United States Department of Labor
Employees' Compensation Appeals Board

CHERYL A. GRIGSBY, Appellant	)	
and	)	**Docket No. 05-660**
	)	**Issued: June 20, 2006**
DEPARTMENT OF LABOR, VETERANS EMPLOYMENT & TRAINING SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Arlene Glenn Simolike, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 24, 2005 appellant, through her attorney, filed a timely appeal from a May 21, 2004 merit decision of the Office of Workers' Compensation Programs denying modification of its termination of her compensation for refusing 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 benefits effective August 9, 2003 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On January 17, 2001 appellant, then a 41-year-old management service assistant, filed a claim for a traumatic injury occurring that date in the performance of duty. She stopped work on January 23, 2001. The Office accepted appellant's claim for a disc herniation. On December 14,

2001 Dr. Andrew Freese, a Board-certified neurosurgeon and her attending physician, performed a hemilaminectomy at L5, and a facetectomy, foraminotomy and discectomy at L5-S1 with the placement of a "pyramesh cage with autologous iliac crest bone graft; L5 through S1 pedicle screw fixation/fusion with autologous iliac crest bone graft and intertransverse/facet fusion."

On February 4, 2003 the Office referred appellant to Dr. Anthony Salem, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated February 25, 2003, Dr. Salem stated, "Clinically, [appellant] is basically normal neurologically, and there are no disabling findings, except for the fact that this woman has a significant supratentorial overlay and will not move…." He opined that she had sustained disc degeneration with bulging at three levels rather than a "significant disc herniation" and found that the December 14, 2001 surgery was unnecessary. Dr. Salem diagnosed a successful fusion at L5-S1 and found that she could resume her usual employment. In an accompanying work restriction evaluation, the physician indicated that appellant could work four hours per day with restrictions.

In a report dated March 17, 2003, Dr. Freese expressed disagreement with Dr. Salem's report. He noted that appellant currently had symptoms of pain throughout her left leg. Dr. Freese found that appellant was "clearly disabled and appears to have reached maximum medical improvement. She may not be able to return to work."

The Office determined that a conflict in medical opinion existed between Dr. Salem and Dr. Freese and referred appellant to Dr. Milton D. Soiferman, an osteopath certified by the American Osteopathic Association with a primary specialty in family practice, for an impartial medical examination.[1]

In a report dated April 21, 2003, Dr. Soiferman diagnosed a lumbar disc herniation, an L5-S1 discectomy and fusion and deconditioning due to pain. He opined that she could return to her usual employment with no lifting or carrying over 10 pounds. In an accompanying work restriction evaluation, Dr. Soiferman found that she could work four to six hours per day at the beginning and gradually increase her hours.

On June 4, 2003 the employing establishment offered appellant the position of management service assistant for four hours per day. The position was sedentary with no lifting, pushing or pulling over 10 pounds.

By letter dated June 11, 2003, the Office informed appellant that the position was suitable and provided her 30 days to accept the position or offer reasons for refusal. The Office notified her that she would be paid for any difference in salary between the offered position and her date-of-injury position, that she could accept the job without penalty and that an employee who refused or neglected suitable work was not entitled to further compensation.

Appellant submitted medical evidence, including additional reports from Dr. Freese and a functional capacity evaluation dated June 14, 2003 which indicated that she could walk and carry

[1] In its March 14, 2003 referral letter, the Office indicated that it was referring appellant to Dr. Milton D. Eiferman rather than Dr. Milton D. Soiferman; however, the address listed is that of Dr. Soiferman's office. It thus appears to be a typographical error.

up to 10 pounds constantly. She also argued that she was unable to work due to pain and her need for further medical procedures.

In a letter dated June 26, 2003, the Office informed appellant that her reasons for refusing the position were unacceptable. The Office provided her 15 days to accept the position or have her compensation terminated.

By letter dated July 2, 2003, appellant's attorney indicated that she was not returning to work on the advice of Dr. Freese.

In a decision dated July 16, 2003, the Office terminated appellant's compensation effective August 9, 2003 on the grounds that she refused an offer of suitable work.

On August 18, 2003 appellant, through her attorney, requested reconsideration and submitted additional medical evidence. By decision dated October 3, 2003, the Office denied modification of its July 16, 2003 decision.

Appellant, through counsel, again requested reconsideration on January 13, 2004. The Office denied modification by decision dated May 21, 2004 after finding that the opinion of Dr. Soiferman represented the weight of the medical evidence.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act, 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.[3] 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.[4] 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.[5]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Pursuant

[2] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[3] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

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

[5] *Joan F. Burke*, 54 ECAB 406 (2003).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 4.

to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[7]

Section 8123(a) provides that, 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.[8] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

The Office's procedure manual provides for the use of the Physicians' Directory System in selecting referee physicians, which includes "physicians listed in the American Board of Medical Specialties Directory and specialists certified by the American Osteopathic Association (AOA)…."[10] The procedure manual further states that specialists shall be selected "in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area…."[11]

ANALYSIS

The Office accepted that appellant sustained a disc herniation due to a January 17, 2001 employment injury. The Office terminated her compensation effective August 9, 2003 on the grounds that she refused a June 4, 2003 offer of suitable work by the employing establishment. The initial question in this case 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 is primarily a medical question that must be resolved by the medical evidence.[12] In this case, the Board finds that the medical evidence does not establish that the modified position was suitable.

The Office determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Freese, a Board-certified neurosurgeon, and Dr. Salem, a Board-certified orthopedic surgeon, regarding the extent of her employment-related disability. 5 U.S.C. § 8123(a) provides that, 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.[13] The Office's implementing regulation states that

[7] 20 C.F.R. § 10.516.

[8] 5 U.S.C. § 8123(a).

[9] 20 C.F.R. § 10.321.

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003).

[11] *Id*. at Chapter 3.500.4(b) (May 2003).

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

[13] 5 U.S.C. § 8123(a).

the Office will select a physician to resolve the conflict in medical opinion who is qualified in the appropriate specialty.[14] A specialist is defined as "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice."[15] In this case, the Office referred appellant to Dr. Soiferman, an osteopath certified by the American Osteopathic Association in family practice, for an impartial medical examination. It thus appears that Dr. Soiferman is not qualified as a specialist but instead as a family practitioner. Consequently, Dr. Soiferman's opinion is insufficient to resolve the conflict in medical opinion on the issue of the extent of appellant's disability for employment.

As the Office failed to follow its procedures and refer appellant to an appropriate specialist for resolution of the conflict in medical opinion, it has not met its burden of poof to terminate her compensation benefits under section 8106(c).

CONCLUSION

The Board finds that the Office did not properly terminate appellant's compensation benefits effective August 9, 2003 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

ORDER

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

Issued: June 20, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[14] 20 C.F.R. § 10.321(b).

[15] *Dorland's Illustrated Medical Dictionary* 1730 (30th ed. 2003).