United States Department of Labor
Employees' Compensation Appeals Board

CECELIA COLEMAN, Appellant	)	
and	)	**Docket No. 04-1530**
	)	**Issued: January 27, 2005**
U.S. POSTAL SERVICE, GRAND CENTRAL STATION, New York, NY, Employer	)	

Appearances:
Steven L. Keats, Esq., for the appellant
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 May 24, 2004 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated April 21, 2004 which denied modification of prior Office decisions that terminated her compensation for refusing 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 effective January 22, 1999 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On October 7, 1993 appellant, then a 39-year-old mail handler, sustained an employment-related aggravation of degenerative disc disease and low back syndrome when she injured herself pushing a tub of mail.[1] She stopped work that day and was placed on the periodic rolls.

[1] The claim was initially accepted for contusion of the hip.

Appellant came under the care of Dr. Theodore Giannaris, Board-certified in orthopedic surgery, who continued to advise that she was totally disabled. An October 29, 1993 computerized tomography (CT) scan of the lumbar spine revealed central bulging of the L4-5 disc with a herniated nucleus pulposus at L5-S1. A March 10, 1994 magnetic resonance imaging (MRI) scan of the lumbar spine was interpreted as showing degenerative disc disease at L4-5 and L5-S1 with diffuse bulging and a right-sided herniation of the L5-S1 disc. Mild disc bulging at L4-5 was also seen.

On January 1, 1995 the Office referred appellant to Dr. Richard E. Stern, also a Board-certified orthopedist, for a second opinion evaluation. In a report dated January 27, 1995, Dr. Stern concluded that appellant's subjective complaints were far out of proportion to the mild objective findings on examination and saw no indication for further diagnostic testing or treatment. In an attached work capacity evaluation, the physician stated that appellant could work 8 hours a day with the permanent restrictions that she limit bending to 4 times an hour with no lifting over 10 pounds.

Finding that a conflict in medical evidence had been created between the opinions of Drs. Giannaris and Stern, by letter dated November 15, 1995, the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. Martin J. Barschi, a Board-certified orthopedic surgeon, for an impartial evaluation. In reports dated December 8, 1995, Dr. Barschi noted his review of the medical record and findings on examination. He concluded that appellant could not work without surgery. In supplementary reports dated January 11 and February 7, 1996, Dr. Barschi advised that appellant's inability to work was caused by the employment injury, noting that the CT and MRI scan findings were consistent with an accident occurring on October 7, 1993 and were not an aggravation of a preexisting condition.

In a December 11, 1997 duty status report, Dr. Irene Chow, an employing establishment osteopathic physician, advised that appellant could work eight hours a day, five days a week with a five-pound restriction on lifting, pushing and pulling. Appellant continued to submit medical evidence regarding her condition and on February 20, 1998 Dr. John Buonocore, an osteopathic physician Board-certified in anesthesiology, began treating appellant for pain management.

The Office continued to develop the claim and on June 25, 1998 referred her, along with the medical record, a statement of accepted facts and a set of questions to Dr. Henry Marano, Board-certified in orthopedic surgery, for a second opinion evaluation. In a report dated July 8, 1998, Dr. Marano noted appellant's complaints, his review of the medical records and findings on physical examination and diagnosed low back pain which he advised was due to the October 7, 1993 employment injury. He opined that appellant could not perform the position of mail handler but could perform sedentary work. In a work capacity evaluation dated July 8, 1998, Dr. Marano advised that appellant could work 4 hours a day with a 4-hour restriction on sitting, could stand and walk for 30-minute intervals with no pushing, pulling, squatting, kneeling, climbing or operating a motor vehicle. Lifting was restricted to one pound. A 15-minute break each hour was also recommended.

On November 3, 1998 the employing establishment offered appellant a modified mail handler position for four hours per day based on the physical restrictions provided by

Dr. Marano. The job was described as working the directory mail, patch up mail and answering the telephone.

By letter dated November 19, 1998, the Office advised appellant that the position offered was suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond. Thereafter Dr. Buonocore submitted a work restriction evaluation dated October 28, 1998 in which he advised that appellant could work two hours per day with restrictions. He also submitted treatment notes dated October 23, November 25, December 23 and 30, 1998.

In a decision dated January 22, 1999, the Office terminated appellant's wage-loss compensation on the grounds that she declined an offer of suitable work. On February 19, 1999 appellant requested a review of the written record and submitted additional medical evidence. She was hospitalized from June 8 to 24, 1999 for pain management.

By decision dated September 7, 1999, an Office hearing representative affirmed the prior decision. On September 1, 2000 appellant, through her attorney, requested reconsideration and submitted additional medical evidence.

By decision dated September 29, 2000, the Office denied modification of the prior decision. On September 26, 2001 appellant's attorney again requested reconsideration and submitted additional medical evidence. Appellant also submitted a June 17, 1995 decision in which the Social Security Administration found her disabled. In a December 26, 2001 decision, the Office again declined to modify the prior decisions.

On December 20, 2002 appellant, through her attorney, again requested reconsideration and submitted additional medical evidence.[2] In a decision dated April 21, 2004, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation 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."[3] 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 such 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.[4] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an

[2] The medical evidence submitted by appellant in this case consisted of *inter alia*, numerous reports from Drs. Giannaris and Buonocore and other physicians who treated her at the Sports Medicine and Orthopaedic Rehabilitation Center.

[3] 5 U.S.C. § 8106(c)(2).

[4] *Janice S. Hodges*, 52 ECAB 379 (2001).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[5]

The implementing regulation provides 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.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

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.[8] 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.[9]

ANALYSIS

On the issue of suitability, the Office found that the weight of the medical evidence rested with the report of the Office referral physician, Dr. Marano, a Board-certified specialist in orthopedic surgery, who related appellant's history and symptoms in his July 8, 1998 report and findings on physical examination and diagnosed low back pain which he advised was due to the October 7, 1993 employment injury. He opined that appellant could not perform the position of mail handler but could perform sedentary work. In a work capacity evaluation dated July 8, 1998, Dr. Marano provided specific restrictions to appellant's physical activity. The offered position involved working the directory mail, patch-up mail and answering the telephone and exactly comported with the restrictions provided by Dr. Marano. The Board finds that inasmuch as the modified mail handler position conformed with appellant's work restrictions as outlined by Dr. Marano, the Office correctly found the job was suitable.[10]

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 appellant

[5] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[6] 20 C.F.R. § 10.517(a).

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

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

[9] *Maurissa Mack*, 50 ECAB 498 (1999).

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

an opportunity to accept or provide reasons for declining the position.[11] The record in this case indicates that the Office did not follow the procedural requirements. By letter dated November 19, 1998, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. She was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. Appellant thereafter submitted a work capacity evaluation dated October 28, 1998 and treatment notes from Dr. Buonocore regarding her ability to work. The record next reflects that the Office issued a final termination decision on January 22, 1999. The Board therefore finds that, as appellant submitted additional evidence prior to the final Office decision in which she responded to the suitability determination, she was entitled to have this evidence evaluated to determine whether she provided an acceptable reason for refusing the offer of suitable work. Thereafter, she was entitled to an additional 15 days to accept the offered job. Thus, the Board finds that the Office did not properly terminate appellant's compensation for the reason that it did not fully afford her the procedural protections set forth in *Maggie L. Moore*.[12] Specifically, the Office failed to evaluate the newly submitted evidence, inform appellant that her reason for rejecting the offer was unjustified and afford appellant 15 days to accept the position. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work.

CONCLUSION

The Board finds that the Office erred in terminating appellant's compensation.

[11] *See Maggie L. Moore*, *supra* note 7.

[12] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 21, 2004 be reversed.

Issued: January 27, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member