United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 09-384**
	)	**Issued: October 19, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Bainbridge, GA, Employer	)	

Appearances:
Greg Dixon, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 24, 2008 appellant filed an appeal from the March 14 and September 24, 2008 decisions of the Office of Workers' Compensation Programs which terminated her wage-loss 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 this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective March 15, 2008 pursuant to 5 U.S.C. § 8106(a).

On appeal, appellant, through her representative, contends that the offered position was not suitable; that the duties of the position exceeded appellant's physical restrictions; that an impartial specialist did not submit an OWCP-5 form; and that the Office did take appellant's diagnosed severe anxiety and major depression into consideration.

FACTUAL HISTORY

On April 28, 2000 appellant, then a 42-year-old city carrier, sustained an employment-related left shoulder strain and contusion with impingement when she tripped and fell at work. She returned to limited duty. On December 7, 2000 appellant underwent left shoulder arthroscopic surgical repair. She returned to limited duty on April 17, 2001. On October 7, 2003 the Office accepted that appellant sustained adhesive capsulitis due to the April 28, 2000 employment injury. On January 10, 2005 appellant rejected a limited-duty job offer and stopped work.[1] She was placed on the periodic rolls effective March 3, 2005.

Appellant came under the care of Dr. Wilton B. Reynolds, Jr., a general practitioner, who advised that she was disabled as of March 3, 2005. In September 2005, the Office referred appellant to Dr. Jeffrey Fried, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 10, 2005 report, Dr. Fried reviewed appellant's history of injury and medical treatment and provided findings on physical examination. He found that appellant could work full time subject to restrictions on her physical activity.

In a November 1, 2005 treatment note, Dr. Nicodemo Macri, a physiatrist, noted findings and advised that appellant not return to the type of work that caused her pain, swelling and a negative impact on her life. Dr. Reynolds also advised that appellant could not work.

The Office found a conflict in medical opinion arose between Dr. Reynolds and Dr. Fried as to appellant's capacity for work. On February 28, 2006 the Office referred her to Dr. Keith G. Vanderzyl, a Board-certified orthopedic surgeon, for an impartial evaluation.

In an April 14, 2006 report, Dr. Vanderzyl reviewed the history of injury and appellant's medical treatment. He provided findings on examination, including mild lymphedema of the left upper extremity and restricted full extension and the terminal 10 to 15 degrees of both abduction and flexion and adduction of the shoulder. Dr. Valderzyl diagnosed a left Grade 2 acromioclavicular (AC) joint separation that was painful and chronic; questionable Arc's syndrome with questionable impingement of the left shoulder with an interarticular labral tear with questionable shoulder subluxation; left anterior shoulder girdle pain with lymphedema secondary to a perineural or intraneural brachial plexus cord injury and lymphatic injury; nonwork-related left elbow pain, rule out cubital tunnel syndrome, with paresthesias of the 4th and 5th fingers; and status post subacromial debridement without significant sequelae. He advised that appellant had residuals that caused disability and opined that the modified-duty position offered by the employing establishment was not suitable. Dr. Valderzyl stated that reaching overhead for one to two hours occasionally was not feasible due to the Grade 2 left AC separation that was persistently tender, complicated by the fact that appellant had an anterior capsular contracture from her thermal treatment. Lifting put stress on both the glenohumeral joint and on the AC joint, and the job requirement of lifting up to 28 pounds was excessive. Dr. Valderzyl recommended a 10-pound lifting restriction. He advised that forward reaching would be fine as long as her arm flexion was limited to 60 degrees, and that any activity that

[1] It is unclear from the record when appellant stopped work. She filed CA-7, claims for compensation, beginning on March 5, 2005. The Office determined that the offered position was suitable, but did not further pursue termination.

required her arms move upwards of 80 to 85 degrees would cause significant AC joint pain and anterior capsular joint pain. Dr. Valderzyl stated that driving was contraindicated by her persistent use of a TENS unit for the prior six years and her medication. However, he noted that this was ordered for back pain, and he could see no justification for its current and continued use, and it had no place in the treatment of her upper extremity condition. Dr. Valderzyl concluded that appellant was at maximum medical improvement because her situation had not changed in two years. Appellant could participate in vocational rehabilitation but was not a candidate for further surgery.[2]

On May 16, 2006 the employing establishment offered appellant a full-time modified city carrier position within the restrictions recommended by Dr. Vanderzyl.[3] Appellant refused the offered position on May 24, 2006, stating that Dr. Reynolds and Dr. Vanderzyl advised that she should not drive. In a May 30, 2006 report, Dr. Reynolds advised that appellant could lift no greater than 10 pounds, had limited use of the left arm and hand, and could not push, pull, climb, bend or stoop and no prolonged standing or walking.

On June 28, 2006 the employing establishment offered appellant another modified position that required no driving. Appellant refused the offered position and submitted an August 9, 2006 report from Dr. Reynolds. The Office determined that the offered position was suitable. By decision dated September 29, 2006, it terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work. Following review of the written record, in a March 15, 2007 decision, an Office hearing representative reversed the September 29, 2006 compensation order. The job offer was not suitable because it did not state whether accommodations would be made for casing mail and did not specifically describe the supply room duties.

On November 28, 2006 Dr. Reynolds agreed with Dr. Vanderzyl's opinion that appellant had sustained a shoulder separation but disagreed with his range of motion findings. He reiterated that appellant remained totally disabled. In an October 26, 2006 report, Dr. Gary W. Smith, a medical psychotherapist, advised that appellant was under his care for major depression and severe anxiety and could not perform her usual job duties as a city carrier.[4]

On May 23, 2007 appellant was referred for vocational rehabilitation. On May 24, 2007 the employing establishment offered appellant a modified full-time position. The duties were described as casing mail by placing it in a box within shoulder level for four hours daily; typing and filing on an intermittent basis at her own pace for one hour daily; and maintaining the supply room for one hour daily by organizing shelves within shoulder level, providing inventory control of supplies in stock, ordering supplies by writing or typing on the computer. Appellant was to

[2] Dr. Valderzyl also stated that he had completed an OWCP-5 form, work capacity evaluation. This, however, is not found in the record.

[3] The duties included casing mail, express/priority mail delivery as needed, collections as needed, typing and filing, maintaining the supply room as needed, and other sedentary duties within her medical restrictions. Dr. Valderzyl restricted lifting from 1/4 to 10 pounds intermittent lifting; intermittent sitting, standing, walking; driving postal vehicle as needed; occasional bending/stooping; no overhead reaching; and no climbing.

[4] Dr. Smith is licensed as a professional counselor by the State of Georgia.

inform a supervisor of items located above shoulder level. The physical requirements were described as the use of both hands; lifting l/4 to 10 pounds intermittently; intermittent sitting, standing and walking; occasional bending and stooping; no overhead reaching, climbing or reaching above shoulder level; and to contact supervisor if assistance was required for all duties listed. Appellant refused the offered position on May 31, 2007.

In a June 1, 2007 report, Dr. Smith advised that appellant had been under his care since February 21, 2006. He opined that, due to her depression and anxiety, appellant was unable to perform her usual job duties as a city carrier. In a June 11, 2007 report, Dr. Reynolds again advised that appellant could not work. He recommended that she continue to see Dr. Smith for chronic depression.

The rehabilitation counselor, Wylie M. Watt, performed a job analysis on September 24, 2007. He reviewed the job description of the modified city carrier position and described essential job functions, including the physical requirements in casing and distributing mail, maintaining supply room inventory, performing accountables, other clerk duties and driving a mail truck.[5] The postmaster, John Transom, certified on September 25, 2007 that the description accurately described the job requirements of a modified city carrier position.

By letter dated December 11, 2007, the Office advised appellant that the May 24, 2007 job offered was found suitable. Appellant was notified that, if she failed to report to work or failed to demonstrate that such failure was justified, her right to wage-loss compensation would be terminated under section 8106.[6] She was given 30 days to respond.

Appellant replied that she had not received a copy of the job offer and that it did not address her diagnosed anxiety disorder or major depression conditions. On February 15, 2008 the Office determined that the offered position was still available. On February 19, 2008 it informed appellant that her reasons for refusing the offered position were unacceptable and gave her 15 days to accept the position. On March 14, 2008 the employing establishment informed the Office that appellant had not returned to work and that the position was still available.

On March 14, 2008 the Office terminated appellant's wage-loss compensation, effective March 15, 2008, on the grounds that she refused an offer of suitable work.

Appellant requested a review of the written record. In reports dated March 15 and November 20, 2007, Dr. Smith reiterated his findings and opinion that appellant was totally disabled due to her emotional conditions and medication. On June 11, 2007 Dr. Reynolds also advised that appellant's status remained the same. On August 15, 2008 appellant contended that following surgery in April 2001, she had been asked to perform work outside her medical restrictions.

[5] The physical requirements described including sitting for two hours, standing for three, walking for one and driving for two with no reaching above 75 degrees with the left arm, overhead and shoulder work with the right hand only, no pulling, and a lifting restriction of up to 10 pounds.

[6] 5 U.S.C. § 8106(c).

By decision dated September 24, 2008, an Office hearing representative affirmed the March 14, 2008 decision.

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[7] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[8] The implementing regulations 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.[9] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[10] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers 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.[11] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[12] 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.[13]

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 medical evidence.[14] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[15]

Section 8123(a) 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

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[7] 5 U.S.C. § 8106(c).

[8] *Joyce M. Doll*, 53 ECAB 790 (2002).

[9] 20 C.F.R. § 10.517(a).

[10] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[11] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[13] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

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

shall appoint a third physician who shall make an examination.[16] When 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 on a proper factual background, must be given special weight.[17]

ANALYSIS

The Board finds that the Office improperly terminated appellant's wage-loss compensation effective March 15, 2008 on the grounds that she refused an offer of suitable work.

The record in this case demonstrates that a modified carrier position was developed for appellant and offered to her on May 24, 2007. The Board finds that the job offer does not appear to conform to the restrictions specified by Dr. Vanderzyl, the referee physician. The evidence of record does not establish that appellant can physically perform the job duties. Although Dr. Valderzyl advised that he had provided an OWCP-5 work capacity evaluation form, it is not of record. The offered position includes a requirement that appellant case mail at shoulder level; however, Dr. Vanderzyl restricted her from reaching and lifting in excess of 80 to 85 degrees, or at or under shoulder level.

Moreover, the Office did not consider her diagnosed emotional condition in terminating her compensation. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of the suitability of an offered position.[18] Dr. Reynolds referred appellant for treatment by Dr. Smith, who diagnosed major depression and anxiety which he advised rendered her disabled from her usual job as a letter carrier. He reviewed his reports and also advised that appellant was totally disabled due to depression and anxiety. This aspect of the medical evidence was not developed further.

Dr. Reynolds also diagnosed depression and advised that appellant could not work due to both her physical and mental conditions and due to the medication she was taking. Thus, the Office did not establish that appellant had the capacity to perform the modified position, in light of her diagnosed depression and anxiety.[19] For the foregoing reasons, the Board finds that the Office did not establish that the modified duty offered appellant was suitable to her medical conditions.[20]

[16] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[17] *Manuel Gill*, 52 ECAB 282 (2001).

[18] *Id*.

[19] *Richard P. Cortes*, *supra* note 15.

[20] *Gloria G. Godfrey*, *supra* note 13.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's monetary compensation effective March 15, 2008 pursuant to section 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 24, 2008 be reversed.

Issued: October 19, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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