

Dr. Richard A. Monti, appellant's podiatric surgeon, reported on May 20, 2003 that she was able to work two hours a day with restrictions. Dr. Philip H. Lewis, an orthopedic surgeon and Office referral physician, reported on September 24, 2003 that appellant had recovered from her left ankle sprain and was able to return to her date-of-injury position with no restriction. To resolve this conflict, the Office referred appellant, together with the case file and a statement of accepted facts, to Dr. Brian A. Cole, a Board-certified orthopedic surgeon.

On November 12, 2003 Dr. James R. Cole, an associate of Dr. Brian A. Cole, interviewed appellant, evaluated her and reported that she was disabled from her job as a letter carrier because she could not walk due to pain in her left ankle. On April 1, 2004, after reviewing previous imaging studies, Dr. James R. Cole reiterated his opinion that appellant was disabled as a letter carrier. On April 16, 2004 he completed a work capacity evaluation outlining her restrictions.

The Office asked the employing establishment to formulate a job offer within the limitations reported by Dr. James R. Cole. On April 27, 2004 the Office notified appellant that the employing establishment had modified work available. The Office notified her: "We have reviewed this offer of employment and have compared it with the medical evidence concerning your ability to work and we have found the offer to be suitable." The Office informed appellant that she had 30 days to accept or to provide an acceptable explanation for refusing the offer. The Office informed appellant of the penalty for refusing an offer of suitable work under 5 U.S.C. § 8106(c).

Appellant responded on May 4, 2004 that she could not sign the letter because she did not know which one to sign. She stated that she would take the position but that she could not start on May 10, 2004 because she no longer had insurance and was not able to get the medicine she needed for her diabetes condition. Appellant stated: "If you can give me my insurance so we [she and her children] all could go to the doctor, I will be more than happy to take this position, around 24th or 1st week in June 2004."

On July 8, 2004 the Office notified appellant that her reasons for not accepting the job offer were unacceptable and that, if she refused the offer or failed to report to work when scheduled, her compensation would be terminated within 15 days.

On July 15, 2004 appellant responded that she could not do anything without her medicine and that she did not refuse the job: she did not sign the paper because she was trying to get her insurance to pay for her medicine. Appellant stated that she would like her position back as a letter carrier and felt that she was now able to do it.

In a decision dated August 2, 2004, the Office terminated appellant's wage-loss compensation effective August 7, 2004 on the grounds that she refused suitable work when it was offered. The Office noted that Dr. Cole's opinion represented the weight of the medical evidence because it was the most recent medical documentation on record and was based on a complete examination.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that, a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.² In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.³

ANALYSIS

The Office found that a conflict arose between appellant's physician, Dr. Monti and the Office referral physician, Dr. Lewis. Dr. Monti reported that appellant could work two hours a day with restrictions, while Dr. Lewis reported that she could work eight hours a day at her date-of-injury position with no restriction. Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁴ The Office, therefore, properly referred the case to an impartial medical specialist to resolve the conflict on the extent of appellant's disability for work.

The Board notes, however, that the physician the Office selected to serve as the impartial medical specialist, Dr. Brian A. Cole, did not examine appellant. He submitted no report. Appellant was instead examined by an associate, Dr. James R. Cole, and it was on the basis of this physician's opinion that the Office found the offered position to be suitable. The law in this area is well established: Where an associate of the physician selected by the Office to serve as an impartial medical specialist examined the claimant and provided an opinion to resolve a conflict in the medical opinion, that associate's opinion cannot represent the weight of the medical evidence, as the associate was not selected as an impartial medical specialist according to Office procedures.⁵

Dr. James A. Cole was not selected to serve as an impartial medical specialist according to Office procedures and his opinion cannot resolve the outstanding conflict between Dr. Monti

¹ 5 U.S.C. § 8106(c)(2).

² *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

³ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁴ 5 U.S.C. § 8123(a).

⁵ *Shirley L. Steib*, 46 ECAB 309 (1994); *Vernon E. Gaskins*, 39 ECAB 746 (1988); *William C. Iadipaolo*, 39 ECAB 530 (1988); *Leonard W. Waggoner*, 37 ECAB 676 (1988).

and Dr. Lewis. Because there remains an unresolved conflict in medical opinion on the extent of appellant's disability for work and on the nature and extent of any medical restrictions, the Office's finding of suitability was premature, as was its application of 5 U.S.C. § 8106(c)(2). The Office did not meet its burden of proof.

CONCLUSION

The Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 13, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member