

¹ 5 U.S.C. § 8101 *et seq.*

for refusing an offer of suitable work on the grounds that it failed to consider all of the medical evidence of record.² The facts and the law contained in the Board's prior decision are incorporated herein by reference. Relevant facts are described below.

On March 14, 2005 appellant, a 38-year-old heavy mobile equipment mechanic, filed a traumatic injury claim alleging that she injured the left side of her body and left shoulder while installing a hood prop shafter. OWCP accepted her claim for lumbar sprain/strain; lumbar radiculitis and aggravation of degenerative disc disease. On November 1, 2005 appellant underwent surgery involving decompression with partial laminectomies at L4, L5 and S1, and foraminectomies at L4-5 and L5-S1 on the left side. OWCP paid appropriate medical and compensation benefits.

On September 25, 2007 Dr. Pierce Nunley, a Board-certified orthopedic surgeon, released appellant to work full time with restrictions. On October 15, 2007 the employing establishment offered appellant a limited-duty position as a clerk. Appellant accepted the light-duty job offer and reported for duty on December 6, 2007. On February 21, 2008 she stopped working without explanation.

By decision dated April 10, 2008, OWCP terminated appellant's wage-loss and schedule award benefits, effective April 13, 2008, on the grounds that abandonment of her light-duty job constituted a refusal of an offer of suitable work.

By decision dated May 14, 2008, OWCP denied modification of the April 10, 2008 decision terminating appellant's entitlement to compensation benefits, based on her refusal of suitable employment. Appellant appealed the May 14, 2008 decision to the Board. By decision dated May 13, 2009, the Board reversed OWCP's April 10 and May 14, 2008 decisions terminating appellant's benefits for refusing an offer of suitable work on the grounds that it failed to consider all of the medical evidence of record.³

On September 4, 2009 appellant underwent a functional capacity examination, signed by a physical therapist, which indicated that appellant demonstrated the physical ability to safely perform work activity classified in the light physical demand level range as defined by the fourth edition of the Dictionary of Occupational Titles. Restrictions included frequent sitting, standing and walking. Walking on uneven terrains and stair-climbing were to be limited to an occasional basis. Appellant was to lift and carry no more than 15 pounds occasionally; push and pull no more than 10 pounds frequently or 15 pounds occasionally; and stoop, squat, kneel and reach overhead occasionally.

On October 26, 2009 the employing establishment offered appellant a light-duty clerk position based on the results of the functional capacity evaluation. The position was described as light duty, which was primarily sedentary, with use of fingers, ability to distinguish basic colors and hearing. The employing establishment did not indicate whether the position was permanent

² Docket No.08-1923 (issued May 13, 2009).

³ See *supra* note 2.

or temporary, or whether it was full or part time.⁴ The stated purpose of the position was to provide general office support and assistance to the organizational unit. Duties included assuring the security of the facility by screening visitors before entrance; requiring all nonassigned personnel to register upon entrance; assuring visitors were properly escorted; coordinating with government contractors related to visits, deliveries, security matters, and messages; acting as signature for deliveries and assuring items were routed promptly and accurately; receiving visitors and telephone calls and referring them to the appropriate person(s); answering routine inquiries; scheduling appointments with the aid of an appointment calendar; date-stamping incoming mail; reviewing, sorting and distributing mail to appropriate person(s); maintaining a follow-up system to ensure timely completion; creating/maintaining filing systems and filing a variety of documents; ordering/maintaining office supplies and other materials; providing office supplies and materials when requested; updating/maintaining any type of manual and/or automated log; and operating fax machines and copy machines. The position required appellant to perform the following duties using typical automation equipment: (a) complete work orders for the entire facility or contact appropriate personnel to obtain uninterrupted service of the facility and operating equipment, maintaining records of who was contacted, when contacted, and when response to the request was received; (b) type labels, envelopes, and various forms; (c) print messages from electronic mail; (d) use software such as electronic mail to receive and transmit messages and use database management software to establish and maintain databases, and assure accuracy and completeness of monthly reports, according to regulatory requirements. Appellant would also be required to provide assistance to higher level employees, including gathering data for reports, studies, etc.; referring to dictionaries, manuals, and other guides; and running errands inside/outside office unit. Some typing skills were required, “but not the level of a fully qualified typist.” Appellant would also be required “to perform other duties as assigned.”

On December 1, 2009 OWCP asked Dr. Nunley to review the functional capacity evaluation and determine whether he agreed with the restrictions recommended. On December 8, 2009 Dr. Nunley stated that he concurred with the results of the functional capacity evaluation.

On November 2, 2009 appellant declined the offered position, stating that she was “going out on disability.”

In a letter dated January 26, 2010, OWCP informed appellant that it found the modified clerk position to be suitable and in accordance with the restrictions provided by her physician. It confirmed that the position remained available to her and that she had 30 days to respond.

In a January 29, 2010 report, Dr. Nunley noted that appellant had experienced a postoperative sacral fracture, which would require reconstructive surgery.

In a January 26, 2010 letter, OWCP informed appellant of its finding that she had not provided a valid reason for refusing to accept the offered position and provided her a period of 15 additional days to accept and make arrangements to report to the position in light its finding. Appellant was advised that, if she had not accepted the position and arranged for a report date

⁴ The hours to be worked were identified as 6:30 a.m. to 5:00 p.m.

within 15 days of the date of the letter, her entitlement to wage loss and schedule award benefits would be terminated.

In a letter dated March 9, 2010, appellant's representative informed OWCP that appellant accepted the modified clerk position. Appellant, however, did not return to work.

By decision dated March 30, 2010, OWCP terminated monetary compensation and schedule award benefits effective March 14, 2010 on the grounds that appellant abandoned suitable work. On April 6, 2010 appellant, through her representative, requested a telephonic hearing.

At a July 13, 2010 hearing, appellant testified that she refused to accept the modified position because she was told that she would lose her social security disability benefits if she accepted a light-duty job. She did not contend that the required duties of the position exceeded her restrictions.

By decision dated September 30, 2010, the hearing representative affirmed the March 30, 2010 decision finding that appellant had abandoned an offer of suitable employment.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered: To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment, and that she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁵

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, include 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 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.

⁵ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824(1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997) (The claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid.

⁶ *Rebecca L. Eckert*, 54 ECAB 183 (2002).

OWCP procedures require that consideration be given to the kind of appointment in determining whether an offered position is suitable. For example, a written offer of modified duty will generally be considered unsuitable if the position offered is less than four hours a day when a claimant is capable of working full time; if the position is temporary when the date-of-injury position was permanent; or if the position is seasonal when the date-of injury position was permanent, full time.⁷

Once OWCP has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.⁸

ANALYSIS

OWCP terminated appellant's compensation and schedule award benefits effective March 14, 2010 on the grounds that she abandoned suitable work. The Board finds, however that the light-duty clerk position offered on October 26, 2009 did not constitute an offer of suitable employment. Therefore, the September 30, 2010 decision must be reversed.

OWCP has the burden of establishing that the offered position is suitable prior to terminating compensation benefits.⁹ 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. The Board notes that Dr. Nunley approved the functional capacity evaluation on which the job offer was made. However, the job was classified as "light;" but, the offer did not identify the physical requirements of the position. The Board notes that duties of the position included operating machinery and maintaining file systems, which could exacerbate a spinal condition. Moreover, the job description indicated that appellant would be required "to perform other duties as assigned." It is impossible for the Board to make an informed decision as to the suitability of the position without knowing the nature of those duties.

The Board must also consider the kind of appointment in determining whether the offered position is suitable. In this case, it is unclear whether the job offered was intended to be permanent or temporary. While the October 26, 2009 limited-duty assignment was not specifically identified as temporary, neither was it identified as permanent. It is also unclear as to whether the position offered was a full-time or part-time position, as appellant's weekly schedule was not specified. As noted, such offers are generally considered to be unsuitable.¹⁰

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997)

⁸ 20 C.F.R. § 10.517. *See Kathv E. Murray*, 55 ECAB 288 (2004); *see also Ronald M. Jones*, *supra* note 5.

⁹ *See supra* note 5 and accompanying text.

¹⁰ *See supra* note 7 and accompanying text.

Under the facts of this case, the modified assignment upon which OWCP based its decision to terminate appellant's benefits was not a suitable job offer. Accordingly, the Board finds that OWCP did not properly determine that appellant abandoned suitable work.¹¹

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits effective March 14, 2010 on the grounds that she abandoned suitable work.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ Appellant contended that her refusal to work was justified because she was told that she would lose her social security retirement benefits if she accepted a limited-duty position. The Board notes that retirement is not an acceptable reason for refusing suitable work. *See B.C.*, Docket No. 08-1274 (issued May 11, 2009); *Robert P. Mitchell*, 52 ECAB 116 (2000). Appellant's argument is moot, however, as the position offered was not suitable.