United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 08-514**
	)	**Issued: August 1, 2008**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Wichita, KS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2007 appellant filed an appeal from an October 1, 2007 decision of the Office of Workers' Compensation Programs that terminated her wage-loss compensation on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective November 1, 2006 pursuant to 5 U.S.C. § 8106(a).

FACTUAL HISTORY

On October 6, 2005 appellant, then a 44-year-old automation clerk, filed a Form CA-1, traumatic injury claim, alleging that on September 30, 2005 she injured her back while stacking mail trays. She stopped work on October 3, 2005. The Office accepted that appellant sustained an employment-related displaced lumbar intervertebral disc at L5-S1. Appellant came under the care of Dr. John Weninger, Board-certified in family medicine, who advised that she should not

work and should be on bed rest. An October 6, 2005 magnetic resonance imaging (MRI) scan demonstrated a left disc herniation at L5-S1 with resultant ventral lateral recess stenosis and likely nerve impingement and hypertrophic facet arthropathy.

Appellant began receiving wage-loss compensation on November 17, 2005. In December 2005, a medical management nurse, Debra Reynolds, R.N., was assigned. A December 14, 2005 MRI scan was reported as unchanged. On January 16, 2006 Dr. Pedro A. Murati, Board-certified in physical medicine and rehabilitation, noted complaints of low back pain and left leg numbness and weakness. Physical examination of the lower extremities demonstrated a decrease in sensation of the left L4-5 and S1 dermatomes with depressed hamstring reflexes and missing ankle reflexes. Muscle strength testing was 4/5 on the left. Rotation on back examination caused pain to radiate down the left leg, and straight leg raising, reverse Thomas, Faber and Fair tests were positive on the left. Dr. Murati diagnosed lumbar pain with radiculopathy and a herniated disc at L5-S1. He recommended electromyography (EMG) and stated that appellant was advised that bed rest was not the appropriate treatment for her back pain and could make the problem worse. In a duty status report dated January 18, 2006, Dr. Murati advised that appellant could return to limited duty for four hours daily. A January 18, 2006 EMG was consistent with chronic L5-S1 radiculopathy.

By decision dated January 27, 2006, the Office denied that appellant was entitled to continuation of pay for the period October 6 through November 16, 2005. On January 30, 2006 appellant returned to work for 2.46 hours, and refused a limited-duty job offer. In a February 10, 2006 report, Dr. Weninger indicated that a review of his records regarding appellant's condition showed that she was first evaluated on October 3, 2005 complaining of pain in her left buttock and that her leg was falling asleep. He noted the October 6, 2005 MRI scan findings and recommended bed rest except for bathroom and meals and pain relief. Dr. Weninger noted that he treated appellant at approximately two-week intervals, recommending bed rest, and stated that she was last seen on January 19, 2006 when Dr. Murati's findings and conclusions were discussed. He concluded that appellant had no further follow-up and assumed that she was "doing her best" at continuing employment with her current limitations.

Appellant requested a hearing regarding the January 27, 2007 Office decision on February 22, 2006. On February 24, 2006 the Office referred her to Dr. Lee R. Dorey, a Board-certified orthopedic surgeon, for a second opinion evaluation. A March 10, 2006 MRI scan demonstrated no significant change from the December 14, 2005 study.

In a March 17, 2006 report, Dr. Dorey noted his review of the statement of accepted facts and medical record. He reported appellant's complaints of tingling down her left leg into the foot with pain in her back and left buttock which continued after sitting or standing in one place, or a combination of the two, for any length of time with no relief and that physical therapy made her pain worse. Physical examination demonstrated marked tenderness of the lumbar spine. Straight leg raising was positive on the left, and hip extension and forced knee flexion caused pain. Achilles reflex was absent on the left. Dr. Dorey noted his review of the MRI scan films and advised that x-rays taken the day of his examination demonstrated hypermobility at L5-S1 and changes of the sacral facet arthropathy. He diagnosed lumbar disc herniation with instability and facet arthropathy at L5-S1 affecting both S1 and L5 nerve roots on the left. Dr. Dorey advised that bed rest was inappropriate for appellant and recommended surgery which appellant

refused. He concluded that, while she could not perform her previous job, she could do sedentary work with frequent rest. In an attached work capacity evaluation, Dr. Dorey advised that without surgery appellant could work eight hours a day with probable permanent restrictions and restricted her activity to one hour sitting, walking, operating a motor vehicle at work and to and from work, two hours standing and reaching above shoulder, four hours reaching and no bending, stooping, squatting or climbing and a 10-pound restriction on pushing and pulling for one hour each, with a 20-pound restriction on lifting for two hours, and a 5-pound restriction on kneeling for one hour. He stated that she needed a one-hour break every four hours.

The Office requested that Dr. Dorey submit a supplementary report, noting that he indicated that appellant could work eight hours and asked that he clarify whether his recommendations regarding appellant's restrictions were that she could perform the tasks, *e.g.*, sitting, were for one hour total each day or for one hour at a time. On April 25, 2006 Dr. Dorey submitted a revised work capacity evaluation in which he elaborated that the restrictions listed were that sitting and walking were restricted to one hour at a time and standing to two hours at a time with reaching limited to four hours during an eight-hour day, reaching above the shoulder for two hours during a day, and driving at work and to and from work, one hour each during a day. His restrictions on pushing, pulling, lifting and kneeling were for an entire day.

By decision dated June 8, 2006, an Office hearing representative reversed the January 27, 2006 Office decision, and returned the case to the Office for payment of continuation of pay. The Office referred appellant to a vocational rehabilitation specialist, William Hosman, on July 12, 2006.

On August 3, 2006 the employing establishment offered appellant a rehabilitation mail processing clerk position, with hours from 12:00 noon to 9:00 p.m. with a one-hour lunch break. The job encompassed checking in scanners, looking through undeliverable bulk business mail and casing letter mail with physical restrictions that matched those provided by Dr. Dorey.

In a letter dated August 15, 2006, appellant stated that, because of the discrepancies in the second opinion report, she was not considering, accepting or declining the job offer. On August 21, 2006 Mr. Hosman and appellant reviewed the offered position at the employing establishment. He recommended that she be furnished a floor mat and ergonomic chair with back support. On August 30, 2006 the Office ascertained that the offered position was still available and advised appellant that the position offered was suitable, as it was in accordance with the medical restrictions provided by Dr. Dorey. Appellant was notified that, if she failed to report to the offered position or failed to demonstrate that the failure was justified, her right to compensation would be terminated. She was given 30 days to respond. In letters dated September 15, 2006, appellant submitted questions for Dr. Dorey, and for the claims examiner. In a separate letter, she stated that Mr. Hosman did not find the offered position suitable and that he informed her that the job remained on hold. Appellant stated that Dr. Dorey's report needed clarification about her restrictions and concluded that she was not accepting or rejecting the job offer.

On October 13, 2006 the rehabilitation counselor notified the Office that the requested ergonomic equipment had arrived. On October 16, 2006 the Office determined that the offered position remained available and, in a letter of that day, responded to the concerns expressed in

her September 15, 2006 letters. It advised appellant that, even though ergonomic equipment was provided, it was not recommended by either her treating physician or the second opinion specialist, and the equipment was not a requirement of the work restrictions offered and was not a consideration in determining job suitability. The Office advised that, as the work restrictions provided by Dr. Weninger were not supported with a well-reasoned medical opinion, a second opinion evaluation was scheduled, and the position offered had been within the restrictions provided by the second opinion examiner. It concluded that appellant had not provided a valid reason for refusing to accept the offered position. Appellant was given an additional 15 days to accept or her entitlement to wage-loss and schedule award benefits would be terminated. On October 22, 2006 the rehabilitation counselor again notified the Office that the ergonomic equipment was in place.

By decision dated November 1, 2006, the Office terminated appellant's wage-loss compensation, effective that day, on the grounds that she declined an offer of suitable work. In a letter dated October 23, 2006, received by the Office on November 6, 2006, appellant rejected the offered position and again argued that Mr. Hosman did not find the position suitable because it was not within Dr. Dorey's restrictions and that she could not perform the job duties.

On November 28, 2008 appellant requested a hearing, and on January 8, 2007 requested subpoenas for Drs. Weninger, Dorey and for the rehabilitation counselor. A February 22, 2007 MRI scan of the lumbar spine demonstrated a worsening appearance to the L5-S1 level when compared with prior studies. There was a prominent midline disc bulge and a separate disc fragment in the right paracentral region consistent with extruded or sequestered disc producing severe right lateral recess stenosis.

A telephonic hearing was held on July 16, 2007. Appellant testified that the subpoena request was not granted.[1] She argued that Dr. Dorey's restrictions were inconsistent and that, as shown by the February 2007 MRI scan, her condition had worsened. Appellant described her typical day, stating that she did very little housework and would lay down and watch television. By letter dated July 16, 2007, she again argued that the offered position was not within the restrictions provided by Dr. Dorey.

In a report dated July 19, 2007, Dr. Jeanette C. Salone, a Board-certified physiatrist, noted the history of injury and appellant's complaints of bilateral buttock pain radiating into thighs, legs and feet with numbness down the legs into the feet. She reviewed the MRI scans and advised that physical examination demonstrated a normal gait and mild limitation of lumbar range of motion. Dr. Salone diagnosed bilateral central herniated disc with segment at L5-S1 and lumbar muscle spasms. She ordered a functional capacity examination (FCE). An FCE dated July 6, 2007 advised that appellant was functioning in the sedentary work category as described in the U.S. Department of Labor's *Dictionary of Occupational Titles*. This was defined as exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull and otherwise move objects. Appellant could frequently stand, sit, climb stairs and crouch and occasionally bend, squat, move her knees and climb a ladder. She was unable to perform floor to waist lifting, and could lift 10 pounds from 12 inches

[1] The record does not contain a letter or decision denying the request.

to the waist, waist to shoulder, and shoulder to overhead. She could carry 10 pounds and push or pull 20 pounds.

On August 10, 2007 the employing establishment reported that all ergonomic equipment had been made available for appellant. In reports dated August 21, 2007, Dr. Salone advised that appellant could work an 8-hour day with 1 hour standing, 2 hours walking, 15 minutes bending, stooping, reaching above the shoulders or holding something. She provided lifting restrictions of 5 pounds continuously and 10 pounds intermittently and no climbing, kneeling, twisting, pushing, pulling or driving a vehicle at work, and that she could not operate machinery or work in high humidity or with chemical solvents. By decision dated October 1, 2007, an Office hearing representative affirmed the November 1, 2006 decision.

LEGAL PRECEDENT

Section 8106(c) of the Federal Employees' Compensation Act[2] provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] The implementing regulation 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 a showing before entitlement to compensation is terminated.[5] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.[7] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] 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.[9] The issue of whether an employee has the physical ability to perform a modified

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c).

[4] *Joyce M. Doll*, 53 ECAB 790 (2002).

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, *Refusal of Job Offer*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[9] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[10] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work on November 1, 2006. The employing establishment offered appellant a modified position with physical restrictions that followed those provided by Dr. Dorey who had provided a second opinion evaluation for the Office. Dr. Dorey advised that appellant could work for eight hours a day and that sitting and walking were restricted to one hour at a time and standing to two hours at a time with reaching for four hours during an eight-hour day, reaching above the shoulder for two hours during a day, and driving at work and to and from work, one hour each during a day. Appellant was restricted to pushing and pulling 10 pounds for 1 hour, lifting 20 pounds for 2 hours, and 5 pounds kneeling for 1 hour were for an entire day. While her attending family practitioner, Dr. Weninger, restricted appellant to bed rest except for eating and bathroom needs, the Board finds this opinion not rationalized. Both Dr. Murati, a Board-certified physiatrist, and Dr. Dorey, a Board-certified orthopedic surgeon, advised that this was not proper treatment for appellant's back condition. A medical opinion not fortified by medical rationale is of little probative value.[12] Appellant also submitted an FCE dated July 6, 2007 and reports from Dr. Salone dated July and August 2007 which limited her to a sedentary position for eight hours a day. These reports, however, were of examinations that took place over six months after the termination and are therefore irrelevant as to whether appellant could perform the offered position on November 1, 2006. The Board also notes that both Mr. Hosman, the rehabilitation specialist, and the employing establishment assured that ergonomic equipment recommended by Mr. Hosman, but not ordered by Dr. Dorey, had arrived prior to the October 16, 2006 letter that gave appellant an additional 15 days to accept the offered position. The Board therefore concludes that the weight of the medical evidence rests with the well-rationalized opinion of Dr. Dorey which was based on a proper factual background and establishes that appellant could physically perform the duties of the offered position.[13]

In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[14] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated August 30, 2006, the Office advised appellant that the offered position was suitable as it was within the restrictions provided by Dr. Dorey. Appellant was notified that, if she failed to report to work or failed to demonstrate that the failure was justified, her right to compensation

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

[11] *Richard P. Cortes*, 56 ECAB 200 (2004).

[12] *Charles W. Downey*, 54 ECAB 421 (2003).

[13] *Gayle Harris*, *supra* note 10.

[14] *See Maggie L. Moore*, *supra* note 6.

would be terminated. She was allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated October 16, 2006, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. Appellant was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, her compensation was properly terminated effective November 1, 2006 on the grounds that she refused an offer of suitable work.[15]

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation on November 1, 2006 pursuant to 5 U.S.C. § 8106(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2007 be affirmed.

Issued: August 1, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *Joyce M. Doll, supra* note 4.