United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
	)	
and	)	**Docket No. 10-1531**
	)	**Issued: April 13, 2011**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Charlotte, NC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 18, 2010 appellant, through her attorney, filed an appeal from an April 13, 2010 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the termination of her wage-loss compensation on the grounds that she refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act[1] and 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 on October 8, 2009 pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's attorney asserts that the decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 30, 2005 appellant, then a 59-year-old manual clerk, filed a traumatic injury claim alleging that she injured her upper thigh and low back while moving a tray of mail. The Office accepted that she sustained right lumbar radiculopathy and a herniated disc at L4-5. On July 12, 2005 Dr. Michael D. Getter performed an authorized hemilaminectomy with microdiscectomy at L4-5 on the right. A December 2, 2005 bone scan of both legs demonstrated no evidence for reflex sympathetic dystrophy in the lower extremities. On February 2, 2006 Dr. Getter advised that appellant's medication prevented her from working and that she was totally disabled.

In an August 25, 2006 report, Dr. Surendrapal Singh Mac, an Office referral physician, noted his review of the employment injury and appellant's medical record. He provided physical examination findings, noting tenderness, painful range of motion, persistent numbness and weakness and antalgic gait with limp. Dr. Mac diagnosed lumbar radiculitis and herniated disc at L4-5; degenerative arthritis of the thoracolumbar and lumbar area with degenerative disc disease; and postlaminectomy syndrome with persistent back and neck pain. He advised that appellant's symptoms were secondary to the preexisting arthritis which was aggravated by the employment injury, that she had reached maximum medical improvement. Appellant could return to a limited-duty position for 8 hours a day with restrictions of 4 hours sitting; 1/2 hour of intermittent walking and standing; 2 hours of reaching; and 1 hour of pushing and pulling. Lifting was restricted to 10 pounds. On October 30, 2006 Dr. Getter advised that appellant could return to sedentary work for four hours daily.

The Office determined that a conflict in medical opinion arose between Dr. Getter and Dr. Mac regarding the relationship of appellant's present condition to the April 29, 2005 employment injury and to determine her work capabilities. It referred appellant to Dr. Robert W. Elkins for an impartial evaluation.[2] In a January 16, 2007 report, Dr. Elkins reviewed the history of injury, the medical record and noted appellant's complaint of pain to her low back, neck, left shoulder, arm, right thigh, calf and foot increased by activity. On physical examination, he noted tenderness to palpation of the lumbar region and over the right sacroiliac joint, somewhat out of proportion to the amount of stimulus; pain in the right sacroiliac joint; and decreased lumbar spine range of motion. Bilateral hip, knee and ankle range of motion were normal. Dr. Elkins diagnosed status post L4-5 laminectomy discectomy, continued sciatica by history, mild to moderate symptom magnification and pain accentuation, somewhat nonphysiologic physical examination and unrelated neck pain. He opined that appellant had reached maximum medical improvement and needed no further treatment. Dr. Elkins found that she could work eight hours a day, starting at sedentary work for one month, and proceeding to light work with no repetitive bending; stooping or squatting; no kneeling and climbing; walking and standing limited to two hours; twisting, bending and stooping to one hour; and pushing, pulling and lifting 10 pounds for one hour.

[2] Dr. Getter, Dr. Mac and Dr. Elkins are Board-certified orthopedic surgeons.

On February 5, 2007 Dr. Getter advised that appellant could not work and needed additional surgery. On April 4, 2007 he advised that she had developed fibromyalgia. On June 4 and July 30, 2007 Dr. Getter found that appellant could return to sedentary work.

On September 18, 2007 appellant rejected a modified-duty assignment for eight hours a day,[3] stating that she could not stand in one place due to her neck and back surgery, could not twist, bend or stoop and was uncomfortable pulling and pushing due to her medication. By report dated November 7, 2007, Dr. Getter advised that she could return to work for four hours daily with restrictions of no bending, stooping, pushing, pulling, kneeling or climbing and one hour of standing, reaching and reaching above the shoulder with a five-pound weight restriction. Appellant accepted the eight-hour a day modified-duty assignment on January 16, 2008. She returned to work for four hours a day on January 20, 2008. Appellant filed claims for compensation for four hours a day. Accommodations were made to the work area.

By letter dated April 23, 2008, the Office advised appellant that the full-time position offered was suitable. Appellant was notified that if she failed to report to the full-time position or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of the Act, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond. Dr. Getter continued to submit reports in which he reiterated his restrictions, including that appellant could only work four hours a day.[4]

By letter dated June 24, 2008, appellant notified the Office that she planned to retire on August 29, 2008. On July 9, 2008 she stated that she had inadvertently accepted the modified position for eight hours a day because she knew when she signed it, she could not work that many hours. On August 7, 2008 the Office advised appellant that her reasons for refusing the offered position were not valid and she was given an additional 15 days to accept. Appellant began working an eight-hour day on August 20, 2008 and voluntarily retired on August 29, 2008.

On September 25, 2008 the Office advised appellant that the position she abandoned on August 29, 2008 was suitable. Appellant was again advised of the penalty provisions of section 8106(c)(2) of the Act and was given 30 days to respond.[5] In a report dated December 4, 2008, Dr. Getter noted that she had fallen at home and on March 6, 2009 he provided physical examination findings, noting multiple positive trigger points that were consistent with fibromyalgia. He diagnosed chronic neck, shoulder and low back pain.

On May 20, 2009 the Office ascertained that the offered position remained available. On June 11, 2009 it notified appellant that the position she abandoned on August 29, 2008 was suitable and of the penalty provisions of section 8106(c)(2). Appellant was given 30 days to

[3] The duties of the assignment were to stick letter in the manual case with restrictions of no walking or standing for more than two hours; no twisting, bending, stooping, pushing, pulling or lifting for more than one hour, with a 10-pound weight restriction.

[4] A second appointment scheduled with Dr. Elkins was cancelled.

[5] Appellant filed a schedule award claim on September 26, 2008 and on February 6, 2009 was granted a schedule award for a 10 percent permanent impairment of the right lower extremity, for a total of 28.8 weeks, to run from August 21, 2008 to March 10, 2009. She did not appeal the February 6, 2009 schedule award decision.

respond. By report dated June 15, 2009, Dr. Getter noted her complaint of low back pain and tenderness on examination of the muscles of her lower back. He advised that straight leg lifting was negative and diagnosed low back pain. By letter dated July 7, 2009, appellant reported that she had retired and advised that she would like to refuse the offered position but was willing to return to work if a suitable position could be found. On August 26, 2009 counsel stated that she was receiving disability retirement and social security benefits.

By letter dated September 10, 2009, the Office advised appellant that her reasons for refusing the offered position were not valid and she was given an additional 15 days to accept the offered position. On September 25, 2009 appellant declined the offered position. On October 6, 2009 the employing establishment confirmed that the position offered on January 16, 2008 remained available.

By decision dated October 8, 2009, the Office terminated appellant's compensation benefits on the grounds that she neglected an offer of suitable work. In letters dated October 7, 2009, received by the Office on October 9, 2009, counsel informed the Office that appellant would accept the offered position. Appellant timely requested a hearing and submitted a December 10, 2009 report in which Dr. Getter stated that he had treated appellant for worsening degenerative disease of the neck and low back for which she had surgery. Dr. Getter provided physical examination findings and diagnosed mechanical neck and back pain.

At the January 13, 2010 hearing, counsel argued that the position offered was make work and, not a bid position and was not suitable. Appellant testified that she mostly worked four hours daily until she retired. After the hearing, she noted the Board case law regarding the withdrawal of a light-duty position, submitted an Equal Employment Opportunity Commission decision and a FECA Bulletin regarding reduction in force.

By decision dated April 13, 2010, an Office hearing representative affirmed the October 8, 2009 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."[6] 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.[7] 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.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to

[6] 5 U.S.C. § 8106(c).

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

[8] 20 C.F.R. § 10.517(a).

accept such employment.[9] 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.[10] 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.[11]

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 shall appoint a third physician who shall make an examination.[12] 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.[13]

ANALYSIS

The Board finds that the Office did not meet its burden of proof in terminating appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

The Office based its October 8, 2009 termination on Dr. Elkins' January 16, 2007 report, he provided an impartial evaluation for the Office, examined appellant and opined that she could return to a light work position for eight hours a day. The Board, however, finds that the Office improperly relied on Dr. Elkins' report, as the report was more than two years old when the Office issued the June 11, 2009 letter informing appellant that it deemed the offered position suitable, and nearly three years old when her wage-loss compensation was terminated on October 8, 2009. The Board finds that the passage of time lessened the report's relevance as to whether the position offered in 2009 was suitable. The Board has considered the age of a medical report as a factor to be considered when the Office modifies benefits. In *Keith Hanselman*,[14] a report almost two years old was deemed an invalid basis for a disability determination or loss of wage-earning capacity decision; in *Anthony Pestana*,[15] a three-year-old medical report was not reasonably current for purposes of determination of wage-earning capacity; and, in *Ellen G. Trimmer*,[16] the passage of time lessened the relevance of work

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

[10] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[11] Federal (FECA) Procedure Manual, Reemployment: *Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

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

[14] 42 ECAB 680 (1991).

[15] 39 ECAB 980 (1988).

[16] 32 ECAB 1878 (1981).

tolerance limitations. Consequently, Dr. Elkins' January 16, 2007 report was insufficient to meet the Office's burden in terminating appellant's wage-loss compensation on the grounds that she refused an offer of suitable employment.

Moreover, subsequent to Dr. Elkins' January 16, 2007 report, Dr. Getter reported that appellant had fallen at home and he diagnosed fibromyalgia. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[17] As a penalty provision, 5 U.S.C. § 8106(c) should be narrowly construed. Dr. Getter reported that appellant's degenerative disease of the neck and low back had worsened.[18] The record does not contain a medical report contemporaneous with the October 8, 2009 termination which supports that the offered position remained suitable to her physical capabilities.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify the termination of appellant's wage-loss compensation on the grounds that she refused an offer of suitable employment as the medical evidence on which the Office relied was not reasonably current to establish relevant work limitations.

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

[18] *S.G.*, Docket No. 08-1992 (issued September 22, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2010 decision of the Office of Workers' Compensation Programs be reversed.

Issued: April 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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