United States Department of Labor
Employees' Compensation Appeals Board

ANTONINA GUTIERREZ, Appellant	)	
and	)	**Docket No. 05-82**
	)	**Issued: April 12, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Antonina Gutierrez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 4, 2004 appellant filed a timely appeal of a July 8, 2004 decision from an Office of Workers' Compensation Programs' hearing representative, affirming a July 30, 2003 decision terminating compensation on the grounds that appellant refused an offer of suitable work. 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 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On November 25, 1994 appellant, then a 30-year-old temporary carrier, filed a traumatic injury claim for continuation of pay (Form CA-1) alleging that on November 18, 1994 she sustained injury when she slipped and fell on stairs while in the performance of duty. The employing establishment indicated that appellant was employed on a temporary appointment.

The Office accepted the claim for right ankle sprain, low back sprain, lumbar and thoracic subluxations at T8, T11, L4 and L5, and posterior annular tears L4-5, L5-S1. Appellant underwent a bilateral hemilaminectomy at L4-5 and L5-S1 on January 12, 1996, and an L5 laminectomy on May 19, 1997. Appellant returned to work at six hours per day and the employing establishment terminated her appointment on July 1, 1999.

The record contains a letter dated January 7, 2003 offering appellant a position as a modified city carrier casual appointee. By letter dated January 14, 2003, an amended job offer was made for the position of modified city carrier casual appointee. The hours were reported as six hours per day, with Sunday as a nonscheduled day. The physical requirements were described as up to six hours per day of intermittent, sitting, walking, standing, with no lifting, squatting, kneeling or climbing. The offer stated that the position was not to exceed two 89-day periods.

In a report dated January 31, 2003, Dr. Dermot More-O'Ferrall noted that appellant had undergone a functional capacity evaluation.[1] Dr. More-O'Ferrall provided results on examination and diagnosed a history of failed back surgery syndrome with persistent axial right-sided low back pain with numbness in the lateral femoral cutaneous nerve of the right thigh. He indicated that appellant could return to work initially at 4 hours per day increasing to 8 hours, with a 10-pound lifting restriction and ability to frequently change positions.

By report dated February 20, 2003, Dr. T.J. Flatley, an attending orthopedic surgeon of professorial rank, stated that appellant had permanent restrictions against bending, lifting, pulling and pushing. Dr. Flatley stated that he had reviewed the job analysis and he felt that appellant physically could perform the job. He further stated that, due to the pain medications appellant was taking and symptoms that were often severe enough to interfere with attention and concentration, he was not confident that appellant could sustain employment.

Dr. Flatley completed a return to work form report dated March 3, 2003 in which he provided work restrictions. The form indicated that "rarely" meant up to 24 minutes a day, "occasional" was up to 2 hours and 38 minutes, and "frequent" meant up to 5 hours and 18 minutes out of an 8-hour day. Dr. Flatley checked "rarely" for walking, "occasional" for standing and "frequent" for sitting. He also checked a box that appellant was capable of sedentary duty with a 10-pound lifting restriction.

In a letter dated March 14, 2003, the employing establishment made appellant an "amended" job offer for a modified city carrier casual appointment. The offer letter noted that the job was available April 5, 2003 and the appointment was not to exceed July 3, 2003. The position was a full-time position. With regard to physical requirements, the job offer stated, "up to eight hours frequently" for sitting and walking, and "up to eight hours occasionally" for standing.

On March 31, 2003 the Office received a statement from appellant that she was refusing the position as it did not meet her medical restrictions. In a letter dated April 4, 2003, the Office

[1] The record contains a January 2, 2003 report from an occupational therapist discussing the results on the functional capacity evaluation.

advised appellant that it found the job offer to be suitable and that she had 30 days to accept the position or provide reasons for refusing. Appellant responded in a letter dated April 28, 2003 that she was not able to perform the job; she submitted a copy of a June 26, 2000 report from Dr. Flatley. By letter dated May 8, 2003, the Office advised appellant that her reasons for refusing the position were not valid and that she had 15 days to accept the position or her compensation benefits would be terminated.

In a report dated July 15, 2003, Dr. J.A. Rydlewicz, an orthopedic surgeon, provided a history and results on examination. He diagnosed degenerative joint disease of the knees, and failed lumbar back surgery.

By decision dated July 30, 2003, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Appellant requested a review of the written record and submitted an August 25, 2003 report from Dr. Rydlewicz. He opined that, because of chronic low back pain requiring schedule II narcotics in the form of Percocet, he did not feel that appellant could be gainfully employed in a competitive work environment. Dr. Rydlewicz stated that narcotic medication would affect appellant's ability to concentrate, would cause sedation and probably fail to provide the necessary comfort to work at the sedentary level. He stated that appellant was totally disabled.

In a decision dated July 8, 2004, the Office hearing representative affirmed the July 30, 2003 decision. The hearing representative found that the job offer was within the work restrictions of Dr. Flatley.

LEGAL PRECEDENT

5 U.S.C. § 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] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[4]

ANALYSIS

In the present case, the Office found that the offered position was medically suitable as it was within the medical restrictions of record. The Office indicated that Dr. Flatley had reviewed the position and opined in his February 20, 2003 report that appellant could perform the job duties. The Office failed to acknowledge, however, that the amended job offer issued on March 14, 2003 differed from the January 14, 2003 job reviewed by Dr. Flatley. The initial job

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

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

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

offer was six hours per day, with up to six hours intermittent sitting, walking and standing. The March 14, 2003 job offer was eight hours per day, "up to eight hours frequently" for sitting and walking and "up to eight hours occasionally" of standing. The March 3, 2003 form report from Dr. Flatley restricted appellant to 24 minutes of walking, 2 hours and 38 minutes of standing and 5 hours and 18 minutes of sitting per day. These restrictions are not within the physical requirements described in the March 14, 2003 job offer. The Office did not request clarification from Dr. Flatley or obtain an opinion that appellant was capable of performing the modified city carrier job offered on March 14, 2003.

The medical evidence of record therefore does not establish that the offered position was medically suitable. It is the Office's burden of proof and the Office failed to meet its burden to terminate compensation pursuant to 5 U.S.C. § 8106(c).

CONCLUSION

The Board finds that the medical evidence of record is not sufficient to establish that the offered position of modified city carrier was medically suitable and therefore the Office did not properly terminate compensation based on a refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 8, 2004 is reversed.

Issued: April 12, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member