United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 08-2086**
	)	**Issued: September 29, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Buffalo, NY, Employer	)	

Appearances:
David W. Covino, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 21, 2008 appellant, through his counsel, filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated June 3, 2008 wherein the Office terminated appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review 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 pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's attorney contends that the Office improperly accepted the opinion of Dr. David P. Nichols, a Board-certified orthopedic surgeon, as a second opinion and the opinion of Dr. Jerry J. Tracy, III, as an impartial medical examiner, as these doctors' reports contradicted the statement of accepted facts. Counsel also contends that there was never a conflict between appellant's treating physician and the second opinion physician, so the case

should never have been referred to an impartial medical specialist. He further contested the validity of the job offer.

FACTUAL HISTORY

On September 10, 2003 appellant, then a 31-year-old transportation security screener, filed a traumatic injury claim alleging that on that date while lifting bags onto a belt, she felt a harsh pinching in her lower back. By letter dated October 12, 2005, the Office accepted her claim for aggravation of spondylolysis. Appropriate compensation and medical benefits were paid.

In an April 13, 2006 work capacity evaluation, Dr. Tracy indicated that appellant was limited to working four hours a day and to pushing/pulling 10 pounds. In a May 2, 2006 report, he noted that appellant was under his care for chronic low back pain in the aftermath of a work-related injury dating back to September 10, 2003. Dr. Tracy reviewed appellant's treatment with her and noted that he was unable to determine the degree of spondylolisthesis until lumbar flexion/ extension x-rays are performed, but thus far her lumbar magnetic resonance imaging showed she had spondylosis with anterolisthesis with small disc protrusion and that her physical examination showed sacroliitis and bilateral greater trochanteric bursitis as well as chronic mechanical pain. Dr. Tracy opined that appellant's work injury was "directly related to her current pain, due to repetitive bending and lifting, which can exacerbate mechanical pain and spondylosis as well as anterolisthesis." He referred to the prior work evaluation form but noted that appellant was "temporarily totally disabled in regard to her previous occupation until diagnostic lumbar flexion/extension x-rays determine the degree of anterolisthesis and until physical therapy is initiated."

By letter dated August 8, 2006, the Office referred appellant to Dr. David P. Nichols, a Board-certified orthopedic surgeon, for a second opinion. In an opinion dated August 28, 2006, Dr. Nichols diagnosed appellant with L5 spondylolysis at L5-S1 degenerative disc disease. He opined that she would be able to work with lifting restrictions and limited requirements for bending, stooping and climbing. Dr. Nichols opined that appellant's current condition was an aggravation of an underlying preexisting condition. He explained that the spondylolysis is a congenital condition and the degenerative disc disease is a result of the aging process with congenital instability in the spine. Dr. Nichols opined that appellant had not fully recovered from the September 10, 2003 employment injury and the subsequent recurrence of December 14, 2005. He opined that she would not be able to return to her usual job as a screener at this time because of the strenuous nature of that particular job involving lifting of luggage. In an attached work capacity evaluation, Dr. Nichols indicated that appellant was limited to sitting and standing part time for four hours a day, walking, reaching, squatting, kneeling, climbing and operating a motor vehicle limited to two hours a day, pushing pulling and lifting up to 15 pounds two hours a day and twisting limited to one hour a day.

In an August 23, 2006 medical opinion, Dr. Tracy indicated that appellant remained moderately temporarily disabled, but totally disabled from her previous occupation. In a November 7, 2006 report, he reviewed the report of Dr. Nichols. Dr. Tracy noted that this examination differed from his examination in that he believed appellant had more pain behaviors

as well as decreased range of motion in the lumbar spine. He assessed her with low back pain/lumbago; radiculitis/neuritis thoracic/lumbar and myofascial pain syndrome.

In a December 1, 2006 report, Dr. Tracy indicated that appellant was unable to do any work, even outside of her usual job. In a February 5, 2007 report, he noted low back pain/lumbago; radiculitis/neuritis thorac/lumbar; myofascial pain syndrome; and depressive disorder. Dr. Tracy requested authorization for electromyograms and nerve conduction skills. He noted that appellant remained moderately temporarily disabled but totally disabled in regard to her previous occupation. Dr. Tracy recommended referral for treatment of pain and related depression and to address poor coping skills and potentially unrealistic outcome expectations.

By letter dated June 8, 2007, the Office referred appellant to Dr. Arlen Snyder, a Board-certified orthopedic surgeon, to resolve the conflict of "whether there is continuing disability due to the accepted injury." In an opinion dated June 25, 2007, Dr. Snyder stated that it was his feeling that appellant has chronic low back pain secondary to aggravation of preexisting spondylolysis which was related to her employment injury; however, he believed that at the present time appellant was embellishing her symptoms as demonstrated by his physical findings. He believed that she was fully recovered from her injury of September 10, 2003 and her subsequent recurrent injury of December 14, 2005. Dr. Synder did not believe that appellant could go back to her job which required heavy lifting, but did believe that she was able to work full duty for eight hours with restrictions of no lifting over 20 pounds and can do any sedentary job. In an accompanying report, he noted that she was limited to pushing and pulling 40 pounds and lifting 20 pounds. Dr. Snyder also noted that appellant was limited to twisting, bending and stooping for four hours a day and occasional squatting, kneeling and climbing.

On December 5, 2007 the employing establishment made an offer of a limited-duty assignment for a transportation security officer. This assignment would require appellant to work eight hours a day during which time she would intermittently sit, walk and stand. Appellant would not be required to squat, kneel, climb stairs/ladders or operate a vehicle. She would be limited to lifting up to 20 pounds three times a day and would only be required to twist, bend or stoop and grasp (manipulation) for four hours a shift. The job offer indicated that the limited-duty position would begin on December 17, 2007 and would be located at "BNIA Checkpoint."

On December 17, 2007 the Office advised appellant that the position of transportation security officer, offered by the employing establishment, was suitable to her abilities based on the opinion of the impartial medical examiner, Dr. Snyder, and advised her that she had 30 days to either accept the position or provide reasons for refusing the offer. The Office advised appellant that, if she failed to accept the offered position and failed to demonstrate that the failure was justified, her compensation would be terminated. This notice was sent to the wrong address.

In a January 21, 2008 report, Dr. Snyder responded to the Office's queries by stating that he believed appellant's accepted injury had fully resolved, that there was a significant exaggeration of her subjective complaints based on her June 25, 2007 examination, and that therefore appellant was able to return to work with restrictions as outlined in the report of

February 25, 2007. He noted that these restrictions were to help prevent a recurrence of her condition.

In a February 12, 2008 medical report, Dr. Michael K. Landi, a Board-certified neurosurgeon, indicated that appellant had progressive low back pain and right lumbar radiculopathy with localized bilateral hip pain. He recommended physical therapy and a magnetic resonance imaging scan. Dr. Landi noted that appellant's symptoms were causally related to a work injury of September 10, 2003.

By letter dated March 24, 2008, appellant, through her attorney, argued, *inter alia*, that the case was improperly referred to an impartial medical examiner as there was no true conflict between the opinion of appellant's physician and the second opinion physician and that the opinions of Dr. Nichols and Dr. Snyder's opinion violated the statement of accepted facts.

By letter from the Office to appellant dated April 3, 2008, it indicated that it had reviewed the offer of employment by the employing establishment and had been informed that the job remained open. It again gave appellant 30 days to accept or explain the refusal to accept the position and notified her that, if she failed to return to work without reasonable cause, her compensation benefits would be terminated.

In response, appellant submitted a March 27, 2008 report, wherein Dr. Landi indicated that appellant had persistent low back pain and bilateral lumbar radiculopathy. Dr. Landi recommended a trial of physical therapy. In an April 24, 2008 note, he indicated that appellant was totally temporarily disabled. Appellant, through her attorney, argued that she was totally disabled pursuant to Dr. Landi's report and asked that her benefits not be terminated.

By letter dated May 14, 2008, the Office gave appellant an additional 15 days to accept the employment and noted that her benefits would be terminated if she did not do so.

By decision dated June 3, 2008, the Office terminated appellant's compensation benefits effective June 8, 2008 for failure to accept suitable employment.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, it has the burden of demonstrating that the employee can work, setting forth 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.[2] In other words, to justify termination of

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

Section 8123 of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[4]

ANALYSIS

The Office accepted appellant's claim for aggravation of spondylosis, and paid appropriate compensation and medical benefits. On December 5, 2007 the employing establishment made appellant an offer of a limited-duty assignment as a transportation security officer. On December 17, 2007 the Office advised appellant that the position offered by the employing establishment was suitable to her abilities based on the opinion of the impartial medical examiner, Dr. Snyder, and advised her that she had 30 days to either accept the offer or provide reasons for rejecting it. The Office advised appellant that, if she failed to accept the offered position and failed to establish that this refusal was justified, her compensation would be terminated. As this notice was sent to her at an improper address, the Office properly sent a new letter dated April 3, 2008 wherein it indicated that it had reviewed the offer of employment, determined that the position remained open, informed her that she had 30 days to accept the offer or explain her refusal and indicated that, if she failed to return to work without reasonable cause, her benefits would be terminated. In response, appellant submitted additional evidence and argued that she was totally disabled. By letter dated May 14, 2008, the Office gave her an additional 15 days to accept the employment and informed her that, if she failed to do so, her benefits would be terminated. By decision dated June 8, 2008, it terminated appellant's compensation benefits for failure to accept suitable employment.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she refused a suitable offer of work. A conflict existed between appellant's treating physician, Dr. Tracy, and the second opinion physician, Dr. Nichols, with regard to appellant's abilities to return to work. Although at times Dr. Tracy indicated that appellant was only temporarily totally disabled from her usual occupation, he also indicated in a December 1, 2006 report that she was unable to do any work. Dr. Nichols found that appellant could work part time four hours a day within limitations. Due to this conflict, the Office properly referred appellant to Dr. Snyder for an impartial medical evaluation. Dr. Snyder believed that appellant had fully recovered from her work injuries of September 10, 2003 and her subsequent recurrent injury of December 14, 2005. He believed that she could work eight hours a day with restrictions of no lifting over 20 pounds and no pushing and pulling over 40 pounds. Dr. Synder also noted that appellant was limited to twisting, bending and stooping for four hours a day and occasional squatting, kneeling and climbing. The December 5, 2007 job offer made by the employing establishment as a transportation security officer was within the limits set by Dr. Snyder. This position required that appellant work eight hours a day during which time she

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

[4] 5 U.S.C. § 8123(a).

could sit, walk or stand. The position description indicated that appellant would not be required to squat, kneel, climb stairs/ladders or operate a vehicle. Appellant would be limited to lifting up to 20 pounds three times a day and would only be required to twist, bend, stoop or grasp for four hours a shift. As the opinion of the impartial medical examiner, Dr. Snyder was well rationalized and well reasoned, as the position offered by the employing establishment was within these restrictions, as the Office found that this position was within appellant's restrictions and gave appellant all required notices prior to terminating benefits, the Office properly terminated appellant's compensation benefits based on her refusal of suitable work.

The Office properly found that a conflict existed between appellant's treating physician, Dr. Tracy, and the second opinion physician, Dr. Nichols. It properly referred appellant for an impartial medical examination. Appellant's attorney also argues that the Office should not have relied upon the opinions of Drs. Nichols and Snyder as these physicians rejected the statement of accepted facts in that they found appellant had preexisting spondylosis, whereas the statement of accepted facts stated that the Office accepted appellant's claim for lumbosacral spondylosis. The statement of accepted facts, however, indicates that appellant's claim was accepted for aggravation of spondylosis.[5] Dr. Nichols found that appellant had an aggravation of the underlying spondylosis; Dr. Snyder noted an aggravation of appellant's underlying spondylosis caused by her work injury. Accordingly, these doctors' opinions were consistent with the statement of accepted facts. Finally, appellant contends that the job offer was invalid as it did not indicate the date the job was available and the location of the job. The Board notes, however, that the job offer indicated that it was for limited duty beginning December 17, 2007 and that the location of the position was "BNIA Checkpoint," *i.e.*, the checkpoint at appellant's duty station, Buffalo International Airport.

The evidence of record establishes that the position offered was medically and vocationally suitable and that the Office complied with the procedural requirements of 5 U.S.C. § 8106(c). The Board finds that the Office met its burden of proof to terminate benefits in this case.

CONCLUSION

The Board finds that the Office properly terminated appellant's benefits on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

[5] The statement of accepted facts dated May 27, 2005 indicated, *inter alia*, that the Office accepted that appellant was employed as a transportation security screener by the employing establishment, that she filed a notice of injury on September 10, 2003 reporting that she injured her lower back by lifting bags onto a conveyor belt at work, that on the same date she stopped work and was seen by a medical facility, that she subsequently came under the care of Dr. Tracy and that she lost time from work from September 10, 2003 until early March 2004, when she returned to light duty. An addendum to statement of accepted facts dated June 20, 2006 indicated, *inter alia*, that the Office accepted appellant's claim for aggravation of spondylosis, that appellant filed a claim alleging a recurrence on December 14, 2005, that the Office accepted this claim and that appellant stopped work beginning December 14, 2005 and has not returned to gainful employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2008 is affirmed.

Issued: September 29, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board