United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 10-787**
	)	**Issued: February 22, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Wichita Falls, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2010 appellant filed an appeal from a July 28, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 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 effective December 5, 2005 pursuant to 5 U.S.C. § 8106(c).

On appeal appellant asserts that a December 23, 2008 medical report had not previously been reviewed by the Office.

FACTUAL HISTORY

On September 14, 1992 appellant, then a 29-year-old letter carrier, sustained an employment-related lumbar strain when she lifted a heavy mail tray. She returned to modified duty and was off work for periods from July 1993 to December 1996 when she returned to

modified duty. The accepted conditions were expanded to include degeneration of thoracolumbar disc and lumbar degenerative disc disease.

By decision dated September 9, 1997, the Office accepted that appellant sustained a recurrence of partial disability on February 2, 1997 and found that her actual, part-time earnings represented her wage-earning capacity. Appellant was in a motor vehicle accident in May 2000. By decision dated June 4, 2001, the Office accepted that she sustained a recurrence of total disability.[1] Appellant was placed on the periodic rolls. On January 30, 2001 she underwent an interdiscal electrotherapy (IDET) procedure at L4-5 and on October 10, 2002 Dr. W. Scott Shaffer, Board-certified in anesthesiology, performed nucleoplasty at L4-5. On April 15, 2004 appellant was granted schedule awards for three percent impairment of the right lower extremity and three percent impairment on the left.

Dr. William H. Mitchell, a Board-certified orthopedic surgeon, performed a fitness-for-duty examination for the employing establishment on July 13, 2004. He diagnosed minimal degenerative disc disease at L4-5 without evidence of radiculopathy and advised that appellant's diagnosis was probably related to wear-and-tear of life and not due to the September 14, 1992 employment injury. Dr. Mitchell stated that she was probably at maximum medical improvement two years following the injury. He concluded that appellant could not return to work due to excessive medication. In reports dated December 4, 2004 and January 5, 2005, Dr. Shaffer diagnosed discogenic pain at L4-5 due to annular tears and advised that she was totally disabled.

The Office referred appellant to Dr. Robert Chouteau, an osteopath practicing orthopedic surgery. In a March 15, 2005 report, Dr. Chouteau performed a physical examination and diagnosed lumbar discogenic disease at L4-5 and L5-S1. He advised that appellant could not return to her regular letter carrier position but could work eight hours daily with permanent restrictions of intermittent sitting and standing with lifting up to 20 pounds. A March 23, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated no significant abnormalities, and an April 5, 2005 functional capacity evaluation demonstrated that appellant was physically able to perform sedentary duties.

On May 27, 2005 the employing establishment offered appellant a full-time sedentary position that she accepted on June 1, 2005. Appellant returned to work on June 7, 2005 and stopped on June 15, 2005. Dr. Shaffer subsequently advised that she was totally disabled.

The Office found a conflict in medical opinions between Dr. Shaffer and Dr. Choteau regarding appellant's ability to work. In August 2005, it referred her to Dr. Farooq Selod, Board-certified in orthopedic surgery, for an impartial evaluation. In a September 13, 2005 report, Dr. Selod noted the history of injury and appellant's complaint of constant sharp pain, increased by bending, stooping and standing. He provided physical examination findings and diagnosed "disc at L4-5, L5-S1". Dr. Selod advised that appellant could not return to her regular

[1] The Office had initially denied the recurrence claim by decision dated December 22, 2000.

position. In an attached work capacity evaluation, he advised that she could work four hours a day with a 10-pound weight restriction and no operating a motor vehicle at work.[2]

On October 11, 2005 the employing establishment offered appellant modified duties that conformed with Dr. Selod's restrictions. The duties were described as answering the telephone and clerical filing. Appellant rejected the offered position. By letter dated October 19, 2005, the Office advised her that the modified job was found suitable. Appellant was notified that, if she failed to report to work or failed to demonstrated that the failure was justified, her right to monetary compensation would be terminated pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act.[3] She was given 30 days to respond.

The employing establishment submitted an investigative memorandum advising that appellant was interviewed by telephone when she reported that she would return to work. An agent, who observed appellant on November 3, 2005 for over two hours, stated that she was seen driving for over an hour and bending, standing, reaching and walking without any apparent discomfort.

On November 23, 2005 the Office advised appellant that her reasons for refusing to accept the offered position were insufficient and that she had an additional 15 days to accept the job offer.

By decision dated December 13, 2005, the Office found that the weight of the medical evidence rested with the opinion of Dr. Selod and terminated appellant's wage-loss compensation effective December 13, 2005. It found that appellant abandoned suitable work. It noted that she had reported for work on December 7, 2005 but did not return.[4]

On October 24, 2006 and March 24, 2008 appellant requested reconsideration and submitted additional medical evidence including reports from Dr. Shaffer dated January 17 to May 9, 2006. Dr. Shaffer reiterated his previous findings and conclusion that she was totally disabled. In a June 20, 2006 report, Dr. L.M. Kjeldgaard, an osteopath, performed a physical examination and diagnosed internal disc disruption at L4-5 proven by discography, previous IDET at that level, and chronic pain syndrome with accompanying reactive depression. He recommended total disc replacement arthroplasty at L4-5.

By reports dated July 18, 2006 to July 30, 2007, Dr. Marcom E. Herren, a Board-certified physiatrist, diagnosed discogenic pain at L4-5 with bilateral lower extremity radiculopathy, pain-related depression and myofascial pain disorder. He advised that, due to the chronicity of appellant's problem, she was disabled from gainful employment due to the employment injury and the medications used for pain control. In reports dated August 25 to November 27, 2007, Dr. Ed Wolski, a family physician practicing pain management, noted the history of injury,

[2] Dr. Selod specifically advised that appellant could sit, walk, stand, reach, reach above the shoulder, twist, bend, stoop, push, pull, lift, squat, kneel and climb for four hours daily.

[3] 5 U.S.C. § 8106(c)(2).

[4] The record contains an Office decision dated December 7, 2005, terminating appellant's benefits, effective December 5, 2005, on the grounds that she refused suitable work. It is unclear if this decision was mailed to her.

provided physical examination findings, and diagnosed lumbar disc displacement, chronic low back pain and probable addiction to class II narcotics. His clinic provided form reports dated September 29 to November 27, 2007, describing appellant's condition and treatment. Dr. Paul J. Pankey, a Board-certified surgeon, submitted reports dated July 31, 2007 to June 20, 2008 in which he provided lumbar examination findings, diagnosed low back syndrome and advised that her work status was unchanged.

In merit decisions dated April 4, 2007 and July 11, 2008, the Office denied modification of the December 13, 2005 decision.[5]

On July 10, 2009 appellant requested reconsideration, and submitted additional reports from Dr. Pankey and Dr. Wolski dated from August 22, 2008 to August 12, 2009. The physicians reiterated their prior findings and conclusions. In a January 22, 2009 report, Dr. J.D. Massingill, M.S., provided a behavioral medicine consultation and recommended psychological testing. On April 16, 2009 Dr. Adam Gabriel, M.A., conducted psychological testing. He and Dr. Nicole Mangum, Ph.D., reported diagnoses of pain disorder associated with psychological factors and general medical condition.

By report dated December 23, 2008, Dr. Selod advised:

> "I saw [appellant] in my office on September 13, 2005 for a specialist evaluation of her lumbar spine. This letter is to clarify the report and OWCP-5 form dated September 13, 2005. This patient is disabled, as [appellant] cannot even hold a sitting job. Please disregard the OWCP-5 form that was submitted on September 13, 2005."

In a merit decision dated July 28, 2009, the Office denied modification of the prior decisions. It noted that Dr. Selod's December 23, 2008 report had previously been reviewed by the Office.

LEGAL PRECEDENT

Section 8106(c) of the Act 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."[6] 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.[7] The implementing regulations provide 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.[8] To justify termination, the Office must show that the

[5] Appellant was granted social security disability on January 27, 2007 and on November 15, 2007 retired on disability.

[6] 5 U.S.C. § 8106(c).

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

[8] 20 C.F.R. § 10.517(a).

work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9] In determining what constitutes "suitable work" for a particular disabled employee, it 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.[10] 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.[11] 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.[12]

The issue 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 medical evidence.[13] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[14]

Section 8123(a) 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.[15] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination, and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[17]

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

[10] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

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

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

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

[15] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[16] 20 C.F.R. § 10.321.

[17] *V.G.*, 59 ECAB 635 (2008).

ANALYSIS

The Board finds that the Office properly terminated appellant's monetary compensation on December 15, 2005 on the grounds that she refused an offer of suitable employment. In a September 13, 2005 report, Dr. Selod, who performed an impartial evaluation for the Office, provided examination findings and diagnosed "disc at L4-5 and L5-S1." He advised that, while appellant could not return to her regular position, she could work four hours a day with a 10-pound weight restriction and no operating a motor vehicle at work. On October 11, 2005 the employing establishment offered her a modified position with duties of answering the telephone and filing that conformed to the restrictions provided by Dr. Selod.

As noted, a reasoned opinion from a referee examiner is entitled to special weight.[18] Dr. Selod's September 13, 2005 report was well rationalized. He based his opinion on a complete background, his review of the accepted facts and the medical record and his examination findings. Dr. Selod's report thus constituted the weight of the medical evidence at that time and, as the offered position was in conformance with his restrictions, the offered position was suitable.

The Board also finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable and provided her with the opportunity to accept the position or provide reasons for refusing. By letter dated October 19, 2005, the Office advised her that the offered position was suitable and advised her of the provisions of section 8106, and in a November 23, 2005 letter, it advised her that the reasons given for not accepting the job were unacceptable. Under section 8106 of the Act, appellant's monetary compensation was properly terminated on December 13, 2005 on the grounds that she refused an offer of suitable work.[19]

As the Office established that the offered position was suitable, the burden then shifted to appellant to establish that her refusal was justified.[20] Appellant submitted reports from Drs. Shaffer, Herren, Wolski and Pankey. While these physicians advised that she could not work due to pain and medication, none explained why the accepted conditions of lumbar sprain, degeneration of thoracolumbar disc and lumbar degenerative disc disease prevented her from performing the duties of the essentially sedentary position at the time it was offered in 2005. Appellant did not establish that her refusal was justified.[21]

[18] *Id.*

[19] *Joyce M. Doll, supra* note 7.

[20] *M.S.*, 57 ECAB 328 (2007).

[21] *Id*. The Board notes that the Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position. *S.G.*, 60 ECAB ___ (Docket No. 08-1992, issued September 22, 2009). There is no evidence in this case of a disabling condition that preexisted the September 14, 1992 employment injury or a disabling condition acquired between September 14, 1992 and December 15, 2005, the date appellant's monetary compensation was terminated.

The Board also finds Dr. Selod's December 23, 2008 report to be of diminished probative value. In this brief summary report, dated more than three years after his referee opinion in September 2005, it is unclear whether Dr. Selod reexamined appellant. He did not provide a rationalized explanation as to why he changed his mind regarding her ability to work modified duty for four hours a day in 2005. It is also unclear whether Dr. Selod began treating appellant after his September 2005 examination, and there is no correspondence from the Office to indicate that it solicited this additional report. His December 23, 2008 report is therefore insufficient to establish that she was totally disabled either prior to or after December 15, 2005.[22]

An employee who refuses or neglects to work after a suitable position has been offered has the burden of showing that such refusal was justified.[23] Appellant did not establish that her refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a) on December 15, 2005 on the grounds that she refused an offer of suitable employment.

[22] *Compare Talmadge Miller*, 47 ECAB 673 (1996) (physician provided explanation for changing opinion regarding disability).

[23] *M.S., supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 22, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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