United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 09-252**
	)	**Issued: October 23, 2009**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Sugarland, TX, Employer	)	

Appearances:
James R. Linehan, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2008 appellant, through her attorney, filed a timely appeal from the September 5, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of a January 6, 2006 decision terminating her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work. On appeal, appellant's attorney contended that the Office improperly terminated her compensation as the evidence established that she accepted the offered position and returned to work.

FACTUAL HISTORY

On August 27, 1997 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that on August 25, 1997 she injured her neck and upper back while casing mail. The Office accepted her claim for cervical strain and aggravation of preexisting cervical disc disease with C5-6 cervical radiculopathy and right shoulder adhesive capsulitis. By letter dated April 23, 1998, appellant was placed on the periodic rolls for temporary total disability. The

Office approved surgery for anterior interbody arthrodesis with accompanying decompression and instrumentation at C5-6 which was performed on July 9, 1998 and C4-5 and C6 anterior cervical discectomies and fusion, which was not performed. It authorized right shoulder arthroscopy and debridement, which occurred on October 8, 1999,[1] right shoulder arthroscopic decompression which occurred on May 30, 2003 and right shoulder arthroscopic subacromial decompression which occurred on November 4, 2004.

In reports dated January 5, February 17, March 23, April 19, June 16 and 30, 2005, Dr. Jain diagnosed right shoulder and neck pain. She indicated that appellant was totally disabled at this point in time and had not reached maximum medical improvement. A physical examination revealed limited range of motion.

In an April 14, 2005 report, Dr. David G. Vanderweide, a second opinion physician, Board-certified orthopedic surgeon, diagnosed cervical radiculopathy, right shoulder internal derangement and status post cervical anterior fusion and right shoulder surgery three times. A physical examination revealed no instability, negligible cervical range of motion in extension and flexion, diminished right side nondermatomal sensation and acromioclavicular joint tenderness on palpation. Right shoulder range of motion revealed 100 degrees flexion, 80 degrees abduction, 90 decrees external rotation and 75 degrees of internal rotation with pain. Dr. Vanderweide opined that appellant was capable of working with restrictions. In an attached work capacity evaluation form, he indicated that appellant was capable of working four hours per day with restrictions including no pushing, pulling or lifting more than 10 pounds.

On June 23, 2005 the Office referred appellant to Dr. Martin L. Bloom, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Jain, her treating physician, who opined that she was totally disabled, and Dr. Vanderweide, an Office referral physician, who opined that she was capable of working four hours per day with restrictions.

On July 11, 2005 Dr. Jain released appellant to return to work for four hours per day with restrictions.

On July 18, 2005 Dr. Bloom based upon a review of the medical evidence, statement of accepted facts and physical examination, diagnosed status post right shoulder subacromial decompression and distal clavicectomy twice with popping and chronic pain and status post anterior cervical discectomy and C5-6 fusion with chronic neck pain. He concluded that appellant was capable of performing sedentary work and working an eight-hour day with restrictions and provided a work capacity evaluation form. Dr. Bloom noted that in addition to the restriction of a sedentary position he would add a right upper extremity restriction of no reaching above shoulder level. In the work capacity evaluation form, he indicated that appellant was restricted from any reaching above her shoulders and no lifting, pushing or pulling more than 10 pounds.

On August 8, 2005 Dr. Jain noted that appellant had been released to sedentary light-duty work and was waiting to review Dr. Bloom's report.

[1] The Office notes the date as October 15, 1999, which is the date referenced by Dr. Anjali Jain, a treating Board-certified physiatrist, in a December 8, 1999 report.

In a letter dated October 25, 2005, the employing establishment offered appellant a position as a modified full-time regular (FTR) mail processing clerk within the medical restrictions noted by Dr. Bloom working eight hours per day. The position was located in Katy, Texas. The work restrictions were intermittent lifting and pulling/pushing up to 10 pounds for eight hours, intermittent sitting for eight hours, standing and stooping/bending for up to eight hours and fine manipulation and simple grasping for up to eight hours. The duties of the position included two hours of assisting customers with the Automated Postal center, two hours of processing returned accountable mail and second notices, up to four hours of retrieving accountable and hold mail for customer and administrative duties within appellant's physical restrictions. Appellant was told to contact Michael Jones, injury compensation specialist, if she had any questions about the job.

By letter dated November 2, 2005, the Office advised appellant that a suitable position was available and that, pursuant to 5 U.S.C. § 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. It stated that, if appellant refused the job or failed to report to work within 30 days, without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).

On November 15, 2005 appellant refused the employing establishment's job offer. She noted that she could not drive the 60 miles round trip to the duty station and that she was unable to work eight hours. Appellant enclosed Dr. Jain's July 11, 2005 return to work form and a November 8, 2005 duty status report (Form CA-17) in support of her contention that the job was not suitable. In a July 11, 2005 return to work form, Dr. Jain released her to limited-duty work for four hours per day with restrictions including a limitation on her driving. In the November 8, 2005 duty status report, she limited appellant to four hours per day with restrictions and driving short distances. Dr. Jain noted that appellant should start with four hours and work up to full time.

On December 9, 2005 the Office received a November 8, 2005 report from Dr. Jain, who noted that she reviewed Dr. Vanderweide's report and the sedentary job he recommended, but that she had not received Dr. Bloom's report to review. Dr. Jain noted that appellant was unable to drive more than 60 miles per day due to her shoulder and neck injuries.

By letter dated December 20, 2005, the Office advised appellant that she had 15 days in which to accept the position, or the Office would terminate her compensation. It noted that Dr. Bloom, the impartial medical examiner, did not place any restrictions on appellant's driving.

In a January 6, 2006 decision, the Office terminated appellant's compensation for refusing an offer of suitable work effective that date.

On January 18, 2006 appellant requested a telephonic hearing before an Office hearing representative, which was held on April 26, 2006. In a letter dated January 18, 2006, she noted that she had informed the employing establishment by letter dated December 20, 2005, that she had accepted the position. Appellant noted that with the assistance of Mr. Jones she started the limited-duty job on January 5, 2006. She noted that she requested leave approval on January 6, 2006 due to severe neck pain and dizziness. In support of her claim, appellant submitted a form dated January 12, 2006 entitled "Request for or Notification of Absence" wherein she requested eight hours of leave beginning January 6, 2006. She did not designate the type of absence.

On January 9, 2006 Dr. Jain noted that appellant had not returned to work as the employing establishment informed her that it had no work within her restrictions. A physical examination revealed 20 percent decreased cervical range of motion and right shoulder tenderness.

On February 28, 2006 Dr. Jain stated that appellant had returned to work. Appellant reported the commute has been difficult and that she is in constant right shoulder and neck pain.

In a report dated April 18, 2006, Dr. Jain reported that appellant had been working full time in a modified job since January 6, 2006. She noted appellant's primary complaint with the modified job was the driving 60 miles round trip to the job. In a second report dated April 18, 2006, Dr. Jain noted that appellant's pain has increased due to her commute and recommended that her driving commute be reduced to no more than a one way commute of 10 miles.

Subsequent to the April 26, 2006 hearing, appellant submitted pay, leave or other hour adjustments form from the employing establishment for pay period 2 in 2006, a pay stub for pay period 2 in 2006.

By June 21, 2006, the Office hearing representative affirmed the termination of appellant's compensation based upon her refusal of a suitable job offer.

On September 26, 2006 the Office received a copy of appellant's December 31, 2005 acceptance of the offered position. Appellant noted that she talked with Mr. Jones on January 5, 2006 and told her that she could start work. At the bottom of the form there is a September 16, 2006 statement noting that she accepted the position on December 31, 2005. However, there is no identifiable signature following this statement.

In a letter dated January 3, 2007, appellant requested reconsideration. She contended that she had accepted the job offer by letter dated December 20, 2005. Appellant noted that a claims examiner had called the employing establishment to confirm that she had returned to work and spoke with a clerk who was unaware of her acceptance of the limited-duty job offer. In support of her claim, she stated that she was submitting affidavits from Italia Russell, postmaster; Sandra McIntosh, customer service representative; and Glenda Sharp, rehabilitation clerk, verifying her acceptance of the job.[2] The record contains a September 16, 2006 statement by Ms. Russell confirming that appellant accepted the offered position on December 31, 2005.

By decision dated March 21, 2007, the Office denied modification of the hearing representative's June 21, 2006 decision.

By letter dated March 21, 2008, appellant's attorney requested reconsideration.[3] Appellant argued that the evidence established that she had accepted the position and returned to work. Therefore, the Office erred in invoking the penalty provisions of section 8106(c) on the grounds that she refused an offer of suitable work. In support of her request, appellant submitted factual evidence including an affidavit from Ms. Sharp. In a November 2, 2006 affidavit,

[2] The only affidavit submitted was from Ms. Russell.

[3] Appellant filed a claim for a recurrence of total disability beginning May 15, 2007.

Ms. Sharp noted that appellant had called multiple times to speak with Ms. Russell prior to her return to work. She stated that she incorrectly informed the claims examiner that appellant was not employed there.

By decision dated September 25, 2008, the Office denied modification of its prior decision.

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.[4] 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.[5] 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.[6] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is a medical question that must be resolved by the medical evidence of record.[7]

ANALYSIS

The Office accepted the conditions cervical strain and aggravation of preexisting cervical disc disease with C5-6 cervical radiculopathy and right shoulder adhesive capsulitis as employment related and attendant surgeries. On June 23, 2005 it referred appellant to Dr. Bloom, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Jain, appellant's treating physician, who opined that appellant was totally disabled, and Dr. Vanderweide, an Office referral physician, who opined that she was capable of working four hours per day with restrictions. Thus, at the time appellant was referred to Dr. Bloom, the Office properly determined that there was a conflict in the medical opinion evidence regarding her ability to work.[8]

In Dr. Bloom's July 15, 2005 report, which is complete and well rationalized, he stated that appellant required a sedentary position and added restrictions consisting of no reaching above her shoulders and no lifting, pushing or pulling more than 10 pounds. By letter dated October 25, 2005, the employing establishment offered appellant a position as a modified full-time regular mail processing clerk within the medical restrictions noted by Dr. Bloom working eight-hours per day. The work restrictions were intermittent lifting and pulling/pushing up to 10

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Mary E. Woodard*, 57 ECAB 211 (2005); *Bryant F. Blackmon*, 56 ECAB 752 (2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[6] *See Karen M. Nolan*, 57 ECAB 589 (2006); *Richard P. Cortes*, 56 ECAB 200 (2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

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

[8] As noted above, Dr. Jain released appellant to return to work for four hours per day with restrictions on July 11, 2005.

pounds for eight hours, intermittent sitting for eight hours, standing and stooping/bending for up to eight hours and fine manipulation and simple grasping for up to eight hours. Dr. Bloom did not review the offered position.

In her November 15, 2005 letter declining the job offer, appellant stated that her drive to the job the Office offered to her in Katy, Texas was 60 miles round trip and submitted Dr. Jain's July 11, 2005 return to work form, and November 8, 2005 CA-17 form in support of her request. Dr. Jain, in a November 8, 2005 report stated that appellant was unable to drive more than 60 miles per day to her shoulder and neck injuries. In the December 20, 2005 letter, the Office dismissed her opinion that appellant should not drive more than 60 miles per day, stating that Dr. Bloom placed no restrictions on her driving.

Under the Office's procedure and Board precedent, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[9] On July 11 and November 8, 2005 Dr. Jain found that appellant was capable of working light duty for four hours per day with no driving more than 60 miles per day. Her report generally supports appellant's contention that she is unable to perform the offered position due to the restriction on driving a motor vehicle. The Office did not undertake further development of the medical evidence by requesting a supplemental report from Dr. Bloom or from Dr. Jain to specifically address appellant's inability to drive more than 60 miles per day. It made no mention of the commuting range of the offered position. In finding that appellant's reason for rejecting the offer was not suitable; the Office noted that Dr. Bloom provided no restriction on her driving. However, it did not provide a copy of the job offer including that it entailed driving more than 30 miles one way to Dr. Bloom for his consideration. Chapter 2.814.5(a)(5) of the procedure manual specifically states that an acceptable reason for refusing an offered position is if there is medical evidence establishing that appellant is unable to travel to the offered job because of her work injuries.[10] In this case, the medical evidence supports that appellant is unable to drive for 60 miles round trip per day as represented by Dr. Jain's report. Dr. Bloom provided no opinion on this issue as he was not provided a copy of the job description for his review. There is no evidence of record showing that any alternative transportation to the worksite was available. Thus, the Office improperly terminated appellant's compensation benefits for refusing suitable work.

On appeal, appellant's attorney contends that the Office erred in invoking the penalty because appellant did not refuse an offer of suitable work as she returned in January 2006. This is established by the evidence of record. He alleges that the Office terminated appellant's benefits because she "did not personally notify" or contact the claims examiner to inform them of her returns to work. Appellant's contentions have merit. The record supports her contention that she accepted the position contrary to the Office's finding that she refused an offer of suitable work. Ms. Russell, a postmaster, confirmed that appellant accepted the position on December 31, 2005. In a November 2, 2006 affidavit, Ms. Sharp, a rehabilitation clerk, verified

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Mary E. Woodard*, *supra* note 5; *Janice S. Hodges*, 52 ECAB 379 (2001); *Donna M. Stroud*, 51 ECAB 264 (2000).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see also supra* note 9.

that she incorrectly informed the claims examiner that appellant was not working at the facility. She also noted that appellant called multiple times requesting to speak with Ms. Russell prior to her return to work. Appellant also submitted a copy of an approved leave request for eight hours of leave on January 6, 2006 and a pay leave or other hour adjustments form from the employing establishment for pay period 2 in 2006, a pay stub for pay period 2 in 2006. The record also contains a claim for a recurrence of total disability beginning May 15, 2007. Thus, the record establishes that appellant did accept the offered position contrary to the Office's finding that she had refused an offer of suitable work. Therefore, the Office improperly found that appellant refused an offer of suitable work and terminated her benefits.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective January 6, 2006, on the grounds that she refused an offer of suitable work as the evidence does not establish that the job was suitable and she did return to work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 5, 2008 is reversed.

Issued: October 23, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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