

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

L.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gaithersburg, MD, Employer**

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**Docket No. 06-694
Issued: May 2, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 1, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 21, 2005. Under 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 compensation benefits on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On January 17, 1996 appellant, a 40-year-old mail handler, injured her right wrist and right elbow while pulling mail. She filed a claim for benefits, which the Office accepted for lateral epicondylitis, right elbow, epicondyle release surgery and stellate ganglion blocks. Appellant returned to work on April 8, 1996 on limited duty and stopped working on

August 20, 1996. The Office paid appropriate compensation.¹ Appellant returned to work with the employing establishment on September 27, 1997, but went off work again on November 12, 1998. The Office expanded appellant's claim to accept the condition of left carpal tunnel syndrome on November 16, 1998, for which she underwent surgery on January 18, 1999. The Office subsequently authorized a right shoulder arthroscopy for right rotator cuff repair with subacromial decompression and distal clavicle excision. Dr. William B. Wolf, Board-certified in orthopedic surgery and the attending physician, performed this procedure on August 31, 2000. Appellant has not returned to work since November 11, 1998.

In a report dated September 15, 2003, Dr. Wolf stated that appellant had some occasional catching in the front of her right shoulder but was essentially doing well a few years after her shoulder surgery. Appellant stated that she had good range of motion and was able to return to work notwithstanding the occasional catching in her shoulder; she denied having numbness and tingling in her hands. Dr. Wolf noted no swelling, edema or erythema or unusual adenopathy, and stated that appellant had full range of motion of the neck with no sternoclavicular or acromioclavicular tenderness. He advised that she was able to return to unrestricted duty, stated that she was able to "lift whatever she wants" and opined that the occasional catching in her shoulder would resolve.

On August 6, 2004 the employing establishment offered appellant a job as a mail processor/machine operator based on Dr. Wolf's September 15, 2003 report and work capacity evaluation. The job description indicated that appellant would operate mail processing machines and other specified routine maintenance tasks, as necessary. It stipulated that appellant could continuously lift up to 50 pounds, sit, stand, walk, climb, bend/twist, push/pull, reach above the shoulder, operate a motor vehicle and perform simple grasping and keyboarding for eight hours per day.

In a report dated August 12, 2004, Dr. Barry P. Boden, Board-certified in orthopedic medicine and the new attending physician, stated that appellant reported complaints of right shoulder pain. He noted that appellant experienced discomfort with overhead activity and extension mostly along the inferolateral aspect of the shoulder. Dr. Boden related that appellant believed Dr. Wolf, the previous treating physician, did not respond to her complaints of shoulder pain, which had been persistent since the August 2000 surgery. He stated that x-rays of her right shoulder revealed a subacromial decompression and distal clavicle excision. In addition, Dr. Boden noted an irregularity at the anterior acromion where the surgery was performed, indicating possible loose acromion or loose fragment.

Dr. Boden advised that appellant was experiencing right shoulder residual pain, status post decompression. He administered a cortisone shot to alleviate the pain and stated that, if her symptoms did not improve within the next month, she would have a magnetic resonance imaging (MRI) scan and computerized axial tomography scan performed prior to her next appointment.

¹ These facts are set forth in a Board decision dated February 16, 1999, Docket No. 99-2584, and are herein incorporated by reference. That decision adjudicated whether an overpayment was made to appellant, an issue which has no bearing on the instant case.

A work capacity evaluation form, dated August 12, 2004, signed by Dr. Boden indicated that appellant was restricted from lifting more than 20 pounds, occasionally. Dr. Boden indicated that these restrictions were temporary.

In a report dated September 17, 2004, Dr. Boden stated:

“[Appellant] returns to the office ... for reevaluation. The patient is status post right shoulder decompression by Dr. Wolf in 2000. She also underwent carpal tunnel release ... on the right side. [Appellant] underwent a cortisone injection and was referred to physical therapy. The patient states that she did not receive any relief from either treatment. [Appellant] complains of persistent pain in the anterior aspect of the shoulder. She is also experiencing discomfort in the right trapezial area. In addition [appellant] reports occasional cold sensation in the right hand. She previously had an MRI [scan] of her neck within the last year which showed a disc bulge but no herniation.”

Dr. Boden concluded:

“The assessment plan is that [appellant] is suffering from right shoulder pain consistent with persistent impingement syndrome.... The patient is also experiencing trapezial spasm. [Appellant] was referred for an MRI [scan] of her right shoulder and will return with the films of her neck and shoulder. She was also referred for an EMG to rule out a peripheral versus cervical radiculopathy. [Appellant] will follow up in the office in three to four weeks with the results.”

By letters dated January 24 and July 7, 2005, the Office advised appellant that a suitable position was available and that pursuant to 5 U.S.C. § 8106(c)(2),² she had 30 days to either accept the job or provide a written explanation for refusing the offer. The Office advised her that it would be terminating her compensation pursuant to section 8106(c)(2) based on her refusal to accept a suitable position which reflected her ability to work as a mail processor/machine operator for eight hours per day. The Office stated that it had reviewed the employing establishment’s job offer and found that it was in accordance with the work restrictions outlined by Dr. Boden in his August 12, 2004 report. The Office advised that, if appellant refused the job without justifiable cause or failed to report to work within 30 days, it would terminate her compensation.

By decision dated December 21, 2005, the Office terminated appellant’s compensation benefits on the grounds that she refused an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees’ Compensation Act³ the Office may terminate the compensation of an employee who refuses or

² 5 U.S.C. § 8106(c)(2).

³ 5 U.S.C. § 8101 *et seq.*

neglects to work after suitable work is offered to, procured by, or secured for the employee.⁴ Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before a determination is made with respect to termination of entitlement to compensation.⁵

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work; setting for 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.⁶ However, all of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.⁷

To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁸ This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The determination of 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.⁹ In the instant case, Dr. Wolf indicated in his September 15, 2003 report and work capacity evaluation that appellant was ready to return to work with no limitations, other than the 50-pound lifting restriction. The employing establishment offered appellant a job on August 6, 2004 as a mail processor/machine operator based on Dr. Wolf's report and work capacity evaluation. However, appellant subsequently submitted an August 12, 2004 report from her new treating physician, Dr. Boden, which indicated that she was experiencing discomfort with overhead activity and extension in her right shoulder. Due to these increasing symptoms in her work-related right shoulder condition, Dr. Boden increased appellant's lifting restriction to 20 pounds. He stated that x-rays of her right shoulder revealed a subacromial decompression and distal clavicle excision, and noted "irregularity" in the anterior acromion where the surgery had been performed, which indicated possible loose acromion or fragments. In his September 17, 2004 report, Dr. Boden indicated that appellant had not received any relief from physical therapy or cortisone injection and continued to experience

⁴ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁵ 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

⁶ *Linda Hilton*, 52 ECAB 476, 481 (2001).

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

⁸ *See John E. Lemker*, 45 ECAB 258 (1993).

⁹ *Robert Dickinson*, 46 ECAB 1002 (1995).

persistent pain in the anterior aspect of the shoulder, discomfort in the right trapezial area, and occasional cold sensation in the right hand. He stated that appellant was referred for an MRI scan of her right shoulder and neck and for an EMG to rule out a peripheral versus cervical radiculopathy.

Once appellant submitted this additional medical evidence indicating that she had greater physical restrictions than those upon which the mail processor/machine operator position was based, the offered position was no longer suitable. The Office was required to consider those conditions, regardless of etiology, prior to the July 2005 determination that the job offer was suitable.¹⁰ The Office, however, failed to consider appellant's increased lifting restriction, worsening symptomatology and referral for further diagnostic testing in determining whether the position it offered to appellant was suitable.

As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.¹¹ Accordingly, the Board will reverse the Office's December 21, 2005 decision.

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

¹⁰ See 20 C.F.R. § 10.124(c).

¹¹ *Barbara R. Bryant*, 47 ECAB 715 (1996).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2005 decision of the Office of Workers' Compensation Programs be reversed.

Issued: May 2, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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