United States Department of Labor
Employees' Compensation Appeals Board

MARILYN F. BURFEINDT, Appellant	)	
and	)	**Docket No. 04-739**
	)	**Issued: June 1, 2005**
U.S. POSTAL SERVICE, MID-HUDSON PROCESSING & DISTRIBUTION CENTER, Newburgh, NY, Employer	)	

Appearances:
Craig D. Robinson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On June 18, 2001 appellant filed a timely appeal of the April 24, 2001 merit decision of the Office of Workers' Compensation Programs, which affirmed a July 17, 2000 decision terminating compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly terminated appellant's compensation because she refused suitable work.

[1] The record on appeal includes evidence received by the Office after the issuance of the April 24, 2001 decision. The Board is limited to reviewing the record as it existed at the time of the Office's final decision. 20 C.F.R. § 501.2(c). Accordingly, the Board may not consider the evidence submitted after the April 24, 2001 decision.

FACTUAL HISTORY

On February 1, 1980 appellant, then a 37-year-old clerk, sustained a traumatic injury while in the performance of duty. The Office initially accepted appellant's claim (A02-0444261) for whiplash injury to the neck and cervical myositis. In 1987 the Office expanded the claim to include cervical strain and herniated nucleus pulposus at C5-6. The Office also authorized surgery, which appellant underwent on March 31, 1987.[2] In 1993 the Office added cervical radiculopathy as an accepted condition.

Appellant sustained another traumatic injury on August 4, 1994. The Office accepted appellant's 1994 claim (A02-685129) for back sprain and lumbar radiculitis. She did not return to work following the August 4, 1994 injury and the Office placed her on the periodic compensation rolls.[3] In 1997 the Office attempted to return appellant to gainful employment, however, she underwent surgery for breast cancer in September 1997 and the Office temporarily suspend its rehabilitation efforts.

By January 1999 appellant was reportedly "cancer free" and on June 15, 1999 her treating physician, Dr. Eckardt Johanning, a Board-certified family practitioner,[4] indicated that appellant was able to sit for eight hours, walk and stand for two hours and squat and kneel for one our each. He precluded lifting, bending, climbing, twisting, pushing and pulling and reaching or work above the shoulder level. However, in response to the Office's June 22, 1999 request for clarification, Dr. Johanning stated that appellant could not work an eight-hour day and he was "unsure" as to how many hours a day she could work. He also reported that appellant had driving restrictions and she could not operate a car, truck or other type of motor vehicle.

Dr. Paul G. Jones, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on September 18, 1999 and diagnosed cervical syndrome.[5] He advised that appellant could work part time in a light or sedentary position and her driving should be restricted to about 30 to 45 minutes. Dr. Jones indicated that appellant had reached maximum medical improvement and he did not believe further treatment for her neck condition would be beneficial given the injury occurred 19 years ago and appellant had undergone surgery and physiotherapy but continued to have problems. Dr. Jones also submitted a work capacity

[2] Dr. Kamran Tabaddor, a Board-certified neurosurgeon, performed an anterior cervical discectomy and discoplasty at C5-6.

[3] At the time of her August 4, 1994 injury, appellant was assigned to the manual letter aisle where she performed part-time, limited-duty work as a result of her February 1, 1980 employment injury. She had been working 20 hours per week and the Office compensated appellant for her loss of wage-earning capacity. Following the August 4, 1994 injury, appellant continued to receive wage-loss compensation for her February 1, 1980 cervical injury. The Office also paid an additional 20 hours of wage-loss compensation per week as a result of the August 4, 1994 lumbar injury.

[4] Dr. Johanning is also Board-certified in preventative medicine and his primary specialty is occupational medicine.

[5] Dr. Jones previously examined appellant at the Office's request on September 29, 1995, January 31, 1996 and January 28, 1998.

evaluation (Form OWCP-5c) wherein he noted that appellant was capable of 8 hours of sitting, walking, standing, pushing, pulling and repetitive movements of the wrist and elbow. He limited her to 1 hour operating a motor vehicle and imposed a 15-pound lifting restriction. Dr. Jones also noted limitations regarding reaching, reaching above shoulder and twisting. In an October 8, 1999 addendum, Dr. Jones clarified that appellant was capable of working only four hours a day.

On December 20, 1999 Dr. Johanning stated that appellant should not work more than one hour per day, if at all, due to a combination of previous musculoskeletal disorders and postsurgery affects.[6] He specifically referenced appellant's cervical and lumbar conditions and her 1997 mastectomy. Dr. Johanning also reported that appellant had difficulty handling a car, which caused increased pain.[7]

The Office determined that a conflict of medical opinion existed between Drs. Jones and Johanning and, therefore, the Office referred appellant for an impartial medical examination with Dr. William P. Howley, a Board-certified orthopedic surgeon. In a report dated February 24, 2000, Dr. Howley indicated that appellant had reached maximum medical improvement and she had a permanent, partial impairment. According to Dr. Howley, she was capable of working no more than four hours per day. He recommended sedentary work with rather frequent breaks to arise from the sitting position and walk about. Dr. Howley also precluded any work that would call for reaching above the shoulder level and any work that would require lifting more than 10 pounds at a time. Additionally, appellant was restricted from work requiring frequent or prolonged bending. He specifically noted that appellant should not do any work that would require prolonged bending forward of the head and neck and any work that would require twisting of the neck or lower back. Lastly, Dr. Howley noted that appellant had a history of symptom aggravation by prolonged driving and he advised that she not drive more than 20 to 30 minutes at a time.[8]

[6] Dr. Johanning reviewed a December 2, 1999 job offer from the employing establishment, which was reportedly based on the restrictions identified by Dr. Jones. The Office advised appellant on December 17, 1999 that the part-time position as a modified distribution clerk in LaGrangeville, NY was suitable and that she had 30 days to either accept the job or to provide a reasonable, acceptable explanation for refusing the offer. Appellant declined the position on December 20, 1999 based on Dr. Johanning's advice.

[7] Dr. Johanning also noted that the December 2, 1999 job offer required appellant to travel 45 minutes twice daily. On or about December 17, 1999 a representative from the employing establishment drove from appellant's home in Red Hook, NY to the LaGrangeville, NY postal facility. The recorded distance was 29.6 miles and the elapsed time was 37 minutes. The Office utilized an internet-based service, MapQuest, which reported the distance as 31.5 miles with an estimated travel time of 57 minutes. The Office later determined that the LaGrangeville, NY location was not an appropriate work site for appellant given her driving restrictions.

[8] In a February 29, 2000 work capacity evaluation Dr. Howley reiterated that appellant could work a maximum of four hours per day. He also reported specific limitations of 4 hours sitting, 15 to 30 minutes walking and standing, 20 to 30 minutes operating a motor vehicle and 4 hours of repetitive movement involving the wrists and elbows. Dr. Howley precluded any reaching, reaching above the shoulder, twisting, pushing, pulling and climbing. He also indicated that appellant could occasionally squat and kneel and she should take a five-minute break each hour.

On April 3, 2000 the employing establishment offered appellant a part-time, limited-duty assignment as a modified distribution clerk in Pine Plains, NY.[9] The specific duties included answering the telephone, filing change of address cards and other routine filing, canceling markup missent mail, reviewing mail prior to submission to computer forwarding unit, rating postage due and business reply mail and assisting the postmaster in filling out routine forms and reports. The noted physical activities included the ability to sit, walk no more than 30 minutes, stand no more than 30 minutes, no reaching above the shoulder, no pushing, no pulling, no twisting, no climbing and no lifting over 10 pounds. The job description also specifically referenced Dr. Howley's February 29, 2000 work capacity evaluation.

By letter dated April 11, 2000, the Office informed appellant that it found the offered position medically suitable for her work capabilities and that it was currently available. The Office allowed appellant 30 days to either accept the position or provide an explanation for refusing the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On April 24, 2000 appellant, through her attorney, argued that the offered position did not comply with the restrictions noted by her attending physician on March 7, 2000.[10] Additionally, counsel argued that the April 3, 2000 position description was inconsistent with the restrictions imposed by the independent medical examiner.

Dr. Howley reviewed the April 3, 2000 job offer and on May 30, 2000 he indicated that the part-time position was within the restrictions he previously outlined and was suitable.

On May 30, 2000 the Office informed appellant that it had considered her attorney's April 24, 2000 arguments regarding the suitability of the offered position. The Office also noted that it had forwarded a copy of the April 3, 2000 job offer to Dr. Howley and he indicated that the position was suitable. The Office advised that the prior determination regarding suitability remained unchanged and it would not consider any further reasons for refusing the position offered. Additionally, appellant was reminded of the consequences of refusing an offer of suitable work and the Office afforded her an additional 15 days to accept the position.

On June 5, 2000 counsel requested a copy of Dr. Howley's May 30, 2000 report and asked that he be permitted an additional 30 days to respond. He further stated that appellant remained disabled and was unable to perform the job that had been proposed.

By decision dated July 17, 2000, the Office terminated appellant's compensation for refusing an offer of suitable work. Appellant requested an oral hearing, which was held on February 21, 2001. She also submitted a February 20, 2001 report for Dr. Richard E. Memoli, an orthopedic surgeon, who diagnosed lumbar central disc herniation at L4-5 and lumbar disc bulge

[9] The employing establishment advised the Office that the Pine Plains, NY facility was located 9.6 miles from appellant's residence in Red Hook, NY and her commute would be 21 minutes.

[10] Dr. Johanning's March 7, 2000 comments were identical to his December 20, 1999 remarks where he noted that appellant could not work more than one hour per day, if at all.

at L5-S1.[11] He reported that when he last saw appellant on November 2, 2000 she showed no improvement in her condition and she remained totally disabled.

In a decision dated April 19, 2001 and finalized April 24, 2001, the Office hearing representative affirmed the July 17, 2000 decision terminating compensation.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[12] Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[13] To justify termination of compensation, the Office must show that the work offered was suitable,[14] and must inform appellant of the consequences of refusal to accept such employment.[15] An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.[16] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[17]

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.[18] Additionally, the Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[19]

ANALYSIS

The Office determined that a conflict of medical opinion existed based on the opinions of Drs. Johanning and Jones. Therefore, the Office properly referred appellant to an impartial

[11] Dr. Memoli first examined appellant for her lumbar condition on June 11, 1996. He provided a similar diagnosis in 1996, which he attributed to appellant's August 4, 1994 employment injury.

[12] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[13] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517(a) (1999).

[14] *Arthur C. Reck*, 47 ECAB 339 (1996).

[15] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[16] 20 C.F.R. § 10.517(a) (1999).

[17] 20 C.F.R. §§ 10.516, 10.517(b) (1999); *John E. Lemker*, 45 ECAB 258, 263 (1993).

[18] *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

[19] *See Gayle Harris, supra* note 18; *Martha A. McConnell*, 50 ECAB 129 (1998).

medical examiner.[20] Dr. Howley, the impartial medical examiner, reported that appellant had reached maximum medical improvement and that she had a permanent partial impairment. He noted that appellant was capable of performing sedentary work no more than four hours per day. He also found that appellant was limited in reaching, reaching above the shoulder level and in lifting more than 10 pounds at a time. Additionally, appellant was restricted from work requiring frequent or prolonged bending and Dr. Howley advised that she should not do any work that would require prolonged bending forward of the head and neck. He also precluded any work that would require twisting of the neck or lower back. Lastly, Dr. Howley stated that appellant should not drive more than 20 to 30 minutes at a time.

The Board finds that the Office properly relied on the impartial medical examiner's findings. Dr. Howley's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed appellant's medical records. Dr. Howley also reported accurate medical and employment histories. Accordingly, the Office properly accorded determinative weight to the impartial medical examiner's findings.[21]

Dr. Memoli's February 20, 2001 report is insufficient to overcome the weight properly accorded Dr. Howley's opinion. Moreover, Dr. Memoli's latest opinion is insufficient to create a new conflict of medical opinion. When Dr. Memoli first examined appellant for her lumbar condition on June 11, 1996 he noted that appellant had a prior workers' compensation "injury [in] 1980 with lumbar laminectomy [in] 1987." As the record reveals, appellant's February 1, 1980 employment injury involved her neck and cervical spine. Additionally, her March 31, 1987 surgery was not a lumbar laminectomy, but an anterior cervical discectomy and discoplasty at C5-6. As reflected in his latest report dated February 20, 2001, Dr. Memoli continued to labor under the misperception that appellant sustained a prior lumbar injury in 1980. Once again, he reiterated that she "had an on[-]the[-]job injury in 1980 with a lumbar laminectomy performed in 1987." He further noted that after surgery she did well with no residual problems until the injury of August 4, 1994. Dr. Memoli's various reports and treatment notes do not reference or discuss appellant's prior cervical injury. While his most recent report of February 20, 2001 identified limitations with respect to appellant's lumbar spine and the doctor concluded that appellant was totally disabled, this report cannot be considered properly rationalized given Dr. Memoli's reliance on an inaccurate and incomplete medical history.[22]

The Board further finds that the part-time position as a modified distribution clerk is suitable for appellant's physical condition and consistent with the restrictions outlined by

[20] The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[21] Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[22] The factors that comprise the evaluation of medical evidence include the opportunity for a physical examination and the thoroughness of the examination. Additional factors include the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion. *Anna M. Delaney*, 53 ECAB 384, 386 (2002).

Dr. Howley, the independent medical examiner. The April 3, 2000 job offer adequately described appellant's specific duties, the physical activities required and the limitations imposed by Dr. Howley.[23] Moreover, the position description specifically referenced and incorporated Dr. Howley's February 29, 2000 work capacity evaluation. Additionally, the record establishes that the proposed job site at Pine Plains, NY is compatible with appellant's driving restriction of 20 to 30 minutes at a time. Lastly, Dr. Howley reviewed the April 3, 2000 position description and specifically indicated that it was "suitable." Appellant argued that the offered position could not be performed without an excessive amount of reaching. However, she did not submit any evidence to substantiate this allegation and Dr. Howley's opinion that the position was consistent with appellant's limitations clearly undermines her contention that the offered position was not medically suitable.

The Office fully apprised appellant of the consequences of failing or refusing to accept an offer of suitable work. On April 11, 2000 the Office properly advised appellant of her rights and responsibilities under the Act when it informed appellant that the April 3, 2000 job offer was deemed suitable. She was allowed 30 days to either accept the position or provide an explanation for refusing and the Office specifically informed her about the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work. On April 24, 2000 appellant's counsel expressed her reservations about being able to perform the offered position. The Office considered the arguments raised and advised appellant on May 30, 2000 that the April 3, 2000 position remained suitable and no additional reasons for refusing the position would be considered. Additionally, the Office reiterated the consequences of refusing an offer of suitable work and advised appellant that she had 15 days to accept the position. Appellant's counsel subsequently requested a copy of Dr. Howley's May 30, 2000 report and a 30-day extension to reply. There is no indication from the record that the Office granted counsel's June 5, 2000 request and appellant did not report to work within the 15-day period allotted by the Office. Prior to the termination of her wage-loss compensation appellant was afforded all the procedural safeguards guaranteed under the Act, regulations and Board precedent.[24]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation for refusing suitable work.

[23] As a part-time, modified distribution clerk appellant would have been required to answer the telephone, file change of address cards and other routine filing, cancel markup missent mail, review mail prior to submission to computer forwarding unit, rate postage due and business reply mail and assist the postmaster in filling out routine forms and reports. The reported physical activities included the ability to sit, walk no more than 30 minutes, stand no more than 30 minutes, no reaching above the shoulder, no pushing, no pulling, no twisting, no climbing and no lifting over 10 pounds.

[24] 20 C.F.R. §§ 10.516, 10.517; *see Linda Hilton*, 52 ECAB 476, 482 (2001).

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member