United States Department of Labor
Employees' Compensation Appeals Board

L.A., Appellant	)	
and	)	**Docket No. 07-1333**
	)	**Issued: July 17, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2007 appellant filed a timely appeal from the November 20, 2006 and March 1, 2007 decisions of the Office of Workers' Compensation Programs, which affirmed the termination of her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On January 24, 1996 appellant, then a 39-year-old distribution clerk, sustained injury to her left shoulder while in the performance of duty. The Office accepted that she sustained a left shoulder strain and adhesive capsulitis. She underwent surgery on August 14, 1996 and received a schedule award for 41 percent impairment to her left upper extremity. Appellant stopped work on June 1, 1997 and has been in receipt of appropriate compensation benefits.

A conflict in medical opinion arose between appellant's attending physicians and Office referral physicians as to the extent of her work limitations due to her left shoulder and low back conditions. The Office referred appellant to Dr. John R. Lang, a Board-certified orthopedic surgeon, selected as the impartial medical referee, who was requested to address her capacity for work and recommend physical limitations in the use of her left shoulder and low back.[1]

In a November 30, 2004 report, Dr. Lang reviewed appellant's history of injury and medical treatment and provided findings on physical examination. He set forth findings on range of motion of the upper extremities and appellant's low back. Dr. Lang advised that the impingement protocol was negative despite appellant's active motion of the left shoulder. He reviewed the medical reports of record, including those giving rise to the conflict in medical opinion and a copy of a position description for video coding system technician.[2] Dr. Lang diagnosed lumbar syndrome without radiculopathy, status postsurgery for a lumbar fracture in 1984 and left shoulder, post acromioplasty. He stated that during his examination, appellant exhibited "a series of rather remarkable functional findings without any evidence of organicity," which were not noted or present during the evaluations by the prior orthopedic surgeons. Dr. Lang found that appellant was capable of performing full-time work with lifting limited to no more than 10 pounds. With respect to the job description, he advised that appellant would be able to sit and stand throughout the day with no manual activities necessary and, therefore, no use of her upper extremities. Dr. Lang advised that the physical requirements for the video coding systems technician job were extremely minimal and that appellant could perform the duties of the position. He noted that there was also a limited-duty job offer of February 28, 2004, which limited standing, walking and sitting to two hours a day, lifting limited from 0 to 10 pounds with no lifting above shoulder level.[3] Dr. Lang indicated that appellant was capable of performing work with standing, walking and sitting allowed to change throughout the workday, lifting limited to 10 pounds and that she was unable to bend, squat, kneel, climb, reach above the shoulders or perform repetitive hand motions. He advised that there was no specific reason why she could not commute from Oakland to the Vallejo/Benicia area. Dr. Lang completed an OWCP-5 setting forth appellant's physical restrictions. He noted that appellant could work full time for eight hours a day, with sitting, walking and standing limited to two hours a day, not reaching above the shoulder and lifting limited to a maximum of 10 pounds.

On January 10, 2005 the employing establishment offered appellant a full-time limited-duty position as a mail processing clerk. The duties of the position noted that appellant would process letter-size mail into a distribution case (pigeonhole) using a manual method to sort and distribute mail for dispatch. She would pick up a hand full of mail with her right hand and place them in her left hand. With her right hand, appellant was to sort one letter at a time into the letter case. She could sit and stand to comfort, lift a maximum of eight pounds and carry a maximum

[1] The record indicates that appellant sustained a lumbosacral strain in 1991, which was accepted by the Office. She previously underwent surgery in the 1980's for a lumbar fracture which was not employment related.

[2] Dr. Lang noted a March 5, 2004 report of Dr. Joseph Robinow, an attending physician Board-certified in internal medicine, who advised that appellant was capable of very sedentary work without any lifting, squatting or bending, the ability to change positions frequently and an inability to commute for more than 20 minutes.

[3] The February 28, 2004 job offer noted that appellant would process letter-size mail into a distribution cage (pigeonhole) using a manual processing method to sort and distribute mail for dispatch.

of eight pounds for short distances. The job offer incorporated the restrictions of Dr. Lang, noting that appellant would not be required to lift above the shoulders or perform repetitive hand motions.

On April 5, 2005 the Office advised appellant that it had reviewed the limited-duty job offer and found it to be suitable to her physical limitations. It confirmed that the position was available to her and conformed to the restrictions recommended by Dr. Lang. Appellant was notified of the penalty provisions of section 8106(c)(2) of the Act and advised that she had 30 days to either accept the position or provide reasons for refusing the job offer.

In an undated letter, appellant noted that she was awaiting an appointment with her physician to determine the suitability of the job offer. In a May 4, 2005 letter, she contended that mail processing clerk position was not suitable. Appellant submitted a March 22, 2005 note from Dr. Robinow, who stated that she showed him a January 10, 2005 job offer based on the assessment of Dr. Lang. Dr. Robinow stated that it was his opinion that appellant was only capable of working four hours a day with lifting restricted to a maximum of five pounds. He stated that she frequently needed to change positions and that she was unable to drive for more than 20 minutes. Appellant noted that there were other postal facilities within her commuting area.

By letter dated June 16, 2005, the Office advised appellant that her reasons for refusing the job offer were not valid and that she had 15 days to accepted the position and arrange for a date to report for work. It noted that the weight of medical opinion was with Dr. Lang.

By decision dated July 19, 2005, the Office terminated appellant's compensation benefits, finding that she refused an offer of suitable work. It confirmed with the employing establishment that appellant did not report for work and that the limited-duty job remained available.

On August 16, 2005 appellant requested a review of the written record before an Office hearing representative. In a January 19, 2006 decision, an Office hearing representative affirmed the July 19, 2005 decision.

Appellant subsequently requested reconsideration before the Office. In decisions dated November 20, 2006 and March 1, 2007, the Office denied modification of its prior decisions terminating appellant's compensation benefits.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses to seek suitable work, or who refuses or neglects to work after suitable work is offered to, procured by or secured for her, is not entitled to compensation.[4] Before compensation can be terminated, however, the Office has the burden of establishing that the employee can work, setting forth the specific restrictions, if any, on appellant's ability to work and of establishing that a position has been offered within the employee's work

[4] 5 U.S.C. § 8106(c)(2).

restrictions, setting forth the specific job requirements of the position.[5] To justify termination, the Office must show that the work offered was suitable and refused by the employee and inform the employee of the consequences for her refusal of such employment.[6]

ANALYSIS

Appellant's claim was accepted by the Office for a left shoulder strain and adhesive capsulitis with impingement. She underwent a left shoulder acromioplasty on August 14, 1996. The record also establishes that appellant sustained injury to her low back in a nonemployment-related automobile accident in 1980, for which she underwent surgery. The Office accepted that she sustained a low back strain in 1991.

Appellant was followed by Dr. John C. Kofoed, an orthopedic surgeon, for residuals of her accepted shoulder condition and by Dr. Robinow, an internist, for residuals of her low back condition. Dr. Kofoed diagnosed mild bilateral shoulder bursitis and myofascial back pain, noting that she was not a surgical candidate. He advised that she had the capacity to perform the duties of a video coding technician part time. Dr. Kofoed imposed work restrictions of lifting no more than two pounds with the ability to change position every 10 minutes. He noted that the employing establishment had offered extremely light-duty work, but that appellant complained that she was unable to travel to and from Oakland due to her back discomfort. Dr. Robinow also reviewed the video coding position description but advised that she was not a candidate for the position due to chronic pain. He indicated that she was unable to commute more than 10 to 15 minutes due to severe back pain and intermittent leg weakness, rendering her totally disabled for work.

Appellant was referred by the Office for evaluation of her shoulder condition by Dr. Thomas Schmitz, a Board-certified orthopedic surgeon, and for an evaluation of her low back condition by Dr. John R. Chu, a Board-certified orthopedic surgeon. Dr. Schmitz advised that appellant was capable of full-time limited-duty work for eight hours a day subject to a lifting restriction of 10 pounds, with sitting, walking and standing limited to two hours during an eight-hour shift. He advised that she had no limitations on driving or commuting to work based on her shoulder condition. Dr. Chu advised that examination of appellant's low back did not reveal any neurological deficit. He advised that sitting be limited to four hours in an eight-hour day, walking and standing to two hours in an eight-hour day and lifting to 10 pounds. Dr. Chu restricted all squatting, kneeling and climbing. He noted that appellant was capable of commuting to work and could operate a motor vehicle one hour a day.

The Office properly determined that a conflict in medical opinion arose as to appellant's capacity for limited-duty work due to her left shoulder and back conditions and referred her to Dr. Lang for an impartial medical examination. Dr. Lang provided a thorough medical report, addressing findings on physical examination and a review of the medical opinions of record. He recorded a normal heal and toe gait with ambulation. A seated examination noted that motor evaluation was impossible as there was no apparent effort to move her feet and ankles. Dr. Lang

[5] *See Charles A. Jackson*, 53 ECAB 671 (2002).

[6] *See John E. Lemker*, 45 ECAB 258 (1993).

noted that appellant complained of pain on straight leg raising. In the supine position, appellant complained during Fabere testing of symptoms going up the entire spine, a nonorganic finding. Examination of the shoulder revealed tenderness over the left greater tuberosity with limitations in motion. Impingement testing of the left shoulder was reported as negative. Dr. Lang diagnosed lumbar syndrome without radiculopathy, status post reduction/internal fixation lumbar fracture 1984, not related and left shoulder, status post acromioplasty. He addressed the medical reports of record giving rise to the conflict in medical opinion. Dr. Lang advised that his examination revealed the ability to walk without difficulty, although appellant stated that she was unable to stand on her tip toes or heels. Her spinal range of motion was virtually zero in flexion and extension; however, she had virtually full flexion of the hips in the supine position and the forward flexed position of the lumbar spine.

Dr. Lang completed an Office work restriction evaluation, advising that appellant was capable of full-time limited duty for eight hours a day with lifting limited to 10 pounds. He disagreed with Dr. Kofoed's recommendation that lifting be limited to a maximum of two pounds and a four-hour workday. Dr. Lang reviewed both the video code technician position and the February 28, 2004 limited-duty clerk job offer. He recommended that appellant be placed in limited duty that allowed her to change positions throughout the day with sitting, walking and standing intermittently for two hours in an eight-hour day. Dr. Lang advised that she was unable to bend, squat, kneel, climb, reach above the shoulders or perform repetitive hand motions.

In situations where a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the report of the medical referee will be give special weight when based on a proper factual and medical background and a well-rationalized explanation for the conclusions reached.[7] The Board finds that Dr. Lang provided an accurate history of appellant's employment and nonemployment-related injuries and addressed the evidence giving rise to the conflict in medical opinion as to the extent of her disability for work. He provided a sound explanation for his opinion that she was capable of full-time limited duty, subject to specified restrictions and was not impaired in her capacity to commute to work. The report of Dr. Lang is entitled to the special weight accorded an impartial medical referee.

The employing establishment offered appellant limited duty full time as a mail processing clerk. The duties of the position conformed to the medical restrictions recommended by Dr. Lang. The duties limited lifting of letter-sized mail to a maximum of eight pounds which she would sort one at a time with her right hand into a letter case. The job offer provided appellant the opportunity to change positions throughout her workday. No lifting was to be done above shoulder level. The Office reviewed the job offer and found it suitable to appellant's physical limitations. On April 5, 2006 it advised her that the position was suitable and available. The Office notified appellant of the provisions of section 8106(2)(c) should she refuse the job offer.

In response, appellant submitted a May 4, 2005 letter contending that the limited-duty job offer was not suitable. In a March 22, 2005 report, Dr. Robinow stated that he reviewed the job offer which was based on Dr. Lang's assessment of appellant's capacity for work. He advised

[7] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *John F. Glynn*, 53 ECAB 562 (2002).

that she was only capable of work for four hours a day and recommended a lift restriction of five pounds maximum. However, as she was unable to drive for more than 20 minutes, Dr. Robinow advised that she should be allowed to commute to a postal facility closer to her home. The Board notes that Dr. Robinow is an attending physician whose opinion gave rise to the conflict in medical opinion regarding appellant's capacity for work due to residuals of her low back condition. His March 22, 2005 medical note largely reiterated his prior opinion, noting however that she was not totally disabled but should be allowed a shorter commute. Dr. Robinow did not provide any discussion of a recent physical examination or address how residuals of appellant's accepted back condition had changed such that she was no longer totally disabled. The Board finds that Dr. Robinow's opinion is insufficient to overcome the special weight accorded the findings of Dr. Lang.[8]

On June 16, 2005 the Office apprised appellant that the report of Dr. Robinow was not sufficient to overcome the medical opinion of Dr. Lang. It provided her 15 days to accept the position, which it confirmed with the employing establishment was still available. She did not respond. On July 19, 2005 the Office terminated her wage-loss compensation benefits under section 8106(2)(c). The Board finds that the Office properly followed its procedures in advising appellant of the suitability determination and affording her the opportunity to accept the position prior to the termination. The Office advised appellant that her reasons for rejecting the job offer were not acceptable and gave her 15 days to accept the position without penalty.[9]

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation under section 8106(2)(c).

[8] *Barbara J. Warren*, 51 ECAB 413 (2000).

[9] *See Melvin James*, 55 ECAB 406 (2004); *Ronald P. Morgan*, 53 ECAB 358 (2002).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2007 and November 20, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 17, 2008
Washington, DC

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

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

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