United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 09-559**
	)	**Issued: November 25, 2009**
INTERNAL REVENUE SERVICE,	)	
Holtsville, NY, Employer	)	
	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 23, 2008 appellant, through her attorney, filed a timely appeal from February 8 and November 17, 2008 merit decisions of the Office of Workers' Compensation Programs terminating compensation 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 the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective February 16, 2008 on the grounds that she refused an offer of suitable work. On appeal, appellant's representative contends that the Office adopted an adversarial approach by accepting nonrationalized and equivocal medical reports by Office physicians at the expense of thorough and consistent evidence supporting a continuing work-related disability.

FACTUAL HISTORY

On December 29, 2004 appellant, then a 79-year-old collection representative, filed a traumatic injury claim (Form CA-1) alleging that, on December 23, 2004, while walking from her car to the parking lot, she stepped in a depression in the concrete and fell on her face. She sustained several cuts and bruises on her legs, hands and face and injured the middle finger of her left hand and shoulder. On March 16, 2005 the Office accepted the claim for aggravation of left shoulder sprain and aggravation of left hip sprain. Appellant returned to her regular duties in 2005. On September 21, 2005 she underwent a left shoulder rotator cuff repair, distal clavicle excision and labral debridement. Appellant was out of work until June 19, 2006 when she returned to light duty for one week with a restriction on lifting. On July 12, 2006 she filed a claim for a recurrence (Form CA-2a) alleging that her condition had not improved since her accident but that she was ordered to work by her supervisors. Appellant stated that she stopped work on June 26, 2007 and that she needed shoulder replacement to relieve her pain. By decision dated September 22, 2006, the Office accepted the recurrence claim and authorized benefits. On January 12, 2007 it included permanent aggravation of left shoulder degenerative joint disease as an accepted condition.

On March 1, 2007 the Office referred appellant to Dr. James Kipnis, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her continuing disability. Dr. Kipnis reviewed her medical and occupational history. He diagnosed osteoarthritis of the left shoulder and a history of prior rotator cuff tear and repair of the left shoulder status post arthroscopy with subacromial decompression and distal clavicle excision. Dr. Kipnis stated that the December 23, 2004 fall permanently aggravated appellant's left shoulder osteoarthritis. He opined that she currently had a partial disability of a moderate degree but that she was permanently restricted from performing her regular employment duties. However, Dr. Kipnis stated that appellant would be capable of performing light or sedentary work activities, primarily using her right arm for activities and with limited use of the left arm due to pain. He further found that she reached maximum medical improvement unless she decided to pursue her surgical options. Dr. Kipnis completed a work capacity evaluation indicating that appellant was unable to reach above the shoulder, push, pull, lift, climb or operate a motor vehicle at work with her left arm. He limited her operating a motor vehicle to and from work to one hour and restricted pushing, pulling and lifting to 10 pounds with her right arm.

In a June 26, 2007 medical note, appellant's treating physician, Dr. Brian McGinley, a Board-certified orthopedic surgeon, stated that appellant was totally disabled for an indefinite time with little or no prospect of returning to work. In a report dated June 26, 2007, he stated that she was indefinitely out of work due to severe limitation in function and activities due to her shoulder rotator cuff arthropathy.

The Office determined that a conflict of medical opinion existed between Drs. McGinley and Kipnis as to appellant's continuing disability and referred her to Dr. Richard A. Ritter, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an August 8, 2007 medical report, Dr. Ritter reviewed appellant's medical history. Physical examination revealed severe limitation of active motion in the shoulder in all directions. Passive range of motion demonstrated forward elevation to approximately 90 degrees, external

rotation to approximately 10 degrees and internal rotation to the region of the left buttock, all of which elicited pain and was accompanied by severe crepitus and clicking. Appellant demonstrated good sensation, full painless motion of the elbow, wrist and fingers and adequate and symmetric range of motion of the cervical spine. Dr. Ritter noted tenderness to palpation of the left trapezius muscle and generalized tenderness over the anterior and lateral aspects of the shoulder. Appellant's overall stability appeared intact; however, Dr. Ritter stated that he had difficulty performing apprehension testing due to motion limitations. Similarly, Dr. Ritter had difficulty assessing strength due to the pain produced during testing. He diagnosed advanced osteoarthritis or degenerative joint disease of the left shoulder. Dr. Ritter opined that the December 23, 2004 employment injury permanently aggravated and potentially accelerated the advancement of appellant's underlying osteoarthritic condition. He concurred with Dr. Kipnis' opinion that appellant was capable of working with restrictions. Dr. Ritter noted sympathy for appellant as an 81-year-old woman with legitimate pain and severe restrictions, which could preclude her ability to work extended periods of time. However, he opined that she could perform light or sedentary work activities with her dominant right upper extremity with very limited use of her left arm due to pain. For example, Dr. Ritter stated that appellant could perform in person or telephone interviews, could sit for extended periods of time, talk over the telephone using a headset or have face-to-face contact. Although appellant could not perform even light lifting with her left upper extremity, she could perform reasonable lifting with her dominant right upper extremity and would be able to read information from a computer screen. Dr. Ritter noted that her ability to use a keyboard might be restricted due to pain; however, she could possibly perform light typing with her right hand and would be able to dictate verbally. Writing would also be possible with appellant's right hand. Dr. Ritter added that her left shoulder pain and discomfort might prevent her from working long hours. He opined that appellant reached maximum medical improvement but noted that she may achieve an improved medical condition with less pain if she underwent total shoulder replacement. In a work capacity evaluation, Dr. Ritter indicated that she was unable to perform her usual duties and provided permanent restrictions. The restrictions included a total limitation on reaching, reaching above the shoulder, pushing, pulling and lifting with the left shoulder, operating a motor vehicle at work and climbing. Dr. Ritter also provided a 1-hour restriction on operating a motor vehicle to and from work, a 10-pound restriction on lifting with the right arm and recommended 15-minute breaks every 2 to 3 hours. He indicated that appellant was able to sit, walk or stand for eight hours.

On September 21, 2007 the Office advised the employing establishment that Dr. Ritter's opinion represented the weight of the medical evidence. It forwarded a copy of his work restrictions to the employing establishment and requested that it offer appellant a position within the provided restrictions.

On October 18, 2007 the employing establishment offered appellant a light-duty position as a contact representative working from 3:00 p.m. to 11:30 p.m., eight hours a week. The general job duties included conducting personal or telephone interviews with a wide range of individuals, answering inquiries and advising taxpayers of enforcement activities and conducting research for information and to locate taxpayers and their assets. Appellant would be in a seated position and would be inputting data into a remote computer terminal at eye level. No reaching or working above the shoulder level was required and she would not be required push, pull or lift anything with her left hand or push, pull or lift anything exceeding 10 pounds with her right

hand. Appellant might be required to walk short distances on an intermittent basis, but not to exceed a total of one hour a day. No stair climbing was involved and she would be allowed to sit or stand at her convenience and permitted to take a 15-minute break every 2 to 3 hours.

In an amended offer dated October 23, 2007, the employing establishment noted that it had made a typographical error in the prior offer and corrected appellant's work hours to eight hours a day, rather than eight hours a week.

By letter dated October 25, 2007, the Office notified appellant that it had reviewed the employing establishment's light-duty offer and found it suitable in accordance with her medical limitations. It confirmed that the position was available and notified her that she would be paid for any difference in pay between the offered position and her date-of-injury job. The Office advised that appellant was expected to accept the position within 30 days or provide a written explanation of her reasons for rejecting the offer otherwise her compensation and schedule award would be terminated.

In a November 20, 2007 letter, appellant contended that she was not able to return to work full time to use a computer. She stated that she was not able to use her arm in a position where she has to move it forward, back or up and that she could not raise her arm away from her body without increasing her constant pain. Appellant claimed that using her computer at home was impossible and that she would be unable to speak to taxpayers with her pain and concentrate on her duties. Further, she contended that Dr. Ritter told her that her shoulder was "a terrible mess," that he was biased and that he reduced her to tears while attempting to move her arm.

On December 3, 2007 the Office stated that it received appellant's November 20, 2007 statement but that she did not provide a valid reason for refusing to accept the offered position. It advised that the weight of the medical evidence rested with Dr. Ritter, who opined that appellant could return to limited duty within the provided restrictions. The Office notified her that she had 15 additional days to accept the offer or her benefits would be terminated.

In a December 10, 2007 letter, appellant informed the employing establishment that she was declining the job offer due to physical injuries sustained from the December 23, 2004 employment injury. She also requested that the employing establishment start her retirement process.

In a January 29, 2008 e-mail, the employing establishment clarified that an average contact representative could work 20 to 30 cases a day and that 100 words per case was a general guide. In addition to the narratives, the position would also require input of information and command codes and logging on and off various systems.

By decision dated February 8, 2008, the Office terminated appellant's compensation benefits effective February 16, 2008 on the grounds that she failed to accept suitable employment. It reviewed the offered light-duty position of customer representative and found that the position was suitable and within the work restrictions provided by Dr. Ritter, who represented the weight of the medical evidence.

On August 28, 2008 appellant, through her representative, filed a request for reconsideration. In an accompanying brief, appellant's representative contended that appellant

sustained more than a simple strain as a result of the employment injury and that the Office failed to advise the second opinion and impartial medical examiner of severity of her injuries, that the Office improperly referred her to Dr. Ritter and engaged in "[the physician] shopping," that Dr. Ritter's report returning her to light duty was equivocal, at best and that the medical evidence was consistent in establishing that her injuries were permanent.

Appellant also submitted medical reports dated March 31 through October 27, 2008 related to her acupuncture treatment and medical reports dated March 8 and October 2 and 9, 2007 addressing continuing left shoulder pain.

By decision dated November 17, 2008, the Office denied modification of the February 8, 2008 decision. It found that the light-duty position was within the physical limitations provided by Dr. Ritter, who represented the weight of the medical evidence as an impartial medical examiner. The Office also found that the arguments presented by appellant's representative were insufficient to justify refusal of the offered position.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides, at section 8106(c)(2), that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[1] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[2] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[3] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[4] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establish is primarily a medical question that must be resolved by the medical evidence of record.[5]

The implementing regulations of the Act provide 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 entitlement to compensation is terminated.[6]

[1] 5 U.S.C. § 8106(c)(2).

[2] *See Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[3] *See H. Adrian Osborne*, 48 ECAB 556 (1997).

[4] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[5] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[6] 20 C.F.R. § 10.517(a).

ANALYSIS

The Office accepted that appellant sustained an aggravation of left shoulder sprain, aggravation of left hip sprain and permanent aggravation of left shoulder degenerative joint disease as a result of an employment-related fall on December 23, 2004. Appellant returned to work in 2005 until she underwent left shoulder rotator cuff repair on September 21, 2005. She returned to light duty in June 19, 2006 but one week later sustained a recurrence of disability and stopped working.

On March 1, 2007 the Office referred appellant to Dr. Kipnis for an evaluation of her continuing disability. Dr. Kipnis opined that she could return to light duty and provided work restrictions. In medical reports dated June 26, 2007, Dr. McGinley, appellant's treating physician, stated that appellant was totally disabled for an indefinite period of time and could not work due to severe limitation in function and activities. The Office thereafter properly found a conflict of medical evidence as to whether appellant was totally disabled, requiring a referral to an impartial medical specialist for resolution.[7]

The Office referred appellant to Dr. Ritter, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion. Dr. Ritter performed a thorough evaluation on her and reviewed the extensive medical record. He reported examination findings and opined that appellant could sit, walk or stand, eight hours a day with restrictions. These restrictions included a total limitation on reaching, reaching above the shoulder, pushing, pulling and lifting with the left shoulder, operating a motor vehicle at work and climbing, a 10-pound weight restriction on lifting with the right arm and 15-minute breaks every 2 to 3 hours.

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[8] Dr. Ritter's opinion represents the weight of the medical evidence on the issue of appellant's ability to work and establishes that she was capable of working eight hours per day with the provided restrictions.

On October 18, 2007 the employing establishment offered appellant a light-duty position as a contact representative in accordance with Dr. Ritter's restrictions. It amended this offer on October 23, 2007 to reflect that she would work eight hours a day. The Office reviewed this position and found it to be suitable for appellant. The Board notes that the position was consistent with the work restrictions provided by Dr. Ritter.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[9] The Board finds that the Office properly

[7] The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: If there is a 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] *Kathryn Haggerty*, 45 ECAB 383 (1994).

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

followed its procedural requirements in this case. By letter dated October 25, 2007, the Office advised appellant that the offered position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. It further notified her that the position remained open, that she would be paid for any difference in pay between the offered position and her date-of-injury job and that a partially disabled employee who refused suitable work was not entitled to compensation.[10]

By letter dated November 20, 2007, appellant contended that she could not use a computer because she was unable to move her arm away from her body without increasing her constant pain and that she would not be able to concentrate on her duties of speaking with taxpayers. She also took issue with Dr. Ritter's medical report, stating that he was biased, had told her shoulder was "a terrible mess" and reduced her to tears while attempting to move her arm; however, appellant did not submit any medical evidence establishing that her physical symptoms would prevent her from performing the light-duty position or to contradict Dr. Ritter's findings that she could perform light typing with her right hand. Further, appellant failed to submit any evidence to support her allegations regarding Dr. Ritter's evaluation. Thus, she did not submit an acceptable reason for refusal.[11]

On December 3, 2007 the Office properly informed appellant that her reasons for refusing the offered position were unacceptable and provided her 15 days to accept the position. In a December 10, 2007 letter, appellant declined the job offer. As she refused suitable work, the Officer properly terminated her wage-loss compensation effective February 16, 2008. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position.

Appellant's representative subsequently submitted a brief for reconsideration arguing that the Office did not appropriately apprise the second opinion physician and impartial medical examiner of the severity of her injuries, that the Office engaged in "[the physician] shopping," that Dr. Ritter's report was equivocal and that the medical evidence consistently established that appellant's injuries were permanent. He did not, however, provide any evidence supporting these allegations. Appellant also submitted several medical reports relating to her continuing left shoulder pain and acupuncture treatment, but these reports did not specifically address her work restrictions or the offered job.[12]

An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[13] The Board finds that the Office properly terminated appellant's monetary compensation due to her refusal of suitable work. Appellant did not, thereafter, establish that her refusal of suitable work was justified.

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[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.801.4-4 (December 1993).

[11] *See id*. at 2.801.4-5. *See also E.H.*, 60 ECAB ___ (Docket No. 08-1862, issued July 8, 2009).

[12] *See E.H.*, *supra* note 11.

[13] 20 C.F.R. § 10.517(a).

On appeal, appellant's representative contends that the Office accepted nonrationalized medical reports and ignored thorough and consistent evidence supporting a continuing work-related disability. As stated above, the issue of whether an employee has the physical ability to perform a modified position is primarily a medical question to be resolved by the medical evidence of record.[14] The Office properly referred appellant to Dr. Ritter, selected as the impartial medical specialist, who reviewed her full medical history, including reports from her treating physician. Dr. Ritter performed a thorough, documented physical evaluation and provided work restrictions in accordance with his findings. His report was well rationalized and his opinion, that appellant could return to light duty, constitutes the weight of the medical evidence.[15] Appellant did not submit any additional, rationalized medical evidence supporting a continuing total disability or explaining why she could not perform the specific duties of the offered position[16] nor did she submit evidence establishing any deficiency in Dr. Ritter's medical report. Therefore, the Board finds that appellant's contentions on appeal are not supported by the record.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective February 16, 2008 on the grounds that she refused an offer of suitable work.

[14] *See John E. Lemker, supra* note 5.

[15] *See Kathryn Haggerty*, *supra* note 8.

[16] *See Catherine G. Hammond*, 41 ECAB 375 (1990).

ORDER

IT IS HEREBY ORDERED THAT the November 17 and February 8, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 25, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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