United States Department of Labor
Employees' Compensation Appeals Board

ANTOINETTE FLORIAN, Appellant	)	
and	)	**Docket No. 04-2227**
	)	**Issued: May 4, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Harwood Heights, IL, Employer	)	

Appearances:
Alan J. Shapiro, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 13, 2004 appellant, through her attorney, filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated June 14, 2004, terminating her compensation benefits effective October 8, 2003 on the grounds that she 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 termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective October 8, 2003, on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On March 9, 2001 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim alleging that on that date she suffered from mental stress resulting from a telephone call in which she was threatened with bodily harm. Appellant stated that after she advised a customer that his check was not in the mail to be delivered he stated that he was going to harm her.

By decision dated August 30, 2001, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. On September 13, 2001 appellant requested reconsideration and submitted evidence in support thereof.

By letter dated December 14, 2001, the Office vacated the August 30, 2001 decision and accepted appellant's claim for severe major depression without psychotic features and panic disorder without agoraphobia. Appellant stopped work on April 14, 2001 and received appropriate compensation.

In an August 8, 2002 letter, the Office advised Dr. Jauren Kelly, appellant's treating clinical psychologist, that a review of her case record revealed that the physician had indicated that she could be released to return to work around August 1, 2002. The Office noted that appellant had not returned to work at that time. The Office requested that Dr. Kelly submit a rationalized narrative medical report indicating why the return to work date changed and when and with what restrictions appellant could return to work. The Office also requested that Dr. Kelly complete an enclosed work capacity evaluation (Form OWCP-5) indicating appellant's physical restrictions. The Office noted that the only restriction was appellant's need to be transferred to a different route or work facility.

Dr. Kelly submitted a Form OWCP-5 and narrative report dated September 1, 2002 in which he indicated, among other things, that appellant could perform her regular work schedule provided her panic attacks were under control as they were at that time, she continued to take her medication and she was assigned to a different worksite. He suggested that appellant begin working part time and then transition to full time to ease her anxiety. Dr. Kelly noted that appellant's use of a therapy dog as prescribed by her medical physician had eased her anxiety and panic attacks on several occasions.

By letter dated June 19, 2002, the Office denied authorization of appellant's request for a service dog as there was no medical evidence showing the need for this therapy dog.

By letter dated October 17, 2002, the Office referred appellant together with her medical records, a statement of accepted facts and a list of questions to be addressed to Dr. Severin G. Wellinghoff, PhD., a clinical psychologist, for a second opinion medical examination.

Dr. Wellinghoff submitted a November 26, 2002 medical report in which he provided a history of appellant's employment and accepted employment injury. He reported two other incidents, one in October 1997 when appellant was physically threatened by a customer while delivering mail and in 1999 when she was followed by a man who asked her about his mail after she responded that she did not know where it was. Dr. Wellinghoff also reported his findings on physical examination. Regarding his findings on psychological examination, Dr. Wellinghoff stated that the Minnesota Multiphasic Personality Inventory II results revealed that appellant appeared to be malingering. He diagnosed panic disorder without agoraphobia and recurrent moderate major depression on Axis I, osteoarthritis and hypothyroidism on Axis II, occupational problems on Axis IV and global assessment of functioning (GAF) of 50 on Axis V. He stated that there was no diagnosis on Axis II. He opined that, based on his review of appellant's case

record and his examination findings, appellant suffered from a psychological condition caused by factors of her employment. He stated that serious consideration should be given to the possibility of malingering at that point in time since appellant had not been employed for the last six months. He further stated that appellant could perform her job in a different work facility. Dr. Wellinghoff indicated that appellant seemed to suffer from residuals of her employment injury as she continued to claim symptoms of panic and depression. He concluded by recommending that she continue treatment with a psychologist to resolve the panic and depressive symptoms. In a Form OWCP-5 dated December 4, 2002, Dr. Wellinghoff reiterated that appellant could perform her regular work duties in a different facility and that she should have her service dog with her while working.

By letter dated January 2, 2003, the employing establishment offered appellant the position of letter carrier effective January 11, 2003, based on the restrictions set forth by Dr. Kelly in his September 1, 2002 report. On January 8, 2003 appellant rejected the job offer. She stated that the offer threatened her compensation benefits, she was still disabled according to her physician's orders and she required the use of her service dog at all times. She concluded that she was still disabled from her work-related injuries.

In a January 3, 2003 letter, the Office requested that Dr. Wellinghoff provide clarification as to whether appellant continued to suffer from residuals of her accepted employment injury and whether she could return to work without her service dog based on restrictions regarding dogs on the premises of some facilities. In response, Dr. Wellinghoff submitted a one-page report dated January 20, 2003, that appeared to be missing additional pages. He noted appellant's residuals which included sleep disturbance, anxiety symptoms and a fluctuating appetite which caused increased weight of about 50 pounds and most importantly a loss of interest in most things that she used to enjoy. Dr. Wellinghoff attributed appellant's current emotional condition to the two other incidents and not the March 9, 2001 employment injury. He stated that her depression was the result of all the incidents taken together in addition to her husband's physical condition. He further stated that appellant could perform the duties of sorting mail without her service dog but she would need to use the dog while she was on her route. Dr. Wellinghoff noted that appellant could dispense mail from her vehicle rather than on a walking route. He advised that she should work two days a week at first and then increase her workload by working an additional day a week until she was back to work full time. He noted that there were no other restrictions.

The Office received progress notes dated February 19 and 28, March 7, 14 and 21 and April 4, 11 and 18, 2003 from a therapist whose signature is illegible regarding appellant's psychological therapy.

By letter dated May 2, 2003, the Office requested that Dr. Wellinghoff provide clarification of his January 20, 2003 report because pages appeared to be missing. The Office also requested that he clarify whether the March 9, 2001 employment injury contributed to appellant's current emotional condition and whether the suggested modifications of her position were required on a permanent basis and were due to her work-related emotional condition. By letter dated May 9, 2003, Dr.Wellinghoff submitted the second page of his January 20, 2003 supplemental report, which provided that appellant should resume individual or group therapy. In response to the Office's questions, he noted that appellant suffered some anxiety as a result of

the March 9, 2001 employment injury but the major reasons for her depression and panic symptoms were due to the prior incidents when she was physically threatened while working on her mail route. He stated that the accepted employment incident was the last incident that contributed to her disappointment and belief that she would not be safe on her job anymore. In support of his opinion that the incidents prior to the March 9, 2001 employment incident caused appellant's current emotional condition, Dr. Wellinghoff stated that when appellant was evaluated she placed the most emphasis on these incidents. He further stated that the March 9, 2001 employment incident cemented appellant's unreasonable belief that she was no longer safe on the job, even in the postal facility. He indicated that appellant's placement in another facility with a different supervisor should be on a permanent basis. Appellant's need for a service dog was temporary in nature and it depended on her progress in therapy. Dr. Wellinghoff reiterated that she should participate in therapy.

The Office received progress notes dated May 28 and August 21, 2003 from the therapist whose signature is illegible concerning appellant's psychological therapy.

In a June 2, 2003 letter, the Office advised the employing establishment that appellant was partially disabled and that she could work with certain restrictions. The Office requested that the employing establishment review Dr. Wellinghoff's reports and provide appellant with a job offer which accommodated her work restrictions.

The Office received progress notes dated June 27, 2003 from the therapist whose signature is illegible regarding appellant's counseling.

By letter dated July 1, 2003, the employing establishment offered appellant a letter carrier position effective July 12, 2003 based on the medical restrictions provided by Dr. Wellinghoff. The position required appellant to work from 7:00 a.m. until 3:30 p.m. She was required to perform regular carrier duties but must change her work location. She was scheduled to work two days per week the first week and add a day per week until she returned to full-time work. Appellant was assigned indoor work only where she would case mail and perform other duties provided within the letter carrier craft. The position, thus, provided that a service dog would not be required in the performance of appellant's daily duties. The employing establishment advised the Office about the offered position in a July 3, 2003 letter.

In a July 18, 2003 letter, the Office advised appellant that the offered position was suitable and provided her with 30 days in which to either accept or reject this position. The Office also provided her procedural rights pursuant to 5 U.S.C. § 8106(c).

In a letter dated July 3, 2003 and received by the Office on July 21, 2003, appellant rejected the employing establishment's job offer. She stated that her treating physician has stated that she was not allowed to return to work until she had the use of a service dog and no longer had any panic attacks and depression. She also stated that her medication caused her to sleep most of the day, to be confused and to be unable to concentrate. Appellant indicated that the employing establishment continually refused to accommodate her disabilities. She further indicated that the second opinion medical evaluation was not conducted properly and that Dr. Wellinghoff made conflicting statements in his report about her condition and ability to

work. Appellant stated that the job offer did not contain all the necessary information, it was not valid based on the National Association of Letter Carriers contract, laws of the Equal Employment Opportunity Commission and a current court order and it did not allow for separation from her former management, which was prejudicing and discriminating against her.

The Office received progress notes dated June 4, 2003, from the therapist whose signature is illegible regarding appellant's counseling. The Office also received a July 7, 2003 report from Dr. Rebecca S. Luzio, a clinical psychologist, who provided a history that appellant continued to struggle with her emotional condition resulting from three incidents which occurred while working for the employing establishment. She noted appellant's medical treatment and diagnosed post-traumatic stress disorder on Axis I, trauma at work on Axis IV and a GAF of 45 on Axis V. Dr. Luzio deferred a diagnosis on Axis II and deferred to appellant's physician on Axis III. Her July 15, 2003 progress notes indicated that appellant brought information regarding mental health dogs and she explained how she continued to be distressed by her boss. Dr. Luzio's July 30, 2003 progress notes revealed appellant's grief concerning the death of her dog who she had to put to sleep.

In a letter dated August 6, 2003, appellant requested a "merit review" and a "referee appointment" for her case. She submitted a case from the United States Court of Appeals for the Eleventh Circuit, which addressed the employing establishment's failure to provide reasonable accommodations pursuant to the Rehabilitation Act.

In a September 18, 2003 letter, the Office advised appellant that her reasons for refusing the job offer were unacceptable. The Office afforded her 15 days to accept the offered position or be subjected to termination of compensation benefits.

On September 29, 2003 the Office received Dr. Luzio's August 8, 2003 progress notes which indicated that appellant discussed her depression, the employing establishment's attempt to get her to return to work without a dog and her frustration with Dr. Wellinghoff. The Office also received a duplicate copy of Dr. Luzio's July 30, 2003 progress notes.

In an October 3, 2003 letter, appellant reiterated her request for a referee examination and her need for a psychiatric service dog. She noted that that she received disability compensation benefits from the Social Security Administration. She submitted correspondence and articles regarding the use of a service dog. Appellant also submitted a duplicate copy of Dr. Wellinghoff's December 4, 2002 Form OWCP-5 and a copy of Dr. Kelly's February 6, 2002 Form OWCP-5, which indicated that she could perform her regular work schedule on a full-time basis when she no longer had any panic attacks. A February 18, 2002 prescription from Dr. Shelia V. Maliekel, a Board-certified internist, recommended that appellant use a psychiatric service dog to assist with her emotional condition. An August 12, 2001 job offer from the employing establishment for a full-time letter carrier position was approved by Dr. Maliekel on September 13, 2002. She indicated that appellant did not have any physical restrictions. She stated that appellant should return to work with a service dog and that she should not be separated from the dog at any time as the dog was essential to mitigating her disability. Appellant submitted correspondence regarding her request to receive disability compensation benefits from the Social Security Administration.

By decision dated October 9, 2003, the Office terminated appellant's compensation effective October 8, 2003 on the grounds that she refused an offer of suitable work. The Office addressed her reasons for refusing the offered position and found them unacceptable.

Appellant's congressional representative submitted her correspondence regarding her claim and duplicate copies of evidence already of record. Appellant also submitted an August 21, 2001 attending physician's report of Dr. Xavier W. Parreno, an internist, which provided a history that in December 1997 she was threatened by a customer during a telephone conversation. He diagnosed post-traumatic stress disorder and indicated with an affirmative mark that her condition was caused by the employment activity. He further indicated that it was to be determined when appellant could return to her regular work duties. Dr. Parreno's June 19, 2002 attending physician's report provided a history that on March 7, 2001 appellant was threatened during a telephone conversation. He diagnosed post-traumatic stress disorder, major depression and anxiety disorder. Dr. Parreno indicated with an affirmative mark that appellant's conditions were caused by the employment activity and that her ability to return to her regular work duties was yet to be determined. Dr. Maliekel's undated work release form revealed that appellant was unable to work from December 1997 through December 2001. She diagnosed panic episodes, severe post-traumatic stress disorder, major depression and anxiety. She stated that appellant should be evaluated and treated by a psychiatrist. In a December 17, 1997 letter, Dr. Maliekel stated that appellant had been under her care for post-traumatic stress disorder following an assault which manifested as a sleep disorder, muscle spasms and acute anxiety. She noted that appellant was receiving counseling and her medication. She recommended that appellant be off from work or be allowed to work only four to five hours a day for the next two weeks.

Appellant's congressional representative submitted her correspondence regarding her claim and its October 17, 2003 response and duplicate evidence already of record. Appellant submitted a February 3, 2004 medical report of Dr. Ronald M. Schwartz, a psychiatrist, who diagnosed post-traumatic stress disorder, recurrent severe episode of major depressive disorder without psychosis, panic disorder with agoraphobia, generalized anxiety disorder and probable personality disorder NOS. He noted appellant's current medications. Dr. Schwartz stated that it was clear that appellant needed to use her psychiatric support dog at all times which, was necessary for her reasonable safety and monitoring of her mental health condition. He stated that he was aware of a discussion regarding appellant's return to work without her dog and he opined that this would be problematic as the highest level of anxiety, panic and traumatic stress that appellant had mentioned was job related. Dr. Schwartz reiterated that she would need the dog at all times and she had expressed that the dog had been quite effective in assisting her to avoid panic situations. He stated that he was unable to make a full determination at that time as to whether appellant could return to work since this was his first meeting with her and he had an extensive amount of information to review regarding her treatment history. Dr. Schwartz concluded that appellant was not fit to return to work on a psychiatric basis due to her high level of anxiety and unresolved traumatic stress and depressive symptomatology. In her October 30, 2003 progress notes, Dr. Luzio discussed appellant's sadness related to her mother's illness and her current fears noting that her nightmares, flashbacks and panic attacks were worse.

In an April 6, 2004 letter, appellant, through her attorney, requested reconsideration of the Office's October 9, 2003 decision. She submitted Dr. Schwartz' March 24, 2004 medical report in which he noted her psychiatric and medical treatment for several emotional conditions and her use of a psychiatric service dog. He stated that it was clear that appellant's post-traumatic stress disorder, anxiety and depressive symptoms continued and were significantly severe enough to warrant the psychiatric service dog even though she had not been working. Dr. Schwartz further stated that appellant's return to work would add a level of stress and anxiety far beyond what they were currently witnessing. He submitted treatment notes dated April 19, May 4, 11, 18 and 25 and June 3, 2004, regarding appellant's emotional condition.

By decision dated June 14, 2004, the Office denied appellant's request for modification based on a merit review of the claim. The Office found that the evidence submitted by appellant was insufficient to establish that she was unable to perform the duties of the offered position.[1]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[2]

Section 8106(c) of the Federal Employees' Compensation Act[3] provides that a partially disabled employee, who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulation[4] 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 a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

The issue of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the

---

[1] Following the issuance of the Office's June 14, 2004 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128.

[2] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[3] 5 U.S.C. § 8106(c)(2).

[4] 20 C.F.R. § 10.517(a).

[5] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

medical evidence.[6] Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.

ANALYSIS

Dr. Wellinghoff, an Office referral physician, provided a rationalized medical opinion based on an accurate factual and medical background. He conducted a thorough medical and psychological examination and review of appellant's medical records. Dr. Wellinghoff diagnosed panic disorder without agoraphobia and recurrent moderate major depression on Axis I, osteoarthritis and hypothyroidism on Axis II, occupational problems on Axis IV and GAF of 50 on Axis V. There was no diagnosis on Axis II. Although Dr. Wellinghoff stated that appellant's current emotional condition was partly attributed to the March 9, 2001 employment incident and mostly to two other prior work incidents, he recommended that serious consideration should be given to the possibility of malingering since she had not been employed for the last six months. He found that appellant could perform her regular duties as a letter carrier with certain restrictions and stated that she should work in a different facility on a permanent basis, she did not need to use a service dog while performing duties such as sorting mail inside a facility and she should start work two days a week and then add a day per week until she was working full time.

The position required appellant to work from 7:00 a.m. until 3:30 p.m., to change her work location and work two days per week the first week and add a day per week until she returned to full-time work. Appellant was assigned indoor work only casing mail and performing other duties provided within the letter carrier craft and, thus, she did not need a service dog. As the position is within the restrictions set forth by Dr. Wellinghoff, the Board, therefore, finds the offered position suitable.

On July 3, 2003 the Office informed appellant that the position of letter carrier was suitable and informed her of the penalty provision of section 8106 of the Act. She rejected the job offer and submitted progress notes of a therapist whose signature is illegible and Dr. Luzio regarding her psychological counseling. She also submitted Dr. Luzio's July 7, 2003 report indicating that she continued to struggle with her emotional condition resulting from three incidents including the March 9, 2001 employment injury. None of the progress notes or Dr. Luzio's report address appellant's ability to work in the offered position. Therefore, the Board finds that they are insufficient to outweigh Dr. Wellinghoff's opinion.

On September 18, 2003 the Office properly informed appellant that she had 15 days to accept the offered position or be subjected to termination of compensation benefits. She rejected the offered position. Appellant submitted additional progress notes of a therapist whose signature is illegible and Dr. Luzio regarding her therapy. In a February 6, 2002 Form OWCP-5, Dr. Kelly opined that appellant could perform her regular work schedule on a full-time basis when she no longer had panic attacks. Dr. Maliekel prescribed a psychiatric service dog to assist appellant with her emotional condition. Dr. Luzio, Dr. Kelly and Dr. Maliekel did not address whether appellant could perform the duties of the offered position without a service dog.

---

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

Dr. Maliekel approved an August 12, 2001 job offer from the employing establishment, which indicated that appellant was required to work from 7:00 a.m. until 3:30 p.m. She stated that appellant did not have any physical restrictions and that she should return to work with a service dog and not be separated from the dog at any time. Dr. Maliekel's approval of the offered position does not relate to whether appellant could perform the duties of the July 1, 2003 offered position of a letter carrier. The offer did not require appellant to gradually increase her work hours as recommended by Dr. Wellinghoff. Further, Dr. Maliekel did not explain why appellant needed the service dog to return to work. Thus, her opinion is not sufficient to establish that appellant was unable to perform the duties of the July 1, 2003 offered position.

As appellant refused to accept the offered position and the Office followed its procedures, the Board finds that the Office properly found that she refused an offer of suitable work on October 9, 2003. Because the Board has found that the Office properly relied on Dr. Wellinghoff's opinion in terminating appellant's compensation, the burden shifts to appellant to show that her refusal to work in the offered position was justified.[7] The Board has reviewed the additional evidence submitted by appellant and finds that it is not of sufficient probative value to establish that she cannot perform the offered position.

Dr. Parreno's August 21, 2001 and June 19, 2002 attending physician's reports indicate with an affirmative mark that appellant's emotional conditions were causally related to an employment activity and that her ability to return to her regular work duties had not yet been determined. Without more by way of medical rationale explaining causal relationship, the reports are insufficient to support appellant's claim.[8] Dr. Maliekel's undated work release form indicated that appellant suffered from several emotional conditions and that she was disabled for work from December 1997 through December 2001. Her December 17, 1997 letter indicated that she treated appellant for post-traumatic stress disorder following an assault and notes the resulting emotional and physical conditions. The Board has recognized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work.[9] As Dr. Parreno's reports and Dr. Maliekel's work release form and letter substantially predate the July 1, 2003 job offer they are insufficient to outweigh Dr. Welllinghoff's opinion.

Further, Dr. Schwartz' reports are insufficient to outweigh Dr. Wellinghoff's opinion. Dr. Schwartz stated that appellant could not return to work without a support dog as the dog was necessary for monitoring her emotional condition. He also stated that her return to work would add a level of stress and anxiety far beyond what they were currently witnessing. The fear of future injury is not sufficient to justify a refusal of employment otherwise found to be suitable.[10]

---

[7] *Gloria J. Godfrey*, 52 ECAB 486, 488 (2001).

[8] *See Lester Covington*, 47 ECAB 539 (1996); *Barbara J. Williams*, 40 ECAB 649 (1989); *Lillian M. Jones*, 34 ECAB 379 (1982).

[9] *See generally Eileen R. Kates*, 46 ECAB 573 (1995).

[10] *Edward P. Carroll*, 44 ECAB 331 (1992).

Dr. Schwartz' treatment notes regarding appellant's emotional condition and Dr. Luzio's October 30, 2003 progress notes revealing that appellant was sad about her mother's illness and that she had fears do not address whether she was able to perform the offered position of letter carrier.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective October 8, 2003 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2004 and October 30, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member