United States Department of Labor
Employees' Compensation Appeals Board

MARY E. WOODARD, Appellant	)	
and	)	**Docket No. 05-1023**
	)	**Issued: November 14, 2005**
DEPARTMENT OF VETERANS AFAIRS, CENTRAL IOWA HEALTH CARE SYSTEM, Des Moines, IA, Employer	)	

Appearances:
Mary E. Woodard, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2005 appellant filed a timely appeal of merit decisions of the Office of Workers' Compensation Programs dated April 30, 2004 and March 4, 2005 that terminated her compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for refusing suitable work.

FACTUAL HISTORY

On July 20, 2001 appellant, then a 39-year-old registered nurse, filed a claim for compensation for an occupational disease of nerve entrapment of the arms. The physical requirements of her position included lifting 20 to 50 pounds. Appellant worked four days a week, from 7:45 a.m. to 4:15 p.m.

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and cubital tunnel syndrome, and authorized surgery to correct these conditions. Dr. Eugene J. Cherny, a Board-certified plastic surgeon, performed surgery on appellant's left wrist and elbow on February 1, 2002 and on her right wrist and elbow on March 20, 2002. On March 29, 2002 appellant returned to work performing limited duty.

In a July 30, 2002 report, Dr. Cherny stated that, due to her poor performance in work hardening, he was unable to determine if she was able to return to full duty. He ordered a functional capacity evaluation (FCE), which was performed on August 8, 2002. It suggested a nonorganic pain response, poor effort and borderline invalid results. In an August 15, 2002 report, Dr. Cherny stated that appellant's "poor progress and self-limiting behaviors during work hardening as well as the invalid performance on the FCE make it impossible to assign permanent restrictions." He indicated that she could return to work with no restrictions and released her from his care. A second functional capacity evaluation on September 4 and 5, 2002 was also invalid, Dr. Cherny repeated on September 10, 2002 that appellant could work with no restrictions.

On November 21, 2002 the employing establishment, which had continued appellant's limited duty, advised that, if she did not present medical evidence of her inability to return to regular work by November 29, 2002, she would be returned to regular duty. She submitted a December 3, 2002 report from Dr. Fred W. Strickland, an osteopath, stating that she had bilateral hand and wrist pain with numbness and tingling, and that she could not lift over 20 pounds. In a December 30, 2002 report, Dr. Mark A. Burdt, an osteopath, noted her complaints of pain, tingling and a cramping sensation, and stated that her current restrictions included no lifting over 20 pounds. On February 4, 2003 the Office referred appellant, her medical records and a statement of accepted facts, to Dr. Charles Denhart, a Board-certified physiatrist, for a second opinion evaluation of her condition and her ability to work. In a March 31, 2003 report, Dr. Denhart concluded that appellant's subjective complaints were more pronounced than her objective findings, and that she had permanent restrictions of no lifting over 20 pounds, less than one-half hour of pushing and pulling, and intermittent repetitive movements of her wrists and elbows not exceeding three hours per day.

On May 14, 2003 the employing establishment offered appellant a position as a nurse for eight hours per day, four days per week, stating that her duties in the medical/surgical inpatient units would involve assessing, planning and providing and directing direct patient care, including interviewing patients, developing nursing care plans, obtaining vital signs, administering medications, verifying physicians' orders in the computer, supervising work of licensed practical nurses and nurse assistants, and coordinating and scheduling tests and procedures. Computer data entry would be about three hours per day, spread throughout the day, and her assistance to patients with bathing, ambulating, toileting and other activities of daily living would not include pulling patients up in bed, rolling or positioning heavy or noncompliant patients, or ambulating or moving between bed and chair anyone who could not assist or was at risk to become dead weight or combative. Appellant did not accept this position, stating that she was unable to assist patients or push the medication cart that weighed more than 20 pounds, and that she had been performing her job in the clinics since September 2002. She submitted reports from Dr. Burdt dated June 2, 2003 and Dr. Strickland dated June 19, 2003 stating that she could not perform this position. On September 4, 2003 the Office advised the employing establishment that the

physical requirements of the offered position exceeded the work tolerance limitations set forth by Dr. Denhart.

On December 23, 2003 the employing establishment submitted descriptions of two temporary light-duty assignments, stating that appellant was performing these duties until she accepted or declined its formal job offer. A December 8, 2003 assignment to the nursing office had duties of orientation to telephone triage for one to two weeks, then helping there as assigned, and orientation, then working as a trainer for providers for encounter forms. A December 22, 2003 assignment to the primary care unit had duties of working with the diabetes nurse, including scheduling, issuing and trouble shooting problems with gluco-meters, calling patients to remind them of appointments and other clerical duties.

On December 23, 2003 the employing establishment offered appellant a position as a telephone triage nurse, working eight hours per day, four days per week, from midnight until 8:00 a.m. The offer stated that the position was currently available, that she was to report on January 25, 2004, and that she had until January 6, 2004 to accept or decline the offer. Attached was a sheet titled "Physical Requirements of Position of Telephone Triage Nurse," which stated:

> "Work requires using a headset to answer telephone calls, apply advice protocol and then document the encounter.
>
> "Work is sedentary, accomplished from a workstation.
>
> "Work can be accomplished from either a sitting or standing position.
>
> "Reference books are available at the workstation. Books could weight (sic) up to eight or nine pounds.
>
> "Employee uses the computer to record the calls. Amount of time required for data entry varies by shift. Computer time between the hours of 12 a.m. to 8 a.m. is no more than three hours."

On December 31, 2003 appellant did not accept the job offer. In a January 15, 2004 letter, the Office advised appellant that it had found the offered position suitable, that an employee who refuses an offer of suitable work was not entitled to further compensation, and that she had 30 days to accept the position or provide a written explanation of her reasons.

In a February 10, 2004 letter, appellant stated that she declined the offered position because she was unable to drive at night due to extremely poor night vision, because the room to which she was assigned had been occupied by a cat used for pet therapy, and because sitting for long periods of time caused increased cervical and lumbar back pain. She stated that her round trip to work was 60 miles and that her husband worked from 7:00 a.m. to 3:30 p.m. Appellant was allergic to cats and had worked in specialty clinics for a year without a lot of difficulty, which she and Dr. Strickland felt she could continue. She submitted a December 19, 2003 report from Dr. Strickland stating that she was allergic to cat dander. In a February 19, 2004 report, Dr. Strickland stated that appellant had bulging cervical and lumbar discs. In a January 9, 2004 report, Dr. Louis J. Scallon, a Board-certified ophthalmologist, set forth a history of vision at night getting gradually worse over the past few years, inability to see other than directly in front

of her, and being bothered by glare and by halos around lights. Dr. Scallon diagnosed difficulty with night driving or subjective nyctalopia with a family history of similar problems, and stated that she had early nuclear sclerosis, a chance of a rod dystrophy, and relatively very mild cataracts.

By letter dated March 29 2004, the Office advised appellant that her reasons for refusing the offer of employment were not valid, and that she had 15 days to accept the position. By decision dated April 30, 2004, the Office terminated appellant's compensation on the basis that she refused an offer of suitable work.

Appellant requested a hearing, and testified at the hearing held on December 9, 2004 that she had a restricted license that did not allow her to drive at night. She also testified that her duties upon returning to work after her surgeries involved scheduling patients primarily while sitting. Appellant also testified that she had not refused to work since she was working, and that her present work involved floating between primary care clinics, nursing visits and telephone calls. She submitted additional medical evidence. In a December 13, 2004 report, Dr. Strickland diagnosed chronic neck and back pain, bulging cervical and lumbar discs, migraine headaches, allergies to cats, muscle spasms, numbness of the hands and wrists, reflex sympathetic dystrophy and fibromyalgia. He concluded that she could not be gainfully employed. In a December 6, 2004 report, Dr. Burdt stated that appellant's primary problems were musculoskeletal with persistent dyesthesias of the upper extremities for which she was restricted to three hours of repetitive motions of the wrists and elbows. He stated that she also had fibromyalgia and night blindness for which she had a restricted driver's license. Dr. Burdt concluded that she was incapable of gainful employment. She also submitted the December 6, 2004 termination of her excepted appointment effective December 17, 2004 on the basis that she was unable to physically perform the duties of a staff nurse on the telemetry unit. In a January 11, 2004 statement, the employing establishment stated that it had been able to provide temporary assignments until a permanent position was identified, and that it had identified an alternate location to address appellant's allergy to cats.

By decision dated March 4, 2005, an Office hearing representative found that appellant refused an offer of suitable work, as the position was within the physical restrictions set by her physicians, and her desire not to work the night shift was not a valid basis for refusing the job offer.

LEGAL PRECEDENT

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.[1] To justify termination of compensation, the Office must establish that the work offered was suitable.[2] If the Office is aware that appellant has actual earnings, it must determine whether such earnings represent appellant's wage-earning

[1] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[2] *David P. Camacho*, 40 ECAB 267 (1988).

capacity before it can invoke the penalty provision of section 8106(c) of the Act.[3] Section 10.516 of the Code of Federal Regulations[4] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[5]

An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work is inability to travel to work.[6] The Office's procedures provide that the inability to travel to work is an acceptable reason if the inability is because of residuals of the employment injury.[7] The Board has also held that nonwork-related conditions that prevent an employee from traveling to work are also an acceptable reason for rejecting an offer of suitable work if supported by the medical evidence.[8] This holding is consistent with the Board's holding that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[9]

ANALYSIS

In the present case, the Office did not meet its burden of proof to terminate appellant's compensation for refusing suitable work for two reasons. First, appellant had actual earnings at the employing establishment since she returned to work on March 29, 2002 following her authorized surgeries. The Office did not consider whether appellant's actual earnings represented her wage-earning capacity. Such a determination must be made before invoking the penalty provision of section 8106(c) of the Act.[10]

Second, the Office did not consider appellant's inability to drive at night, which clearly would affect her ability to travel to a job beginning at midnight. Her inability to drive at night was supported by the January 9, 2004 report of Dr. Scallon, a Board-certified ophthalmologist, and by her testimony that she had a restricted driver's license that did not allow driving at night. Appellant's objection to working on a shift beginning at midnight was not a mere desire to work

[3] *Michael E. Moravec*, 46 ECAB 492 (1995).

[4] 20 C.F.R. § 10.516.

[5] *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5a(5) (July 1996); cited in *Donna M. Stroud*, 51 ECAB 264 (2000).

[8] *Janice S. Hodges*, 52 ECAB 379 (2001).

[9] *Edward J. Stabell*, 49 ECAB 566 (1998).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a) (July 1997). *See also Joyce M. Doll*, 53 ECAB 790 (2002).

a different shift, as found by the Office hearing representative, but rather was based on her inability to travel to work at that time.

CONCLUSION

The Office did not meet its burden of proof to terminate appellant's compensation for refusing suitable work, as it did not consider whether her actual earnings represented her wage-earning capacity and whether she was able to travel to work at night.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2005 and April 30, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: November 14, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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