United States Department of Labor
Employees' Compensation Appeals Board

CONSTANCE A. DAILEY, Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, AUTOMATION CENTER, Austin, TX, Employer	)	**Docket No. 05-1429** **Issued: September 22, 2005**

Appearances:
Constance A. Dailey, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 11, 2004, terminating her compensation, and a May 25, 2005 decision, denying modification of the August 11, 2004 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 11, 2004 and May 25, 2005 decisions.

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 June 4, 2003 appellant, then a 55-year-old general supply specialist, filed an occupational disease claim alleging that she injured her hands, arms and neck due to repetitive tasks performed in her job. The Office accepted her claim for bilateral carpal tunnel syndrome.

Effective October 8, 2003, she was placed on the periodic compensation rolls in receipt of compensation for temporary total disability.

In an unsigned report, Dr. Robert P. Wills, an attending Board-certified anesthesiologist, provided a history of appellant's condition and findings on examination. He diagnosed intractable bilateral upper extremity pain secondary to ulnar neuropathy and carpal tunnel syndrome, possible complex regional pain syndrome and depression. Dr. Wills recommended bilateral ganglion blocks and medication.

In a June 6, 2004 report, Marcia Sobel-Fox, the rehabilitation nurse assigned to appellant's case, indicated that she would meet with Dr. Wills' physician's assistant on June 30, 2004 to obtain a work capacity evaluation.

In a report dated June 17, 2004, Dr. Jonathan C. Race, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on physical examination. He opined that she could work for eight hours a day and provided a list of work restrictions.

A June 25, 2004 file memorandum by an Office claims examiner indicated that appellant's attending physician, Dr. Wills, had released her to return to work for six hours a day with restrictions.

In a June 30, 2004 report, Mary Jo Hart, a physician's assistant for Dr. Wills, indicated that she met with Ms. Sobel-Fox to discuss whether appellant could return to work and, if so, her work restrictions. She stated that appellant was not present and no physical examination was performed. Ms. Hart indicated that appellant could work for six hours a day until her pain was under control and provided a list of work restrictions.

On July 2, 2004 the employing establishment offered appellant a management analyst position for six hours a day with physical demands described as "sedentary" and within the work restrictions listed in the June 30, 2004 report prepared by Dr. Wills' physician's assistant.[1]

In a July 6, 2004 report, Dr. David F. Henges, an attending Board-certified orthopedic surgeon, specializing in hand surgery, provided findings on physical examination and stated his opinion that appellant was unable to work due to a complex regional pain syndrome in both upper extremities, sympathetic dystrophy and depression.[2]

In a July 7, 2004 report, Ms. Sobel-Fox stated, "Dr. Wills' physician's assistant, Mary Jo Hart, Pa-C, released [appellant] to return to work [six] hours per day, limited duty on 30 June [2004]. A job offer was sent to [appellant] on 2 July [2004]."

By letter dated July 19, 2004, the Office advised appellant that the management analyst position was suitable and gave her 30 days in which to accept the position or provide her reasons for refusal. It noted that the job offer was in accordance with her medical limitations as provided

[1] The employing establishment indicated that the restrictions were recommended by Dr. Wills.

[2] Dr. Henges is the physician who referred appellant to Dr. Wills.

by Dr. Wills in a report dated June 30, 2004. The Office also advised her that an employee who refused an offer of suitable work without reasonable cause was not entitled to compensation. On July 20, 2004 appellant indicated that the June 30, 2004 list of restrictions was not prepared by Dr. Wills.

By letter dated July 27, 2004, the Office advised appellant that her reasons for refusing the position were not acceptable and that she had 15 days to accept.

By decision dated August 11, 2004, the Office terminated appellant's compensation effective September 4, 2004 on the grounds that she had refused an offer of suitable work. It stated that the job offer had been based on medical restrictions listed by Dr. Wills.

Appellant requested reconsideration and submitted additional evidence.

In an August 5, 2004 report, received by the Office on August 16, 2004, Dr. Henges stated that he had treated appellant since October 2003 and she had developed complex regional pain syndrome following surgery for her bilateral carpal tunnel syndrome and other nerve problems in her upper extremities. He referred appellant to Dr. Wills for pain management but had not received any reports from his office. Dr. Hedges stated that he had not released appellant to return to work and opined that she remained totally disabled.

By decision dated May 24, 2005, the Office denied modification of the August 11, 2004 decision.[3]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act,[5] which 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."[6] To justify termination of compensation, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[7] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[8]

[3] Appellant submitted additional evidence subsequent to the May 24, 2005 decision. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board has no jurisdiction to consider this evidence for the first time on appeal.

[4] *Richard P. Cortes,* 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *Melvin James,* 55 ECAB ___ (Docket No. 03-2140, issued March 25, 2004).

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero,* 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003).

[7] *Ronald M. Jones,* 52 ECAB 190 (2000); *Arthur C. Reck,* 47 ECAB 339 (1995).

[8] *Richard P. Cortes, supra* note 4.

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome as a result of her employment. The Office terminated appellant's compensation by decision dated August 11, 2004 on the grounds that she refused an offer of suitable work. The initial question is whether the Office properly determined that the offered position was suitable.

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 probative medical evidence.[9]

In the August 11, 2004 termination decision, the Office stated that it relied on the work restrictions imposed by Dr. Wills in finding that the management analyst position offered by the employing establishment was within appellant's work limitations. However, the record reflects that the work restrictions were prepared by a physician's assistant, not Dr. Wills. The Board notes that reports from a physician's assistant are of no probative value under the Act. A "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist.[10] Lay individuals such as physician's assistants, nurse practitioners and social workers are not competent to render a medical opinion.[11] Therefore, the report from the physician's assistant is not probative on the issue of whether appellant was capable of performing the management analyst position offered by the employing establishment. The record does not contain any evidence that the restrictions provided by Ms. Hart were ever reviewed or approached by Dr. Wills. Moreover, Dr. Henges submitted reports noting that appellant remained totally disabled. Consequently, the Office erred in finding the offered position constituted suitable work based on the work restrictions provided by the physician's assistant. Accordingly, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation based on her refusal to accept an offer of suitable work.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

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

[10] 5 U.S.C. § 8101(2).

[11] *See Robert J. Krstyen*, 44 ECAB 227 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 24, 2005 and August 11, 2004 are reversed.

Issued: September 22, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board