10:00 p.m. to 4:00 a.m. consistent with the restrictions outlined by Dr. Carr and Dr. Nowicki. The Office reviewed the position and found it suitable. Appellant, however, refused the position, citing an inability to drive to the work location. She submitted evidence from two computer mapping services indicating that the time that it took to get from her residence to the work location exceeded 34 minutes, the driving restriction set forth by the impartial medical examiner.

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[16] *Gayle Harris*, 52 ECAB 319 (2001).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

[18] Section 8123(a) provides that, 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 examination. 5 U.S.C. § 8123(a).

[19] *See R.H.*, 59 ECAB 382 (2008); *David W. Pickett*, 54 ECAB 272 (2002).

Under the Office's procedure and Board precedent, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[20] Dr. Carr initially found that appellant could drive 15 to 30 minutes with a back support and adjustment to her car so that her leg could be in a comfortable position.[21] Upon further inquiry by the Office, she advised that appellant could drive up to 34 minutes to and from work if the seat could be properly adjusted and appellant had a backrest or lumbar support. Appellant, however, submitted evidence suggesting that the trip from her residence to the work location exceeded 34 minutes. She submitted reports from her attending physician finding that she could only drive 30 minutes or could drive with an altered vehicle. The Office found that appellant could take breaks, if necessary, during the commute to and from work and thus reduce the amount of continuous driving time to 30 minutes or less; however, the issue of whether she has the physical capacity to drive over 34 minutes with breaks is a medical determination and must be supported by the medical evidence. The medical evidence of record is insufficient to establish that she is capable of driving over 34 minutes. As the evidence conflicts regarding the amount of time it takes to get from her residence to the work location, the Board finds that the Office failed to meets its burden of proof to terminate her compensation under section 8106 for refusing an offer of suitable work.

CONCLUSION

The Board finds that the Office improperly terminated appellant's entitlement to compensation effective December 20, 2009 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

[20] Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.814.5(a)(5) (July 1997); *see Mary E. Woodard*, 57 ECAB 211 (2005); *Janice S. Hodges*, 52 ECAB 379 (2001).

[21] The employing establishment mailed appellant a back support.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2010 is reversed.

Issued: May 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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