United States Department of Labor
Employees' Compensation Appeals Board

ELEANOR A. DENSON, Appellant	)	
	)	**Docket No. 04-566**
and	)	**Issued: June 23, 2004**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Santa Barbara, CA, Employer	)	

Appearances:
Sally F. La Macchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 23, 2003 appellant filed a timely appeal from a May 27, 2003 decision of the Office of Workers' Compensation Programs terminating her compensation benefits on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective April 25, 2002 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On January 31, 1996 appellant, then a 33-year-old letter carrier, filed a claim for occupational disease alleging that on December 7, 1995 she developed left wrist tendinitis and a soft tissue injury as a result of repetitive use and motion of her wrist as a letter carrier. The Office accepted the claim for left wrist tendinitis, left carpal tunnel syndrome. In August 9, 1996 appellant filed another claim for compensation which was accepted for left shoulder sprain and

left rotator cuff tear. Appellant stopped work on June 26, 1993, returned to a limited-duty position on January 13, 1997 and was paid appropriate compensation benefits for all periods of disability.[1]

Appellant came under the treatment of Dr. Ramana Rao, a Board-certified orthopedist, who noted performing a left shoulder arthroscopy, decompression and rotator cuff repair on October 18, 1996. On October 24, 1997 the doctor performed a left shoulder arthroscopy with debridement and subacromial bursectomy and diagnosed degenerative changes of the bursal side of the rotator cuff, without evidence of a tear and mild subacromial bursitis. Appellant returned to work on December 8, 1997 and worked intermittently thereafter. On December 30, 1997 appellant filed a notice of recurrence of disability claiming that on October 22, 1997 she experienced pain and swelling in her right shoulder causally related to her accepted work injury. On February 2, 1998 the Office accepted the recurrence of disability.

Appellant was offered a position as a modified clerk effective September 22, 1998 which was approved by her treating physician Dr. Rao. Appellant initially rejected the job offer as being outside her restrictions, however, later accepted the position and began working on September 22, 1998.

By decision dated May 10, 1999, the Office indicated that appellant had been employed as a full-time modified carrier effective September 30, 1998, which was over 60 days and that the pay in that position of $684.62 per week was equivalent to the pay rate for the position appellant held at the time of her injury; thus, no loss of wages occurred. The Office concluded that the position of full-time modified carrier fairly and reasonably represented appellant's wage-earning capacity.

Appellant continued to work in her modified carrier position until she underwent a third surgery to her left shoulder on December 20, 1999. In an operative report of the same day, Dr. Craig Zeman, a Board-certified orthopedist, noted performing a left claviculectomy, partial left shoulder acromioplasty, partial arthroscopically assisted thermal capsular shift with rotator and open rotator interval closure. Appellant stopped work completely after this surgery. On October 10, 2000 Dr. Zeman noted performing manipulation under anesthesia of the left shoulder, arthroscopy of the left shoulder, surgical with subacromial decompression and partial acromioplasty and extensive debridement of the anterior shoulder capsule. He diagnosed left shoulder adhesive capsulitis with subacromial impingement.

On February 14, 2001 appellant was offered a position as a full-time limited-duty modified carrier which she accepted and started working on February 15, 2001. Appellant continued under treatment with Dr. Zeman and in notes dated June 22, 2001 advised that appellant had a tender suture on her elbow consistent with a retained ethibond suture and recommended removal. On August 14, 2001 the physician removed a deep suture of the left

[1] On May 27, 1993 and July 29, 1994, appellant filed claims for occupational disease alleging that she developed a right hernia in February 1993 and a left inguinal hernia on May 27, 1993 as a result of lifting and carrying heavy objects at work, in claim No. A-13-1111818. The Office accepted the claim for a right inguinal hernia and left femoral hernia and authorized a right inguinal hernia repair which was performed on June 11, 1993 and a left hernia repair which was performed on October 17, 1994.

shoulder. In treatment notes from August 10 to September 26, 2001, Dr. Zeman advised that appellant was improving postoperatively.

On September 11, 2001 appellant filed a notice of recurrence of disability, stating the recurrence that commenced on August 14, 2001 was due to her accepted left shoulder condition. Appellant stopped working on August 14, 2001.

Appellant continued treatment under Dr. Zeman, who, in a work capacity evaluation dated October 4, 2001, advised that appellant could work 8 hours per day subject to the following restrictions: walking and standing limited to 4 hours per day, no reaching above the shoulder, twisting limited to 2 hours per day, pushing and pulling limited to 1 hour per day up to 5 pounds, lifting for 3 hours per day up to 5 pounds per day, kneeling limited to 30 minutes per day and climbing limited to 10 minutes per day and no repetitive movements of the wrists and elbows. In a report dated October 17, 2001, Dr. Zeman indicated that appellant could return to work on October 17, 2001 with additional restrictions of no repetitive overhead lifting, no repetitive shoulder work, no letter carrying, no mail casing, no modified letter carrying and no repetitive lifting over 15 pounds.

In an Office memorandum dated October 19, 2001, the Office noted that a conference was held with appellant, the claims examiner and the compensation specialist to discuss a potential job offer for appellant. Appellant was advised that the job offer would be made based on the restrictions from Dr. Zeman.

On October 29, 2001 the employing establishment offered appellant a position as a limited-duty carrier working eight hours per day from 9:30 a.m. to 6:00 p.m. The tasks would be performed with the right hand and arm and the duties included casing mail with the right hand and arm, sorting mail in delivery sequence for the assigned route, occasional floor to waist lifting up to five pounds, occasional reaching above the shoulder, repetitive forward reaching, occasional bending, frequent pivoting/turning, standing, repetitive simple grasping, occasional firm grasping and fine manipulation, nixie mail which involved minimal writing or stamping of individual pieces, preparing second notices which requires handwriting of forms, answering telephones, accepting or signing out accountable mail which involved minimal movement, picking up mail bundles and placing them in carts for dispatch which weighed no more than two pounds and which involved simple grasping and fine manipulation and post office box record keeping which involved entering and processing post office box payments.

On November 16, 2001 appellant rejected the job offer indicating that it was beyond her medical restrictions. Dr. Zeman also rejected the job offer on November 16, 2001 noting that the offer was inconsistent with his restrictions which stated no casing mail, no reaching above the shoulders or handling mail bundles. In a report dated November 16, 2001, Dr. Zeman diagnosed left shoulder impingement with left acromioclavicular (AC) joint arthritis, left shoulder instability status post left shoulder AC joint excision, subacromial decompression and capsular shrinkage. He noted work restrictions of no letter carrying, no modified letter carrying, no casing, no repetitive shoulder level work, no repetitive overhead lifting, no repetitive lifting over 15 pounds and advised he did not think appellant could continue with the position she previously held. The physician advised that appellant was permanent and stationary as of October 17, 2001 and recommended vocational retraining.

In a letter dated December 4, 2001, the Office requested that Dr. Zeman clarify his restrictions for kneeling and climbing when appellant's accepted conditions related to the left upper extremity.

By letter dated December 6, 2001, the Office informed appellant that it had reviewed the position description and found the job offer suitable with her physical limitations. Appellant was advised that she had 30 days to accept the position or offer her reasons for refusing. She was apprised of the penalty provisions of the Federal Employees' Compensation Act[2] if she did not return to suitable work.

In a letter dated December 31, 2001, appellant declined the job offer. She advised that the limitations imposed by Dr. Zeman were not limited to her left arm. Also submitted was a report from Dr. Zeman dated December 14, 2001 which advised that he placed a restriction on appellant kneeling because this position would require appellant to support herself with her arm, placing undue stress on her left shoulder. He further advised that appellant could not climb a ladder because she would be required to put her arms over her head and pull her self up the ladder placing undue stress on her left arm.

By letter dated April 10, 2002, the Office informed appellant that her refusal of the offered position was found to be unjustified. The Office indicated that the position was within the restrictions as set forth by Dr. Zeman. The Office provided appellant with 15 days to accept the job.

In a letter dated April 18, 2002, appellant was referred for nursing intervention. In a report dated May 18, 2002, the nurse indicated that she evaluated appellant's work site for safety and compliance with the work tolerance limitations and found that appellant could function within the work limitations without working outside her medical restrictions. She advised that the employing establishment was willing to accommodate appellant's work limitations.

By decision dated June 15, 2002, the Office terminated appellant's compensation, finding that she refused an offer of suitable work.

On July 8, 2002 appellant requested an oral hearing before an Office hearing representative. The hearing was held on February 27, 2003. Appellant submitted several reports from Dr. Zeman dated August 8, 2002 to April 9, 2003 which noted his continued treatment for her left shoulder strain and muscle spasms. His report of December 30, 2001[3] advised that the medical restrictions set forth in his reports of October 4 and November 16, 2001 applied to both extremities. The doctor noted that it would be difficult to lift things without depending on your other arm and this could result in reinjury. Therefore, because of the possibility of reinjury he was restricting appellant's lifting to 15 pounds with either arm. Dr. Zeman also indicated that he did not want her to repetitively lift overhead with her right or left arm or to case mail with her right or left arm. He further noted that climbing and kneeling could not be done without both

[2] 5 U.S.C. §§ 8101-8193.

[3] The date on this report December 30, 2001 appears to be incorrect as it was written in response to a letter dated November and should therefore be December 30, 2002.

arms. With regard to the restriction of working with UBBM mail or mail bundles, he advised that UBBM mail involved the use of containers which weighed over 15 pounds and mail bundles weighed between 10 to 25 pounds and that this weight was over the weight limit of 15 pounds that he established for appellant.

In a March 31, 2003 letter, the employing establishment advised that the limited-duty job offer involved picking up UBBM mail bundles which weighed under five pounds and that the job offer did not require appellant to push the hamper to collect the bundles of mail as the mail bundles would be brought to her. Additionally, the employing establishment advised that the mail bundles weighed between two and five pounds.

In an April 8, 2003 letter, appellant, through her representative, reiterated appellant's concerns regarding the offered position and noted that, although the job offer did not state that appellant would be pushing hampers, this was a customary duty and further noted that the employing establishment did not adequately describe the job duties in the job offer. In a decision dated May 27, 2003, the hearing representative affirmed the decision of the Office dated June 15, 2002.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who … refuses or neglects to work after suitable work is offered … is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[5] 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.[6]

The Office's implementing federal regulation[7] 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 establishing that such refusal or failure to return 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.[8] To justify termination of compensation, the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.[9]

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Michael. I. Schaffer*,46 ECAB 845 (1995).

[6] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R. § 10.517 (1999).

[8] *Id.*

[9] *Arthur C. Reck*, 47 ECAB 339 (1995).

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.[10] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

ANALYSIS

In this case, the Office established that the offered position of October 29, 2001 was suitable. Dr. Zeman prepared a work restriction evaluation dated October 4, 2001 and advised that appellant could work 8 hours per day subject to the following restrictions: walking and standing limited to 4 hours per day, no reaching above the shoulder, twisting limited to 2 hours per day, pushing and pulling limited to 1 hour per day up to 5 pounds, lifting for 3 hours per day up to 5 pounds per day, kneeling limited to 30 minutes per day and climbing limited to 10 minutes per day and no repetitive movements of the wrists and elbows. In a report dated October 17, 2001, Dr. Zeman indicated that appellant could return to work on October 17, 2001 with additional restrictions of no repetitive overhead lifting, no repetitive shoulder work, no letter carrying, no mail casing, no modified letter carrying duties and no repetitive lifting over 15 pounds.

On October 29, 2001 the employing establishment offered appellant a position as a limited-duty carrier subject, eight hours per day from 9:30 a.m. to 6:00 p.m. The tasks would be performed with the right hand and arm and the duties included casing mail with the right hand and arm, sorting mail in delivery sequence for the assigned route, occasional floor to waist lifting up to five pounds, occasional reaching above the shoulder, repetitive forward reaching, occasional bending, frequent pivoting/turning, standing, repetitive simple grasping, occasional firm grasping and fine manipulation, preparing nixie mail, preparing second notices which require handwriting of forms, answering telephones, accepting and signing out accountable mail, picking up mail bundles and placing them in carts for dispatch which weigh no more than two pounds and post office box recordkeeping.

In letters dated November 16 and December 31, 2001, appellant declined the job offer indicating that it was beyond her medical restrictions. Dr. Zeman also rejected the job offer on November 16, 2001 noting that the job offer was inconsistent with his restrictions which stated no casing mail, no reaching above the shoulders or handling mail bundles no modified letter carrying, no repetitive lifting over 15 pounds and advised he did not think appellant could continue with the position she previously held. The Board, however, finds that the job offer specifically delinates all the restrictions set forth by Dr. Zeman with respect to the accepted left

[10] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] *See Connie Johns*, 44 ECAB 560 (1993).

shoulder sprain and left rotator cuff injuries noting that the duties would be performed with the right arm and hand. Dr. Zeman's restrictions appear to apply also to the right upper extremity; however, he did not explain, why there would be right upper extremity restrictions when the accepted conditions only relate to the left upper extremity. The Office never accepted that appellant sustained a right upper extremity condition and there is no rationalized medical evidence to support such a conclusion.[12] The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[13] Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.[14] The only additional report submitted was from Dr. Zeman dated December 14, 2001, which advised that appellant was not able to kneel as it would place undue stress on her shoulder and could not climb a ladder because it would require her to put her arms over her head and pull her self up the ladder. However, the Board notes that the job offer did not require climbing or kneeling. Therefore, the evidence is not sufficient to establish that appellant could not perform the limited-duty job at the time the job was offered or at any time prior to the termination of benefits.[15]

Additionally, in a report dated May 18, 2002, the nurse assigned to assist appellant indicated that she evaluated appellant's work site for safety and compliance with the work tolerance limitations and found that the appellant could function within the work limitations without working outside her medical restrictions.

The Office properly demonstrated that the limited-duty position offered appellant was suitable work based on the restrictions of Dr. Zeman at the time. The burden then shifted to appellant to show that her refusal to work in that position was justified.[16]

Following the Office's June 15, 2002 decision, appellant provided testimony which raised essentially the same arguments made previously. Appellant noted that the job offer was outside her restrictions and that it did not outline the specific physical requirements of the offered position and was therefore invalid. However, as noted above, these arguments are insufficient to establish that the offered position was unsuitable and is therefore insufficient to meet appellant's burden of proof. Also submitted were several reports from Dr. Zeman. His report of December 30, 2001 advised that the medical restrictions set forth in his reports of October 4 and November 16, 2001, apply to both extremities and advised that it would be difficult to lift things without depending on your other arm and this could result in reinjury. Therefore, because of the possibility of reinjury he was restricting her lifting to 15 pounds with either arm. The doctor also indicated that he did not want her to repetitively lift overhead with

[12] *Alice J. Tysinger*, 51 ECAB 638 (2000) (for conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship).

[13] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[14] *See Stephen R. Lubin*, 43 ECAB 564 (1992).

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

[16] *See Ronald M. Jones*, 52 ECAB 190 (2000).

her right or left arm or to case mail with her right or left arm. However, the Board notes that Dr. Zeman's restriction on appellant's return to work are prophylactic in nature and that fear of future injury is not compensable under the Act.[17] This evidence was insufficient to show that the offered position was not medically suitable. Dr. Zeman's treatment notes merely note appellant's symptoms but did not address the suitability of the offered position. His opinion, however, while generally supporting continuing left shoulder sprain and rotator cuff tear, does not explain how appellant's condition and residuals prevented her return to work in the modified position on October 29, 2001 when the Office notified her of the offered position and its finding that it was suitable. Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.[18]

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[19] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated December 6, 2001, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.

In a letter dated April 10, 2002, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. She was given an additional 15 days in which to respond. The record reflects that appellant did respond to the Office's notice and her reasons for refusal were evaluated and found to be unacceptable. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She 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 April 25, 2002.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work.

[17] *See Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of a recurrence of disability upon return to work is not a basis for compensation).

[18] *Id*.

[19] *See Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member