United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 09-1702**
	)	**Issued: July 1, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Oak Creek, WI, Employer	)	

Appearances:
William Hackney, 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 June 15, 2009 appellant, through her representative, filed a timely appeal from the July 22, 2008 and March 10, 2009 merit decisions of the Office of Workers' Compensation Programs affirming its decision terminating appellant's compensation for failure to accept suitable work. Pursuant 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's monetary compensation benefits as of December 5, 2007 because she refused an offer of suitable employment, pursuant to 5 U.S.C. § 8106(c)(2).

Appellant, through her representative, contends on appeal that her physicians support that she cannot perform the duties of the offered position, as long as it requires repetitive work.

FACTUAL HISTORY

On April 12, 2003 appellant, then a 50-year-old clerk, was struck by a forklift causing injury to her low back and left knee. Appellant stopped work on the date of the injury. The Office accepted her claim for a back contusion, lumbago, myalgia, cervical strain, lumbosacral strain, cervicalgia and aggravation of herniated cervical discs. On December 17, 2003 appellant underwent a cervical discography at C4-5, C5-6 and C6-7. On July 25, 2005 she underwent a microscopic anterior cervical discectomy and anterior cervical arthodesis C4-5 and C5-6. Appellant returned to work in a modified position for four hours a day. The Office paid wage-loss and medical benefits.

On January 18, 2007 Dr. Kenneth J. Kurt, a treating osteopath, completed a work capacity evaluation. He advised that appellant could sit, walk, stand, reach, twist, operate a motor vehicle, perform repetitive movements with her wrists and elbows, and push, pull and lift up to 10 pounds for four hours a day. Dr. Kurt prohibited squatting, kneeling and climbing and allowed occasional bending/stooping.

On May 21, 2007 the employing establishment offered appellant a modified mail processing clerk position for four hours a day (7:55 p.m. to 11:55 p.m.). The job offer stated that it was made within the restrictions specified by Dr. Kurt. Appellant's duties were limited to four hours a day sitting, walking, standing, repetitive wrist and elbow movements, no lifting, pushing or pulling more than 10 pounds; occasional reaching above shoulder, bending and stooping. She would sort incoming mail by delivery point, sort outgoing mail for dispatch and maintain records. Appellant rejected the offer, noting: "The job offer violates my restrictions [sic] and the start times are not helpful to my condition."

On June 25, 2007 the Office informed appellant that it had reviewed the physical requirements of the offered position and had determined that it was suitable as it conformed with the medical limitations of Dr. Kurt. The employing establishment confirmed that the position remained available to appellant. The Office instructed appellant that she must, within 30 days, either accept the position or provide a written explanation of the reason she did not accept the position, or she could lose her right to compensation under 5 U.S.C. § 8106(c) of the Federal Employees' Compensation Act.[1]

By letter dated August 9, 2007, the Office found that the reasons given by appellant for refusing the offered position were not valid. It gave her 15 additional days to accept position or to make arrangements to report to this position. The Office noted that if she did not accept the position within 15 days of the date of the letter, her right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of the Act. It would not consider any further reasons for refusal.

On August 23, 2007 appellant contended that she never received the June 25, 2007 letter. She stated that she had contacted the Office but no one returned her call.

[1] 5 U.S.C. §§ 8101-8193.

In an August 22, 2007 report, Dr. Mark Rhyner, an attending Board-certified family practitioner, noted that appellant had a cervical fusion on July 25, 2005 for a work-related injury and that her surgeon had her on permanent restrictions. He stated that appellant advised that she was currently able to handle her job but that the proposed job offer would be more difficult. Dr. Rhyner noted that he could review the job offer to determine whether she had the capability of performing the duties. He noted that appellant's medication had the side effect of sedation which made it difficult to work different shifts. He attached the June 26, 2007 duty status report that he previously completed, noting that appellant could sit, perform fine manipulation and operate a motor vehicle for four hours a day, could stand and walk for one hour a day, could perform occasional bending/stooping/pushing/pulling of 10 pounds, and was prohibited from climbing, kneeling and twisting.

By decision dated December 5, 2007, the Office terminated appellant's monetary compensation benefits effective that day, finding that appellant refused to accept a suitable job offer.

On December 21, 2007 appellant requested an oral hearing.

In an October 4, 2007 report, Dr. Rhyner stated that he reviewed the position description of the offered job. He stated that appellant would be able to sort incoming mail by delivery point, place letters into pigeon holes but that reaching above the level of her fifth rib cage caused a significant amount of discomfort. Dr. Rhyner noted that she tried doing this work in the past and could barely make it through the day, even though the job was modified to use only the lower half of the pigeon holes. He stated that the offered position broke the restriction of no repetitive arm movement. Appellant told him that she had to lean forward to pigeon hole the mail which caused a significant amount of strain on her low back and mid-thoracic region. Dr. Rhyner opined that it would be difficult for appellant to do this with any regularity. He recommended that she sort outgoing mail for dispatch if it did not violate any other restrictions. As to maintaining records of mail, Dr. Rhyner noted that appellant would be able to walk around, although at a slower pace than may be expected. Appellant would be able to walk for about an hour as long as she had frequent opportunities to do so. Dr. Rhyner stated that any repetitive movements and frequent bending would most likely aggravate her back conditions. He concluded that repetitive bending and movements would aggravate her underlying condition and she could partially reinjure herself, necessitating more surgeries or long-term impairment.

In a February 8, 2008 report, Dr. Colby White, an osteopath, listed his impressions as status post anterior cervical discectomy and fusion C4-5 and C5-6; neck pain and bilateral hand numbness; remote history of lumbar laminectomy; history of carpal tunnel disease; and low back and bilateral leg pain. He discussed his findings with appellant and noted that, although the electromyograms of both upper extremities did not demonstrate any evidence of cervical radiculopathy, there was some evidence of mild carpal tunnel disease bilaterally which may account for her present symptomatology. Dr. White noted evidence of degenerative changes at L3-4, L4-5 and L5-S1 with postsurgical changes at the L4-5 level.

At the hearing held on March 28, 2008, appellant testified that she returned to work in January 2006 in the loop mail department. She previously tried to perform the duties of the offered position about one year ago but it involved repetitive lifting with her arm to place items

in pigeon holes and that the hole was almost six feet high, which caused pain in her low back and neck. Appellant testified that the employees in this position had to file three full trays of mail an hour. She stated that she could count mail. Appellant noted that Dr. Kurt was semi-retired and had moved so she was treated by Dr. Rhyner.

In an April 22, 2008 report, Dr. Rhyner clarified his prior opinion. He noted that appellant had chronic neck, shoulder and low back discomfort. Dr. Rhyner indicated that appellant described that she needed to lean, perform repetitive bending and assume various positions that put pressure on her body. A magnetic resonance imaging (MRI) scan of January 3, 2008 showed evidence of degeneration, postoperative changes at L4-5 and a disc bulge at L4-5 and L5-S1. As to appellant's cervical condition, Dr. Rhyner noted that when she kept her arm at shoulder level over a period of time and performed repetitive activity she noticed significant discomfort.

In an April 23, 2008 note, Dr. Kurt stated that appellant had advanced degenerative disc disease of the cervical and lumbar spine, history of cervical spinal fusion, lumbar fusion and carpal tunnel syndrome of the right wrist, surgically repaired. Carpal tunnel syndrome of the left wrist was also a problem. He advised that appellant was able to work at her regular job for four hours a day; however, she was unable to do any repetitive duties that required reaching and repetition with both hands or arms. Her cervical condition prevented any overhead movement with her arms. Dr. Kurt noted that appellant had an MRI scan of her lumbar spine that revealed worsening of her condition with an annual tear of a disc. She also had pain on range of motion and palpation of the spine. Dr. Kurt concluded that appellant could work at her present job with restrictions, but should not do any extreme reaching and repetitive work.

On May 2, 2008 the employing establishment submitted comments and described the letter case as seven horizontal rows of seven pigeon holes across. The base was on four legs at the height of five feet five inches and the letter tray ledge was two feet six inches from the floor. There were no pigeon holes below the letter tray ledge and the bottom was open which allowed for ample leg room. The employee had the option to stand or lean against a rest bar while distributing mail and if restrictions allowed for the use of a chair, it was provided. If restrictions precluded one employee from casing mail into the upper portion of the case, the mail would be worked by another employee. While there were targets for the manual mail distribution, there was no minimal standard and employees were not required to work a certain amount of mail trays or pieces each hour. The employees with work restrictions were expected to case mail within the parameters of their work capabilities.

In a July 22, 2008 decision, an Office hearing representative found that appellant's benefits were properly terminated based on her refusal of suitable work. The new medical evidence was of diminished probative value. Dr. Kurt did not adequately address whether appellant's work tolerances had changed and Dr. Rhyner did not base his opinion on an accurate description of casing mail, as provided by the employing establishment.

By letter dated February 19, 2009, appellant, through her representative, requested reconsideration. In a report dated January 29, 2009, Dr. Rhyner stated that appellant brought him a job description of casing mail, that he had read all 14 points and reiterated his prior opinion. He noted that number 13 of the description stated that there was a minimum production

of three trays per hour, while the employing establishment had addressed that there were no minimum production requirements.

By decision dated March 10, 2009, the Office denied modification of the July 22, 2008 decision. It determined that the evidence was not sufficient to establish that the decision terminating benefits was erroneous.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Federal Employees' Compensation 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."[2] 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.[3] 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 compensation is terminated.[4] 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.[5] 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.[6] 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.[7] 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.[8]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses to work after suitable work has been offered to or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified.[9]

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[2] 5 U.S.C. § 8106(c).

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

[4] 20 C.F.R. § 10.517(a).

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

[6] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[7] 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).

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

[9] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, 42 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

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 and must be resolved by medical evidence.[10] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of the offered position.[11]

ANALYSIS

On May 21, 2007 the employing establishment offered appellant work as a modified mail processing clerk for four hours a day (from 7:55 p.m. to 11:55 p.m.). The Office found that this position was within the work restrictions set by her treating physician, Dr. Kurt, on January 18, 2007. It provided her with proper notice that the job was found to be suitable to her physical limitations on June 25, 2007. Appellant ejected the job offer, contending that the duties were outside her physical restrictions. On August 9, 2007 the Office notified appellant that her reasons for refusing the job offer were not supported by the medial evidence. The termination of compensation benefits was based on appellant's refusal to accept a new modified job in the loop mail department.

The Board finds that the Office properly established that the job offer as a modified mail processing clerk was within appellant's work restrictions. Pursuant to the restrictions set by Dr. Kurt on January 18, 2007, appellant was limited to four hours a day sitting, walking, standing, repetitive wrist and elbow movements and no lifting/pushing/pulling more than 10 pounds. She would perform occasional reaching above her shoulder, bending and stooping. The employing establishment noted that her restrictions would be strictly adhered to when performing the tasks. Although appellant alleged that the duties of the position were not within her restrictions, the evidence of record at the time benefits were terminated established that the position conformed to those specified by Dr. Kurt on January 18, 2007.

On August 22, 2207 Dr. Rhyner stated only that the offered position would be difficult, but he did not appear to be aware that the duties had been modified for appellant or what the specific requirements of the position were. He appeared to base his review on appellant's stated description of her duties rather than the actual job description. Dr. Rhyner stated that he would limit standing and walking for one hour a day, but there is no indication as to why this restriction was added. Appellant contended that the start times were not helpful but there is no medical evidence to establish that appellant could not work with a start time of 7:55 p.m. Dr. Rhyner noted that appellant's medication had the side effect of sedation to a particular work shift. The Board notes that an employee's general dislike of the position offered or the work hours scheduled is not an acceptable reason to refuse a suitable job offer.[12] As the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work, the burden shifted to appellant to establish that her refusal was justified.[13]

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

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

[12] *Patricia M. Finch*, 51 ECAB 165 (1999).

[13] *M.S.*, 58 ECAB 328 (2007); *Gayle Harris*, 52 ECAB 319 (2001).

Appellant submitted medical evidence subsequent to the termination of her compensation benefits, but it is insufficient to establish that she was unable to perform the modified work duties. Dr. White did not address appellant's ability to perform the work position. On April 23, 2008 Dr. Kurt stated that appellant was unable to do any job that required reaching and repetition of both hands and arms. In his January 18, 2007 report, Dr. Kurt had limited repetitive movements for four hours a day, which was the length of appellant's workday in the proposed job description. He did not address how any new restrictions applied to the time that her compensation was terminated. Dr. Rhyner did not appear to have an accurate description of the offered position. Although Dr. Rhyner described how appellant bending in certain positions and reaching in a certain manner would be inadvisable, he based his opinion on appellant's description of the job. On May 2, 2008 the employing establishment provided further description of the duties of her job, noting a different description of her workstation. On January 29, 2009 Dr. Rhyner stated that he had reviewed the position description that appellant brought him for casing mail, and that item number 13 of the listed dates required a minimum production of three trays per hour. The record does not contain the job description appellant provided Dr. Rhyner. The employing establishment advised that there were no production requirements per hour. Based on the evidence of record, these reports are not sufficient to establish appellant's mobility to perform the duties of the modified job offer.

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[14] The Board finds that the Office properly terminated appellant's monetary compensation based on her refusal of suitable work. Appellant did not establish that her refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation on December 5, 2007 on the grounds that appellant refused an offer of suitable employment.

[14] 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 10, 2009 and July 22, 2008 are affirmed.

Issued: July 1, 2010
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