United States Department of Labor
Employees' Compensation Appeals Board

DIXIE F. KING, Appellant	)	
and	)	**Docket No. 04-199**
	)	**Issued: March 10, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Englewood, CO, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 October 27, 2003 appellant filed a timely appeal of the October 21, 2003 decision of the Office of Workers' Compensation Programs, which affirmed a January 16, 2002 decision terminating appellant's compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

[1] Appellant's claim was previously before the Board. In a decision dated March 15, 2002, the Board affirmed the Office's May 4, 2000 decision that appellant received an overpayment in the amount of $2,981.22 and she was not entitled to a waiver of recovery of the overpayment. Docket No. 00-2077 (issued March 15, 2002).

FACTUAL HISTORY

On May 4, 1994 appellant, then a 37-year-old letter carrier, sustained a traumatic injury to her right lower extremity while in the performance of duty. The Office accepted appellant's claim for right ankle strain and post-traumatic arthritis of the right ankle. Additionally, the Office authorized surgical procedures in 1995 and 1996 to repair ligament damage in appellant's right ankle. A few months after her May 9, 1996 surgery, the Office placed appellant on the periodic compensation rolls and she received appropriate wage-loss compensation.[2] The Office later expanded the claim to include reflex sympathetic dystrophy (RSD) of the right lower extremity.[3]

On September 12, 2000 appellant underwent a second opinion evaluation at the Office's request. In a report dated September 18, 2000, Dr. Daniel C. Carneval, an osteopath Board-certified in orthopedic surgery and an Office referral physician, determined that appellant initially sustained a Grade 3 sprain of the right ankle. Additionally, Dr. Carneval stated that appellant developed RSD in the right lower extremity as a consequence of her two ankle surgeries.[4] With respect to appellant's right lower extremity RSD, Dr. Carneval found that appellant was at the third stage of RSD with a "near-complete recovery." He explained that appellant was "experiencing no more than a 'mild causalgia.'" Dr. Carneval stated that in all probability appellant could not currently return to her pre-injury job as a mail carrier. However, he advised that appellant could return to work initially in a part-time capacity and gradually increase to a full-time schedule over a three-month period. Dr. Carneval found that appellant could intermittently stand, sit and walk each for two to three hours per day. He also stated that she could twist, turn, stoop and bend within what was considered normal human tolerances. Dr. Carneval further indicated that appellant could lift, push, pull and carry intermittently 30 to 40 pounds. Lastly, he imposed no restrictions with respect to appellant's upper extremities.

On April 10, 2001 the employing establishment offered appellant a full-time position as a modified carrier beginning April 28, 2001.[5] The modified carrier position indicated that it was prepared in compliance with Dr. Carneval's September 18, 2000 limitations. On April 18, 2001 appellant declined the job offer. She noted that her personal physician had not yet released her to return to work.

---

[2] Appellant performed limited-duty work intermittently between July and October 1996. She last worked on October 3, 1996.

[3] Appellant was also diagnosed with RSD of the right upper extremity; however, the Office did not accept appellant's right upper extremity condition as related to the May 4, 1994 employment injury.

[4] Dr. Carneval stated that in his experience he had never seen RSD transfer from one anatomical location to another nor was he familiar with any scientific studies or literature documenting a transfer from a lower extremity to an upper extremity. Consequently, Dr. Carneval opined that appellant's right upper extremity symptoms were unrelated to her right foot and ankle symptoms.

[5] Appellant relocated to Pennsylvania following her injury. The April 10, 2001 modified carrier job offer was for employment in Englewood, CO.

By letter dated August 20, 2001, the Office informed appellant that it found the modified carrier position suitable for her work capabilities and that it was currently available. The Office allowed appellant 30 days to either accept the position or provide an explanation for refusing the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.[6]

The Office received a September 11, 2001 report from appellant's treating physician, Dr. Thomas E. McGuire, a Board-certified family practitioner. He advised that appellant had been seen recently by a pain management specialist and a working diagnosis of RSD had reportedly been established. Dr. McGuire stated that it would be reasonable to await the complete results of the pain specialist's evaluation before returning appellant to work as it could potentially worsen her condition. He further stated that being a mail or letter carrier would be aggravating for whatever the cause of appellant's pain. The Office also received a September 12, 2001 report from Dr. Michael Stanton-Hicks, a specialist in pain management, who initially examined appellant on March 22, 2001 and diagnosed complex regional pain syndrome (CRPS) of the right ankle and upper extremities.[7] Dr. Stanton-Hicks stated that it was clear from clinical examination that appellant still exhibited active CRPS, contrary to the independent medical examiner's assessment.

On November 15, 2001 the Office acknowledged receipt of Dr. McGuire's September 11, 2001 report and informed appellant that her reason for refusing to work was unacceptable. Appellant was afforded an additional 15 days to accept the position and was further advised that the Office would not consider any additional reasons for refusal to work. Because of an apparent change of address, the Office sent a second copy of the November 15, 2001 letter on November 20, 2001. Appellant was afforded an additional 15 days to accept the April 10, 2001 job offer.

Appellant verbally accepted the position on December 5, 2001, but the employing establishment advised her that only an unequivocal written acceptance would suffice. On December 7, 2001 the employing establishment faxed an amended copy of the April 10, 2001 job offer to appellant for her approval. The changes to the original April 10, 2001 job offer included an acceptance date of December 7, 2001 and a report-to-work date of December 17, 2001.

On December 7, 2001 appellant again declined the job offer. She indicated that according to her treating physicians the job offer was not acceptable. Appellant also submitted a letter from Dr. McGuire addressed to the claims examiner. Dr. McGuire stated that he had not released appellant to return to work. He also noted that the Office had approved the testing and treatment by Dr. Stanton-Hicks for appellant's RSD, and to his knowledge, Dr. Stanton-Hicks

[6] Additionally, the Office acknowledged that appellant had previously declined the position on the basis that her attending physician had not released her for work. The Office provided appellant a copy of Dr. Carneval's report and advised that she forward it to her physician for review and comment.

[7] The Office had previously authorized Dr. Stanton-Hick's evaluation of appellant and on May 23, 2001 requested that he review the April 10, 2001 job offer.

had not released appellant to return to work. Dr. McGuire advised that to remove appellant from her treatment at this time would be harmful to her condition.

By decision dated January 16, 2002, the Office terminated appellant's compensation for refusing to accept an offer of suitable work.[8] Appellant requested a review of the written record,[9] and in a decision dated October 21, 2003, the Office hearing representative affirmed the January 16, 2002 decision terminating compensation.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[10] Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[11] To justify termination of compensation, the Office must show that the work offered was suitable[12] and must inform appellant of the consequences of refusal to accept such employment.[13] An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.[14] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[15]

ANALYSIS

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 the medical evidence.[16] Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[17] In this instance, the Office relied upon Dr. Carneval's September 18, 2000 report to find the April 10, 2001 job offer suitable. While the April 10, 2001 modified letter carrier

[8] Although the decision noted that compensation would be terminated effective December 10, 2001, the Office paid compensation through January 16, 2002.

[9] Appellant initially requested an oral hearing, however, by letter dated July 17, 2003, appellant's counsel requested that the Office review the written record rather than proceed with the scheduled hearing.

[10] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[11] 5 U.S.C. § 8106(c)(2).

[12] *Arthur C. Reck*, 47 ECAB 339 (1996).

[13] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[14] 20 C.F.R. § 10.517 (1999).

[15] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[16] *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

[17] *See Gayle Harris*, *supra* note 16; *Martha A. McConnell*, 50 ECAB 129 (1998).

position is entirely consistent with Dr. Carneval's noted restrictions,[18] the medical evidence of record does not clearly establish that appellant is capable of performing the required duties. First, it is not clear from Dr. Carneval's report why he found that appellant did not have any limitations with respect to her upper extremities despite having reported right upper extremity symptoms.[19] Second, there is disagreement among the various physicians regarding the severity of appellant's pain disorder. In particular, Dr. Stanton-Hicks indicated that appellant still exhibited active CRPS, contrary to the independent medical examiner's assessment. Dr. Carneval, however, had previously found that appellant was "experiencing no more than a 'mild causalgia.'" Additionally, while Dr. McGuire, appellant's treating physician, did not provide a particularly rationalized opinion, he clearly stated that he had not released appellant to return to work and felt it potentially harmful and inadvisable to return appellant to work in Colorado and effectively remove her from her current treatment with Dr. Stanton-Hicks in Cleveland, OH.

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[20] Drs. Stanton-Hicks and Carneval disagreed regarding the extent of appellant's RSD/CRPS and as there remains an unresolved conflict of medical opinion, the Office failed to carry its burden to justify termination of compensation benefits.[21]

CONCLUSION

The Board finds that the Office failed to establish that the April 10, 2001 job offer was suitable, and therefore, improperly terminated appellant's compensation for refusing to accept this position.

[18] As previously indicated, Dr. Carneval stated that appellant could return to work initially in a part-time capacity and gradually increase to a full-time schedule over a three-month period. He also stated that appellant could intermittently stand, sit and walk for two to three hours per day and she could twist, turn, stoop and bend within what was considered normal human tolerances. Dr. Carneval further indicated that appellant could lift, push, pull and carry intermittently 30 to 40 pounds and he did not impose any restrictions with respect to appellant's upper extremities.

[19] The April 10, 2001 job offer requires reaching and working above the shoulder five hours per day. Although appellant's upper extremity RSD has not been accepted as employment related, the Office must take into account this condition in determining the suitability of the offered position. It is unclear whether the lack of upper extremity limitations is because Dr. Carneval believed there were no physical limitations or because he believed the reported upper extremity symptoms were unrelated to appellant's accepted employment injury.

[20] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[21] *James B. Christenson*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member