United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	**Docket No. 08-322**
	)	**Issued: October 7, 2008**
U.S. POSTAL SERVICE, ANNANDALE POST OFFICE, Annandale, VA, Employer	)	

Appearances:
Stephen D. Scavuzzo, Esq., for the appellant
No appearance, for the Director

Oral Argument May 14, 2008

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2007 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated February 15 and August 8, 2007, affirming the termination of her compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective November 27, 2005 for refusing suitable work under 5 U.S.C. § 8106(c). Counsel contends that the Office improperly relied on the medical reports of an Office referral physician in finding that the offered position was suitable.

FACTUAL HISTORY

On May 24, 2002 appellant, then a 44-year-old sales service associate, filed a traumatic injury claim alleging that on that date she experienced severe pain in her back after lifting a tray

of mail. On July 29, 2002 she stopped work. By letter dated December 11, 2002, the Office accepted the claim for a herniated lumbar disc.

The Office received medical reports dated December 13, 2003 to September 23, 2004 from Dr. Eric G. Dawson, an attending orthopedic surgeon, which stated that appellant continued to experience back problems and that she was totally disabled for work.

By letter dated October 27, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a January 21, 2005 medical report, Dr. Smith reviewed the history of the May 24, 2002 employment injury.[1] He stated that the claim had been accepted for displacement of thoracic or lumbar intervertebral disc without myelopathy. On physical and neurological examination, Dr. Smith reported essentially normal findings with the exception of appellant's complaint of back pain and numbness of the entire right lower extremity. He stated that, despite her pain behavior, there was no objective physiologic finding of an ongoing back strain or radicular problem. Dr. Smith noted that it was unclear as to whether appellant had any displacement of the thoracic or intervertebral discs since he did not have any diagnostic test results. He opined that her clinical examination was benign and there was no evidence of any ongoing significant pathology in her spine or lower extremities causally related to the May 24, 2002 employment injury. Dr. Smith found no evidence of unrelated conditions that would prevent appellant from returning to work. Appellant could perform light-duty work that did not require lifting more than 25 pounds. Dr. Smith indicated that, if diagnostic testing demonstrated no evidence of any post-traumatic abnormality related to the accepted employment-related injury, she could return to her regular-duty work. He stated that she did not require future medical treatment, testing or activity modification other than the stated temporary restrictions. In a January 21, 2005 work capacity evaluation (Form OWCP-5c), Dr. Smith stated that appellant was restricted from pushing and pulling more than 25 pounds. She could not squat, kneel or climb.

By letter dated January 27, 2005, the Office requested that the employing establishment offer appellant a permanent position within the restrictions set forth by Dr. Smith.

On February 9, 2005 the employing establishment offered appellant a modified distribution window clerk position. It involved sales and service associate and distribution duties. The position required rendering service to customers at the retail window and assisting in distribution areas such as, unendorsed bulk business mail (UBBM), post office box and second notices and other duties as assigned not to exceed appellant's physical limitations. The physical requirements included pushing, pulling and lifting intermittently no more than 25 pounds, eight hours per day and no squatting, kneeling or climbing.

[1] The Board notes that appellant attended the scheduled examination with Dr. Smith on November 22, 2004. In a letter dated November 22, 2004, Dr. Smith advised the Office that he discontinued the examination because appellant insisted on tape recording it which was against his policy. On January 13, 2005 the Office issued a notice proposing to suspend appellant's compensation pursuant to 5 U.S.C. § 8123(d) because she failed to cooperate with the scheduled medical examination. It rescheduled the examination with Dr. Smith.

In a supplemental report dated March 3, 2005, Dr. Smith stated that a February 28, 2005 MRI scan of appellant's thoracic spine demonstrated very minimal degeneration at T9 and T10 with no evidence of any right-sided disc herniation, spinal stenosis or significant foraminal narrowing. He opined that appellant did not have any displaced thoracic or lumbar disc or right leg pain coming from the back. Dr. Smith advised that she had no objective residuals of her May 24, 2002 employment-related injury. He concluded that appellant could return to her regular-duty work.

On March 15, 2005 the employing establishment stated that the offered position was still available.

In a March 24, 2005 report, Dr. Dawson reviewed recent MRI scan findings by Dr. Geeti G. Parsa, a physiatrist, of appellant's thoracic and upper lumbar. He stated that the report was incomprehensible since her claim had been accepted for impingement of the lumbar spine and there were findings of lumbar discopathy and neural radiculopathy. Dr. Dawson stated that appellant had a positive straight leg raising test and sciatic nerve irritability. He stated that she was not cleared to return to work.

On April 7, 2005 the Office received appellant's February 17, 2005 rejection of the employing establishment's job offer. She stated that her attending physician opined that the offered position was not suitable to her existing condition.

By letter dated April 8, 2005, the Office advised appellant that a suitable position was available and in accordance with the restrictions set forth by Dr. Smith. Appellant had 30 days to either accept the position or provide an explanation for refusing the position. The Office further advised her that she would be paid for any difference in salary between the offered position and her date-of-injury position. It informed appellant that her compensation would be terminated based on her refusal to accept a suitable position.

On May 8, 2005 appellant again rejected the job offer, contending that Dr. Dawson found that the offered position was not physically suitable.

By letters dated September 14 and 26, 2005, the Office advised appellant that she had not provided any reasons for refusing the offered position. Appellant was given 15 days to accept the position. In an October 9, 2005 letter, she stated that she had provided a valid reason for rejecting the job offer.

By decision dated November 29, 2005, the Office terminated appellant's compensation effective November 27, 2005. It found that the offered position was consistent with Dr. Smith's restrictions.

The Office received Dr. Dawson's December 12 and 19, 2005 reports. Dr. Dawson stated that appellant had degenerative disc disease at multiple levels and impingement at L5 and S1 based on Dr. Parsa's electromyogram/nerve conduction study (EMG/NCS) test results.

In a December 19, 2005 letter, appellant requested reconsideration of the Office's November 29, 2005 decision.

By decision dated January 17, 2006, the Office denied modification of the November 29, 2005 decision. It noted that Dr. Parsa's EMG/NCS findings were not contained in the case record. The Office determined that the evidence of record did not establish that appellant was unable to perform the duties of the offered position.

In a letter dated January 30, 2006, appellant requested reconsideration.

Appellant submitted Dr. Parsa's October 7, 2002 EMG/NCS results which found submaximal force generation in all muscles that may be due to pain that was either preexisting or exacerbated by an EMG needle. He also found moderate chronic radiculopathy on the right at L5 and S1. Dr. Parsa noted some component of complex regional pain syndrome.

The Office found a conflict in the medical opinion evidence between Dr. Smith and Dr. Parsa as to whether the offered position was suitable as of April 8, 2005. By letter dated May 10, 2006, it referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Edward G. Alexander, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a June 14, 2006 report, Dr. Alexander reviewed the history of the May 24, 2002 employment-related injury and a back injury appellant sustained at work in 1988 and her medical treatment. He reported essentially normal findings on physical examination with the exception of diminished range of motion in all planes of the back. Dr. Alexander diagnosed degenerative disc disease with bulging discs in the lumbar spine. He stated that an EMG of the spine demonstrated chronic radiculopathy on the right at L5-S1 that was possibly related to appellant's 1988 injury. Dr. Alexander also diagnosed possible regional pain complex versus supratentorial factors which caused stocking-type analgesia. He stated that there was no anatomic evidence of radiculopathy other than on the EMG. Dr. Alexander could not find any neurologic damage on examination. He believed some psychological factors were involved. Dr. Alexander opined that appellant was not totally impaired and that she could perform light-duty work as long as it had a sit and stand option and she did not have to bend or lift over 15 to 20 pounds.

By decision dated August 3, 2006, the Office denied modification of the January 17, 2006 decision. It accorded special weight to Dr. Alexander's June 14, 2006 report as an impartial medical specialist in finding that the offered position was suitable.

Appellant's subsequent requests for modification of the Office's prior decisions were denied by the Office on February 15 and August 8, 2007. The Office found that Dr. Alexander's impartial medical opinion was entitled to special weight in finding that appellant could perform the duties of the offered position.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee

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

who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] To support termination, 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]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[6] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[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 the 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] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[10]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[11] Thus, before

[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. § 10.500(b).

[7] *Richard P. Cortes*, 56 ECAB 200 (2004).

[8] *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

[9] *See Connie Johns*, 44 ECAB 560 (1993).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[11] 20 C.F.R. § 10.516.

terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[12] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[13]

Section 8123 of the Act 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.[14] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Office accepted that appellant sustained a herniated disc of the lumbar spine as a result of lifting a tray of mail at work on May 24, 2002. Dr. Dawson, an attending physician, stated that appellant continued to experience back problems and was totally disabled. The Office, however, in the November 29, 2005 decision, terminated appellant's compensation benefits effective November 27, 2005, finding that she refused an offer of suitable work as a modified distribution window clerk based on the medical reports of Dr. Smith, an Office referral physician. It later found a conflict in the medical opinion evidence between Dr. Dawson and Dr. Smith regarding appellant's ability to perform the offered position and referred her to Dr. Alexander for an impartial medical examination. The Office, in subsequent decisions, terminated appellant's compensation benefits on the grounds that she refused suitable work based on Dr. Alexander's opinion that she was able to perform light-duty work with restrictions. The initial question in this case is whether the Office properly determined that the offered position was medically 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.[16]

On January 21, 2005 Dr. Smith stated that appellant's claim had been accepted for displacement of thoracic or lumbar intervertebral disc without myelopathy. On physical and neurological examination, he reported his essentially normal findings with the exception of appellant's complaint of back pain and numbness of the entire right lower extremity. Dr. Smith

[12] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

[13] *Id.*

[14] 5 U.S.C. § 8123.

[15] *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

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

stated that, despite a lot of pain behavior, there was no objective physiologic finding of an ongoing back strain or radicular problem. He related that it was unclear as to whether appellant had any displacement of the thoracic or intervertebral discs since he did not have any diagnostic test results. Dr. Smith opined that her clinical examination was benign and there was no clinical evidence of any ongoing significant pathology in her spine or lower extremities causally related to the May 24, 2002 employment injury. He found no evidence of unrelated conditions that would prevent appellant from returning to work. Dr. Smith opined that she could perform light-duty work that did not require her to lift, push or pull more than 25 pounds and squat, kneel or climb.

On March 3, 2005 Dr. Smith reviewed a February 28, 2005 MRI scan of appellant's thoracic spine which demonstrated some, although very minimal degeneration at T9 and T10 and no evidence of any right-sided disc herniation, spinal stenosis or significant foraminal narrowing. He opined that based on the MRI scan findings, appellant did not have any displaced thoracic or lumbar discs and no right leg pain coming from the back. Dr. Smith further opined that she had no objective residuals of her May 24, 2002 employment-related injury and that she could return to her regular-duty work.

The Board notes that Dr. Smith's history of injury is incorrect as appellant's claim has not been accepted for a thoracic condition. In addition, his opinion that she no longer had any residuals of the May 24, 2002 employment injury is primarily based on objective evidence related to her thoracic spine. Dr. Smith did not explain how the diagnosed thoracic spine conditions were causally related to the accepted employment injury. It is well established that medical reports must be based on a complete and accurate factual and medical background, and medical opinions based on an incomplete or inaccurate history are of little probative value.[17] Thus, Dr. Smith's reports are insufficient to cause a conflict with Dr. Dawson's opinion regarding appellant's ability to perform the duties of the offered position which resulted in the referral to Dr. Alexander for an impartial medical examination and termination of her compensation benefits.

The Board finds that the medical evidence of record does not establish that appellant was capable of performing the modified distribution window clerk position offered by the employing establishment. In determining that she was physically capable of performing the offered position, the Office improperly relied on the opinion of Dr. Smith. Therefore, the Office improperly terminated appellant's compensation on the grounds that she refused suitable work.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation effective November 27, 2005 on the grounds that she refused suitable work.

[17] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

ORDER

IT IS HEREBY ORDERED THAT the August 8 and February 15, 2007 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: October 7, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board