United States Department of Labor
Employees' Compensation Appeals Board

DEBORAH K. PERRY, Appellant	)	
and	)	**Docket No. 04-2296**
	)	**Issued: April 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Blue Springs, MO, Employer	)	

Appearances:
Deborah K. Perry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 23, 2004, denying modification of a May 21, 2004 decision terminating compensation for wage loss. The record also contains an August 27, 2004 decision denying appellant's request for reconsideration without merit review of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate compensation on May 21, 2004; and (2) whether the Office properly denied appellant's August 16, 2004 reconsideration request without merit review of the claim.

FACTUAL HISTORY

On July 23, 2002 appellant, then a 52-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained shoulder and neck injuries causally related to her

federal employment. The Office accepted the claim for bilateral shoulder tears, and aggravation of C5-6 and C6-7 spinal stenosis. Appellant underwent left shoulder surgery on November 13, 2002 and right shoulder surgery on September 26, 2003. She remained off work and received compensation benefits.

In a report dated January 7, 2004, Dr. Larry Frevert, an orthopedic surgeon, reported that restrictions of no lifting, pushing or pulling with the right arm would continue. In a report dated February 10, 2004, Dr. Everett Wilkinson, Jr., an osteopath, provided results on examination and diagnosed status post rotator cuff repair left shoulder. In a form report (CA-20) dated February 13, 2004, Dr. Wilkinson indicated that appellant was restricted to no pushing, pulling, lifting or grasping with the left arm.

The record indicates that, on January 26 and February 4, 2004, the employing establishment offered appellant a light-duty position as a modified clerk. The employing establishment submitted a March 14, 2004 investigative memorandum regarding observation of appellant's activities. By letter dated March 18, 2004, the Office referred appellant for a second opinion evaluation to Dr. Edward Prostic, an orthopedic surgeon.

On March 29, 2004 the employing establishment offered appellant a modified general clerk position. The position required eight hours of intermittent sitting, standing or walking.

In a letter dated April 2, 2004, the Office issued a notice of proposed termination. The Office stated that the limited-duty position included sitting and standing intermittently for up to eight hours, and both Dr. Frevert and Wilkinson demonstrate that the accepted work injury no longer prevented appellant from "returning to this position." The Office concluded that the evidence established that appellant "was no longer disabled from work[ing] the limited-duty position available to you due to your accepted condition."

On April 5, 2004 appellant indicated that she was neither accepting or refusing the offered position, but would let the Office and her physicians determine if it was suitable. In a report dated April 7, 2004, Dr. Frevert stated that appellant's work restrictions included no overhead activity and no lifting, pushing or pulling over 10 to 15 pounds and no casing of mail. In a report dated April 23, 2004, the second opinion physician, Dr. Prostic, provided a history and results on examination. He opined that he saw "no orthopedic reason why this lady is unable to return to her previous duties as a rural mail carrier." By report dated May 3, 2004, Dr. Wilkerson stated that appellant could not lift up to 75 pounds; for the left shoulder she could lift 35 to 40 pounds, and for the right shoulder up to 15 pounds, and this obviously would limit her overall job activities.

By decision dated May 21, 2004, the Office terminated compensation benefits for wage loss effective May 21, 2004. The Office stated that the medical evidence submitted after April 2, 2004, including Dr. Prostic's report, showed that the work tolerance limitations recommended by these physicians "were within the limited-duty job offered to you. At this time you have not reported to this position."

In a letter dated June 1, 2004, appellant requested reconsideration of her claim. Appellant submitted a copy of an April 27, 2004 letter to the employing establishment accepting the March 29, 2004 job offer.

By decision dated July 23, 2004, the Office denied modification of the prior decision. The Office stated that compensation was not terminated because appellant failed to provide written acceptance, but because "of failure to report to duty." Appellant requested reconsideration by letter dated August 16, 2004. In a decision dated August 27, 2004, the Office denied the request without merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

Section 8106(c) 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." 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.[2] To justify such a termination, the Office must show that the work offered was suitable.[3]

ANALYSIS -- ISSUE 1

The Office in this case attempted to terminate compensation without properly establishing the grounds for termination. A termination may be based on the grounds that the medical evidence established that employment-related disability for the date-of-injury position had ceased, but the Office in this case did not make a finding that employment-related disability for the rural carrier position had ceased. The Office did not discuss the second opinion physician Dr. Prostic's findings with respect to the carrier position, nor did it discuss the attending physicians' restrictions and the ability to perform the date-of-injury position. The Board finds that the Office did not meet its burden of proof to terminate based on the medical evidence and continuing disability for the rural carrier position.

The basis for the termination of compensation was reported to be that there was a limited-duty job available to appellant that was within her work restrictions. If the Office attempts to terminate compensation based on a refusal of suitable work, there are well-established procedures for terminating compensation pursuant to 5 U.S.C. § 8106(c). The Office must notify appellant of a finding that the position was suitable, the provisions of section 8106(c) and the potential consequences of refusal, and afford an opportunity to accept the position or provide

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

reasons for refusal.[4] If the employee presents reasons for refusing the position, the Office must inform her that the reasons are inadequate to justify refusal and afford her a final opportunity to accept the position.[5]

In this case, the Office did not refer to 5 U.S.C. § 8106(c) or follow established procedures for terminating compensation based on a refusal of suitable work. To the extent that the termination was based on a refusal of suitable work, the Office did not meet its burden of proof in this case. In view of the Board's findings in this case, the reconsideration issue will not be addressed.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate compensation for wage loss as of May 21, 2004. The Office did not establish that employment-related disability for the date-of-injury position had ceased as of May 21, 2004 based on the evidence of record, nor did it properly terminate compensation pursuant to 5 U.S.C. § 8106(c) based on refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 23 and May 21, 2004 are reversed.

Issued: April 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[4] *See, e.g., Alfred Gomez*, 53 ECAB 149, 150 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.* 43 ECAB 818 (1992).

[5] *Maggie L. Moore, supra* note 4.